EU Case Law

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Abstract: This article provides an overview of the most relevant cases decided by the Court of Justice of the European Union concerning contract law. The present issue covers the period between the beginning of July 2022 and the end of December 2022. Out of a total of 265 judgments decided in this period, 57 had a contract law dimension.

Keywords: court of justice, EU contract law, most relevant cases, second semester 2022

1 Commercial Contract Law

1.1 Fees with a Deterrent Effect as Not Reasonable and Proportionate: Judgment in Case C-390/21 ADPA and Gesamtverband Autoteile-Handel

Regulation 2018/858 introduces rules governing the market for motor vehicles and their components. One of the aims of the regulation is to foster the market for repairs. To achieve it, the regulation grants independent operators unrestricted, standardised and non-discriminatory access to on board diagnostics information and vehicle repair and maintenance information in return for reasonable and proportionate fees.

In the main proceedings, two publishers of technical information challenge the fees charged to access vehicle repair and maintenance information by Peugeot and

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PSA for being neither reasonable nor proportionate. In particular, they complain about the fact that the charged fees are based, *inter alia*, on ‘the number of end users’ since it would grant ‘automotive manufacturers a share in the profits made’ (para 14) and do not rely solely on the costs to provide the information.

After having answered a question regarding the temporal scope of application of Regulation 2018/858, the Court of Justice gives an answer to three questions that are meant to assess the lawfulness of Peugeot and PSA’s commercial practices.

The referring judge is unsure about whether manufacturers have ‘the obligation to allow publishers of technical information to process and use that information for the purposes of their activities in the aftermarket supply chain, without subjecting them to conditions other than those laid down in that regulation’ (para 25). The ECJ answers in the affirmative.

As a first step, the Court finds that the wording of Article 61(1) and (2) justifies this conclusion. Furthermore, the objective pursued by the regulation also supports the finding that the manufacturers could impose no additional conditions; deciding otherwise would make it more difficult for independent operators to ‘compete with … authorised dealers’ (para 31).

Finally, the ECJ explains that the activity by independent operators in the main proceedings cannot be equated with the mere duplication or reproduction of the information provided by the manufacturer. In fact, the claimants ‘develop and sell products directed at users such as motor vehicle repair shops, wholesalers and manufacturers of replacement parts’ (para 13); there is, in other words, the information received by the manufacturer is processed, and new products and services are developed. They are, in other words, publishers of technical information.

Having clarified the contours of the right to receive the information by independent operators, the Court of Justice moves to the analysis of the duty to pay reasonable and proportionate fees. In clear opposition to the view expressed by the independent contracts in the main proceedings, the ECJ takes the view that the ‘fees … must take into account the extent to which each independent operator uses’ the information ‘not to discourage access to such information’ (para 37). The Court adds that this interpretation is ‘consistent with the general principle of equal treatment’ (para 41), which requires that different fees are charged to publishers of technical information and independent repairs in light of the different use of the information made by the two types of economic agents.

Finally, the Court of Justice rejects the claim that the fees should merely reflect the costs of sharing the information, since Article 63(1) simply requires them to be reasonable and proportionate and Recital 52 further clarifies that this requirement
is meant to avoid that the amount of the fees ‘does not deter independent operators from accessing vehicle repair and maintenance information’ as to allow them to ‘compete with authorised dealers’ (para 43).

It is useful to remark that the explicit focus on the detrimental effects on the market structure make perfect sense from an economic point of view. At the same time, the Court of Justice has not provided much guidance on which factors the referring judge will have to consider to apply this test in the main proceedings.

1.2 Cost to Lease Replacement Locomotives as Not Constituting Damage to Property under the Contract of Use of Infrastructure: Judgment in Case C-500/20 ÖBB-Infrastruktur Aktiengesellschaft

In 2013, the European Union accessed the Convention concerning International Carriage by Rail of 9 May 1980, as amended by the Vilnius Protocol of 3 June 1999 (COTIF). Appendix E to the COTIF is entitled Uniform Rules concerning the Contract of Use of Infrastructure in International Rail Traffic (‘Appendix E’). The present case focuses on the interpretation of several provisions disciplining the liability of the infrastructure manager vis-à-vis the carrier using the infrastructure. It is particularly interesting to compare the answer given to the interpretation of the expression ‘loss of or damage to property’ in this case with the analysis of the damage recoverable under the Montreal Convention in Laudamotion (Judgment of 20 October 2022, C-111/21, ECLI:EU:C:2022:808), commented below.

The controversy follows an accident that led to the damage of two locomotives transported by the claimant on the railway managed by the defendant. As a consequence, the claimant had to lease two replacement locomotives while the ones damaged in the accident were under repair. The core legal issue is determining which, if any, provision of Appendix E could be used to ground a compensation claim against the manager.

After having established its jurisdiction over this preliminary reference, the Court focuses on the interpretation of Article 8(1)(b) Appendix E, establishing that the

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1 This is true regardless of whether the appropriate welfare standard used is total welfare or the welfare of the consumers active on the repair and maintenance market; see, F. Esposito, The Consumer Welfare Hypothesis in Law and Economics: Towards a Synthesis for the 21st Century (Cheltenham: Edward Elgar, 2022) 75–76.
manager is liable for ‘loss of or damage to property (destruction of, or damage to, movable or immovable property)’. The ECJ answers in the negative.

As a first step, the Court of Justice reframes the doubt expressed by the referring judge as distinguishing ‘loss or damage to property’ from loss ‘closely linked to that loss or damage’ (para 55). In other words, from the outset, the cost of the lease is framed as different from the damage to property within the meaning of the relevant provision. Next, the Court derives the duty to interpret the provision narrowly from the circumstance that it establishes a strict liability regime – which is, however, common in contractual settings.

The literal meaning of the provision ‘is limited to the damage caused to the actual substance of the damaged property and does not extend to loss or damage arising from that property not being available’ (para 59). The reason, not made explicit by the decision, could be that the property is damaged only in its physical integrity; this is apparent at least with regard to the term ‘loss’ that is rephrased as ‘destruction’. The context confirms this view since letter c of the same provision focuses on purely economic losses and the two are ‘mutually exclusive’ (para 60). The explanatory report accompanying the COFIT corroborates this finding, according to the Court.

Having concluded against the applicability of the provision under scrutiny to the damage suffered by the claimant, the ECJ adds that other provisions of Appendix E might ground the claim.

The final question focuses on the coordination between Appendix E and national law. In fact, Article 4 provides that Appendix E is a set of mandatory rules for the parties, who can however assume additional obligations in comparison to the ones established by Appendix E. It is disputed in particular what is the implication of a ‘blanket reference to national law’ (para 67).

The Court of Justice relies on the plain meaning of the provision and the explanatory report to find that Article 8(1) merely ‘set(s) the minimum extent of the manager’s liability’ (para 71). It follows that if national law introduces higher standards of liability, those standards will govern the relationship between the parties.

Finally, Article 19(1) represents another potential obstacle since it subjects all actions against managers and carriers to the respect of the rules set by Appendix E. Despite its general wording, this provision ‘does not concern the liability of the parties to a contract in their mutual relations’ (para 76).

In sum, the Court of Justice has endorsed a narrow interpretation of the concept of ‘damage to property’ in the context of the COFIT, in a context where this phrase has to be coordinated with other grounds of liability.
2 Unfair Terms in Consumer Contracts

2.1 Contractual Invalidity as Always Avoidable Provided that the Dziubak Guillotine is Applied: Judgment in Joined Cases C-80/21 to 82/21 D.B.P. (Crédit hypothécaire libellé en devises étrangères)

The present ruling offers yet a new perspective on the way in which national judges are required to determine the consequences of the finding that in a loan agreement, the clause indexing the reimbursement to a foreign currency is unfair under Directive 93/13. In fact, the guidance provided by the Court of Justice differs partially from the conflicting positions articulated in Dziubak (Judgment of 3 October 2019, C-260/18, ECLI:EU:C:2019:81), Banca BPH (Judgment of 29 April 2021, C-19/20, EU:C:2021:341, para 80), and Lombard Lízing (Judgment of 31 March 2022, C-472/20, ECLI:EU:C:2022:242). It is also certain that this is not the last chance the ECJ has to rule on this matter.

With the answer to the first question, the Court of Justice revisits the extent of the power of a national judge to remove ‘only the unfair element of a term’ (para 62). Relying on the decision in Banca BPH (Judgment of 29 April 2021, C-19/20, EU:C:2021:341, para 80), the ECJ conditions this power to two main requirements. The first is that the unfair element ‘consists of a separate contractual obligation which is capable of being examined individually for its unfairness’ (para 62). The second is that the deterrence objective of the directive ‘is ensured by national provisions regulating its use’ (ibidem). However, the case file does not show that such national provisions exist in the Polish legal system, to the effect that Directive 93/13 prohibits such intervention on the unfair term.

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5 In fact, another relevant judgment was delivered in late January, but falls outside the scope of this review: Judgment of 12 January 2023, D.V. (Honoraires d’avocat – Principe du tarif horaire), C-395/21, ECLI:EU:C:2023:14; for a brief comment, see F. Esposito, ‘Uncertainty can be a Particularly Unfavourable Consequence if a Consumer Contract Cannot Continue into Existence’ EU Law Live, 31 January 2022. Other relevant cases are pending and, with the steep increase of the Euribor, the Euro InterBank Offered Rate which sets the average interest rates at which a large panel of European banks borrow funds from one another, it is plausible to expect a new wave of litigation on loan agreements.
The next question examined relates to the power of the national judge to replace the unfair term with a default rule when the invalidity of the entire contract is not a consequence of removing the unfair term. Relying on well-established principles, the Court of Justice denies this possibility as it is contrary to the deterrence objective of Directive 93/13.

However, in this process, the Court follows (without referring to it) Lombard in reformulating the Kásler exception as applying every time the contract would be declared invalid in its entirety, and not only when the said invalidity would have particularly negative consequences for the consumer, such as having to reimburse the entire capital loaned.6

Moving to the power of judges once the contract cannot continue into existence without the unfair term, the said term could be ‘replace(d) either with an interpretation of the wishes of the parties … or with a supplementary provision of national law’ in a situation where the consumer has accepted the consequences of contractual invalidity (para 70).

It is a well-established principle that the view of consumers is ‘sovereign’ in this context, in the sense that the decision between the various solutions available rests with them. Against this background, the Court of Justice fully endorses the need to apply the Dziubak guillotine, here formulated as the ‘possibility of substitution … is limited to supplementary provisions of national law or those which are applicable where the parties so agree and is based, in particular, on the ground that such provisions are presumed not to contain unfair terms’ (para 72).

However, this endorsement is not consequential in the present case, since the ECJ correctly warns the national judge that ‘a national court is not entitled to revise the content of an unfair term which has been annulled in order to maintain in force a contract which cannot remain in force after the removal of that term, where the consumer concerned has been informed of the consequences of the annulment of the contract and has accepted the consequences thereof’ (para 83).

The final question concerns the compliance with Directive 93/13 and the principle of effectiveness of a 10-year limitation period for restitution of sums unduly paid that ‘begins to run on the date of each performance by that consumer, even though the consumer was not in a position, at that date, to assess the unfairness of the contractual term’ (para 85).

The answer to this question relies significantly on the ruling in BNP Paribas Personal Finance (Judgment of 10 June 2021, C-776/19 to C-782/19, EU:C:2021:470). The ECJ analyses the issue under the principles of equivalence and effectiveness. In

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6 See, Esposito, ‘Loans and the Unfair Contract Terms Directive after C-472/20 Lombard’, cit n 4 above. Regrettably, the Court attributes this position to Dziubak which actually limited, rather than expanding, the scope of the Kásler exception.
particular, the latter does not preclude the introduction of a limitation period, provided that ‘its application does not in practice make it impossible or excessively difficult to exercise the rights’ (para 91).

While a 10-year limitation period is not per se incompatible with the principle of effectiveness, the Court problematizes the fact that the period begins to run from the date of the payment. In fact, a ‘consumers may be unaware of the unfairness of a term in a mortgage loan agreement or may not perceive the extent of their rights under Directive 93/13’ (para 94). Accordingly, ‘there is a non-negligible risk’ that consumers will not be able to exercise their rights especially considering that the duration of the contract is ‘much longer than the statutory limitation period’ (paras 96–97).

3 Consumer Sale Law

3.1 Use of a Prohibited Defeat Device as Non-Minor Lack of Conformity under EU Consumer Sale Law: Judgment in Case C-145/20 Porsche Inter Auto and Volkswagen

With this decision, the Court of Justice writes another chapter in the Dieselgate saga. In the main proceedings, DS, a consumer, brought an action against the seller and Volkswagen asking for the contract termination or, alternatively, a price reduction or damages. The claim rests on the fact that on the car was present a prohibited ‘defeat device’ within the meaning of Article 5(2) Regulation 715/2017.

A defeat device is used to make a vehicle behave differently during an emission test than on the road (see Article 3(10)(10) of the regulation for more details). Using such devices is not categorically prohibited since Article 5(2) carves out three exceptions to the prohibition. This case focuses on the first exception: ‘the need for the device is justified in terms of protecting the engine against damage or accident and for safe operation of the vehicle’.

The following facts are noteworthy to understand better the context that led to the present decision. KBA, the German Federal Office for Motor Vehicles, approved the vehicle type purchased by DS without knowing about the defeat device, and it would not have granted the approval had it known.

Once the scheme became public, Volkswagen proposed, and the KBA accepted, a software update as ‘suitable for re-establishing conformity’ (para 33). However, as pointed out by DS, the new system is ‘fully effective only when the external

temperature was between 15 and 33 °C (para 34). Such a temperature window is not compatible with normal use conditions in large portions of the EU internal market.

Nevertheless, DS lost in the first and second instances and then brought an appeal on a point of law before the Austrian Supreme Court, which decided to stay the main proceedings and ask three questions to the Court of Justice. The German government fully supported Volkswagen’s arguments before the ECJ.

With the first question, in essence, the referring judge asks to clarify the relationship between the concept of conformity within the meaning of Article 2(2)(d) Directive 1999/44 and a valid EC-type approval issued for a vehicle type that, nevertheless, uses a prohibited defeat device. In other words, the question is what are the implications of an authorisation to market granted in lack of the necessary requirements for the right to receive goods in conformity under Directive 1999/44.

The Court of Justice reaches the conclusion that, in such circumstances, the good can be found to be not in conformity. At the core of the Court’s reasoning rests the observation that the fact the vehicle has been approved by the competent authority entitles consumers to ‘reasonably expect’ compliance with the relevant legal standards (para 54). This means that those standards are part of the characteristics of a good in conformity within the concept of conformity used by Directive 1999/44.

The second question focuses on the correct application by the KBA of Article 5(2)(a) of the regulation, which justifies the use of the defeat device to protect ‘the engine against damage or accident and for safe operation of the vehicle’. In its answer, the ECJ considers and rejects various arguments proposed by Volkswagen and by the German government. In light of the interest of the readers of this journal in the contractual dimension of the case, it will suffice to observe the following.

First, a broad interpretation of the exception would make the prohibition set by Article 5(2) ‘devoid of substance and deprived of any effectiveness’ (para 66). Second, the Court rejected the claim that ‘the concept of ‘need’ for a defeat device does not require the best available technology and that account must be taken of the state-of-the-art technology at the time of EC type-approval’ (para 77). Instead, the need referred to in Article 5(2)(a) exists only when ‘no other technical solution’ regardless of considerations of cost (paras 79–80).

Finally, the ECJ rejected the ‘need to balance environmental interests with the economic interests of manufacturers’ (para 77). Those interests were considered when the regulation was drafted, as ‘it is apparent from recital 7’ (para 78).

With the last question, the referring judge focuses again on Directive 1999/44. It asks whether the lack of conformity at issue in the main proceedings can be qualified as minor within the meaning of Article 3(6) of the directive. A possible factor in reaching this conclusion is that the ‘consumer had been aware of the existence and
operation of that device, [and] he or she would still have purchased that vehicle’ (para 82).

As a first step, the Court of Justice notes that Article 2(3) of the directive gives relevance to defects known or that should have been known by the consumer. In fact, when this condition is met at the time of the conclusion of the contract, the defects do not constitute a lack of conformity. On the contrary, the Court observes, the qualification of a lack of conformity as minor ‘is not subject to such a subjective element’ (para 85).

The ECJ then finds that the lack of conformity in the main proceedings ‘cannot be regarded as minor’ (para 96). In fact, under the ‘usual meaning of the term ‘minor’’, the lack of conformity must be of ‘minor importance’ (para 89). Moreover, the function of the concept of minor lack of conformity suggests that the lack of conformity at hand is not of minor importance. In fact, this concept limits the use of ‘rescission of the contract, which constitutes the weightiest legal remedy available to the consumer’, … where a lack of conformity is of a sufficient magnitude’ (para 94). The Court then simply points out that the lack of conformity of a vehicle ‘with such a device cannot be approved’ and that ‘is not able to comply with the emission limits’ cannot be ‘regarded as … minor’ (paras 96–97). In other words, the ECJ makes the implicit inference that in a case such as the one in the main proceedings, it is appropriate for consumers to ‘exercise exit’ if they wish to do so.

In delivering this decision, the Court of Justice has resisted the attempts to find a loophole favouring Volkswagen. In this regard, it is noteworthy that the answer to the first question is temporally limited to the implication of an authorisation issued on the basis of incomplete information by the manufacturer. However, the same finding also seems extendable to the situation, examined by the answers to the second and third questions, where the administrative body erred in interpreting and applying the relevant rules to correct and complete factual representations.

4 Air Passenger Rights

4.1 Purely Psychological Damage as Recoverable under the Montreal Convention: Judgment in Case C-111/21

Laudamotion

One of the most crucial questions for any liability system is the definition of recoverable damage. Traditionally, contract law has been reluctant to award damages for purely psychological damage; however, the past two decades have witnessed a progressive reconsideration of this doctrinal limitation in various
areas and jurisdictions. With the present decision, the Court of Justice takes a clear position on this matter in the context of air passenger rights.

During take-off, an aircraft had to perform an emergency evacuation of the passengers because the left engine exploded. Regrettably, BT, the applicant in the main proceedings, ‘was hurled several meters through the air by the jet blast of the right engine which had not yet been shut down’ and, as a consequence, suffered from post-traumatic stress disorder (para 9).

The relevant provision of the Montreal Convention expressly applies only to ‘bodily harm’ and, on these grounds, both the District and Regional Courts decided against the passenger. The answer provided by the Court of Justice goes in the opposite direction.

As a first step, the ECJ identifies the rules of interpretation applicable in this case. These are, in particular, Articles 31 and 32 of the Vienna Convention on the Law of Treaties, which establish that provisions must be interpreted in light of their ordinary meaning, object, and purpose, considering the preparatory works.

As a second step, the Court of Justice finds that the ordinary meaning of the phrase ‘bodily injury’ may cover psychological damage ‘linked to such bodily injury’, but not purely psychological damage (para 24). Next, the Court considers that the intention of the authors of the convention might have been not to exclude the recovery of damage of this kind but offers in support of this view only a rather ambivalent passage from the preparatory works (para 26).

It is ultimately in the objectives of the convention that the ECJ grounds the recoverability of purely psychological damage, namely ‘protection of the interests of consumers’ and ‘equitable compensation based on the principle of restitution’ (para 27). In particular, the latter objective requires that passengers who have suffered injuries are treated equally regardless of the nature of the damage.

The Court of Justice then considers the dreaded fear of flooding courts with frivolous claims, which would not be equitable to air carriers. Accordingly, the ECJ enters into the details of how passengers should demonstrate the damage, namely ‘to the requisite legal standard, by means in particular of a medical report and proof of medical treatment, the existence of an adverse effect on his or her psychological integrity suffered as a result of an ‘accident’, within the meaning of that provision, of such gravity or intensity such that it affects his or her general state of health, particularly in view of its psychosomatic effects, and that it cannot be resolved without medical treatment’ (para 31).

While the detailed direction provided to the national judge might raise concerns in terms of procedural autonomy, the recoverability of purely psychological damage under the Montreal Convention is convincingly argued for.
5 Labour and Agency Law

5.1 Payment of the Goodwill Indemnity to the Subagent Who Becomes the Main Agent as Not Equitable: Judgment in Case C-593/21 Herios

Herios entered into an exclusive commercial agency contract with Poensgen to sell the latter’s products in Belgium, France, and Luxemburg. In parallel, Herios entered into a subagency contract with NY. A few years later, Poensgen terminated the relationship with Herios and entered into a new one directly with NY. As a consequence, Poensgen paid a goodwill indemnity to Herios. Notably, in the meantime, Herios ceased its activities. Against this background, NY brought an action against Herios claiming payment of a goodwill indemnity which ‘represents the respondent’s turnover … resulting from the new customers acquired’ (para 14).

To decide whether NY is entitled to such payment, the Court of Justice interprets Article 17(2)(a) of Directive 86/593 in light of its wording, context, and the objectives pursued. This provision includes two main requirements for the goodwill to be due: first, ‘the principal continues to derive substantial benefits from the business’ generated by the agent’s past activity; second, the payment of the indemnity is ‘equitable having regard to all the circumstance and, in particular, the commission lost by the commercial agent’.

Concerning the first requirement, the ECJ observes that the phrase ‘substantial benefits’ is ‘capable of encompassing all of the benefits that the principal derives … including the goodwill indemnity that it has received from its own principal’ (para 24). A restrictive interpretation would be contrary to the objectives of the directive.

The Court then moves to the analysis of the equitability requirement. Notably, the referring judge had not explicitly formulated a question in this regard, but the analysis is necessary to ‘provide a complete answer’ (para 32). The ECJ notes that the circumstances relevant to determine if paying the goodwill indemnity is equitable include the fact that the agent may benefit from the customer base ‘whether on his or her own account or for the benefit of another principal’ (para 35).

The purpose of the goodwill indemnity is to remunerate ‘the agent for his or her past efforts, in so far as the principal continues to benefit from the economic advantages resulting from those efforts’ (para 36). However, when a subagent substitutes the main agent, he or she ‘does not suffer, a fortiori, any negative consequence from the termination of his or her commercial agency contract with that main agent’ (para 39).
As usual, the Court of Justice leaves the final word to the referring judge, but it is apparent that the remaining margin of manoeuvre in the application of Article 17(2)(a) is relatively narrow.

6 Public Procurement Law

6.1 Exclusion of the Second-Ranked Tender Constituting a Single Economic Operator with the First-Ranked Tender Who Withdrew as a Disproportionate Irrebuttable Presumption of Concerted Practice: Judgment in Case C-769/21 AAS ‘BTA Baltic Insurance Company’

EU public procurement law and, in particular, Directive 2014/24 seek to ensure the broadest participation of economic operators in tenders. Sometimes, tenderers belong to the same economic operator, which raises serious concerns about concerted practices, to the detriment of the public interest.

The present case deals with the compatibility with EU law, particularly the principle of proportionality, of a measure set in place by Latvian law against one of such attempts. At issue is the power to terminate the procedure without awarding the contract when the first- and second-ranked tenderers constituted a single economic operator and the first tenderers withdrew from the procedure. Under these circumstances, it is plausible to wonder whether the withdrawal is motivated by the higher profit the single economic operator would receive when the contract is awarded to the second tenderer.

The procurement committed relied on Paragraphs 23 and 24 of Decree No 107 of the Council of Ministers on public procurement procedures and competitions of 28 February 2017 to terminate the procedure without awarding the contract. For this power to be actionable, it is sufficient that the second-ranked tenderer is part of the same economic operator as the first one, who has withdrawn the tender.

To evaluate the compatibility of these powers, as applied by the procurement committee, the Court of Justice relies heavily on its reasoning in Assittur (Judgments of 19 May 2009, C-538/07, EU:C:2009:317) and Lloyd’s of London (Judgment of 8 February 2018, C-144/17, EU:C:2018:78). In those decisions, the ECJ held that it is incompatible with EU law to prohibit tenderers who constitute a single economic operator to participate in the tender.

The innovative part of the present decision is extending the arguments from the prohibition to participate to the power exercised by the procurement committee in
the adjudication phase since ‘its effects are similar’ (para 41) to the said prohibition. To justify this conclusion, the Court of Justice offers a nuanced analysis.

The main concern is that the power under consideration establishes the ‘irrebuttable presumption’ of a concerted practice (para 42) which will reduce participation by tenderers, contrary to the public interest. In fact, potential tenderers from the same economic operator might be deterred from participating. Moreover, the legislation under consideration might even make concerted practices more likely, in that information about the tenders is made available to the parties, making unlawful coordination easier ‘in the context of the next procedure’ (para 44).

Against this background, the ECJ readily admits that the withdrawal of the first-ranked tenderer that would lead to the contract being awarded to a company of the same economic operator ‘might constitute evidence of an anti-competitive concerted practice’ (para 45). However, the principle of proportionality requires giving the tenderers ‘the opportunity to demonstrate the independent nature of their tenders’ (para 45).

While one may doubt the strength of the incentives relied upon by the Court of Justice, the prospected solution, namely a case-by-case decision where the burden of persuasion rests on the tenderers, seems to strike a reasonable balance between increasing participation and deterring concerted practices.

7 Private International Law

7.1 The Letter of Comfort by the Employer’s Parent Company does Not Fall Outside the Employee’s Trade or Professional Activity: Judgment in Case C-604/20 ROI Land Investments

The present case tested the categories used in EU private international law to labour contracts in light of the complexity of the arrangements between the parties. In fact, FD, domiciled in Germany, worked for R Swiss, a company created under Swiss law and controlled by ROI Land. ROI Land was FD’s initial employer and FD, to accept the change of employer, obtained a ‘letter of comfort’ making ROI Land directly liable for the R Swiss obligations vis-à-vis FD. Since R Swiss became insolvent, FD filed a lawsuit against ROI Land, relying on the letter of comfort.

The first question examined by the Court of Justice is whether FD could have started the proceedings in Germany by relying against ROI Land on the fora specialia established by Articles 21(1)(b)(i) Regulation 1215/2012 (the Regulation), namely the last and the habitual place where the work was carried out.
To answer this question, the ECJ first observes that the provision under consideration must receive an autonomous interpretation, just like its predecessor, Article 19(2) Regulation 44/2001. Next, the Court clarifies that the referring judge will have to determine whether the main proceeding concerns a dispute over an individual contract of employment. In other words, the ECJ takes the view that the letter of comfort could be enough to establish an employment relationship between FD and ROI Land, provided that the conditions in *Bosworth and Hurley* (Judgment of 11 April 2019, C-603/17, EU:C:2019:310, paras 25–7) are satisfied.

The second question focuses on the system of rules applicable to determine the jurisdiction against a defendant who is not domiciled in a Member State. The referring judge seeks guidance in deciding how Article 6(1) and 21(2) Regulation must be applied. Following the plain meaning of the provisions, the ECJ explains that, normally, it is for the law of a Member State to establish the rules on jurisdiction against third-country domiciled.

However, Article 6(1) expressively provides for a list of exceptions which covers, among others, employment contracts. Usefully for future cases, the Court points out that this list is exclusive (para 42). When the exception applies, the specific provisions of the Regulation take precedence over national law. In other words, FD’s power to ground the jurisdiction in the main proceedings derives exclusively from Article 21(1) Regulation.

Finally, the Court of Justice investigates if, in case no employment relationship exists between FD and ROI Land, the former can rely on the *forum consumatoris* established by Article 17(1) Regulation to establish the referring judge’s jurisdiction over the letter of comfort. In essence, the point is whether the letter of comfort can be considered a consumer contract between FD and ROI Land. The Court’s answer is negative because the letter of comfort is ‘inextricably linked to the contract of employment’ between FD and ROI Land (para 57).

In sum, FD will succeed in establishing the jurisdiction of the referring judge only if the latter qualifies the letter of comfort as an employment relationship between FD and ROI Land on the basis of the criteria set out in *Bosworth and Hurley*.

Note: The primary responsibility for the areas of Commercial Contract Law, Consumer Sales Law, and Public Procurement Law lies with Lucila de Almeida; for the areas of Unfair Terms in Consumer Contracts, Air Passenger Rights, Labour and Agency Law, Private International Law, it lies with Fabrizio Esposito.