

*International private law aspects and dispute  
settlement related to transnational company  
agreements*

***ANNEX 1***

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## ANNEX I

### ANNEX I

#### **Characterization in private international law of the claims arising under a TCA**

##### *A. Relevant instruments and their scope of application*

The main instrument as to jurisdiction in civil and commercial matters is the Brussels I Regulation. Like the Brussels Convention before it, the regulation covers a wide range of issues including contractual obligations and non-contractual liability. The conflict of law rules pertaining to these two issues are dispersed amongst two Regulations. The Rome I Regulation, which replaces the 1980 Rome Convention, deals with the law applying to contractual obligations, the Rome II Regulation contains the conflict of law rules for non-contractual obligations. Both regulations also restrict their scope of application to civil and commercial matters. This begs the following questions:

- 1) what is considered to be a ‘civil and commercial matter’ for the application of the said regulations?
- 2) where do the regulations draw the line between contractual obligations and non-contractual obligations?

These very technical matters will be discussed below. In doing so, we will mainly base ourselves on the ECJ decisions with regard to the Brussels Convention and the Brussels I Regulation.

The Brussels I Regulation is relatively new, especially when compared to the long standing of its predecessor: the Brussels Convention. Hence, most case law on jurisdiction will be rendered under the Convention, rather than under the Regulation. This does not mean, however, that the case law has no significance any more. The provisions of the Regulation are to a large extent based on the Convention. The Regulation itself stresses in its preamble the continuity between the treaty and the regulation (amongst others: preamble no. 19). Accordingly, the ECJ will compare the provisions of the Regulation to the parallel provision in the Convention. When these are identical or in substance equivalent, the case law under the Convention may be used to interpret the Regulation as well.<sup>1</sup> As the scope of application of the Regulation is identical to that of the Convention, any case law on Article 1 of the Convention is still relevant to the issue at hand.

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<sup>1</sup> Opinion of AG Trstenjak of 27 January to Case C-533/07, *Falco and Rabitsch v. Weller-Lindhorst*, 2007 ECR I-0000 with references to case law of the ECJ. Furthermore, see, U. Magnus & P. Mankowski, *European Commentaries on Private international law: the Brussels I Regulation*, München, Sellier Europa Law Publishers 2007, introduction, marginal 91, p. 31 and marginal 96, p. 33.

## ANNEX I

Likewise, the case law on the Brussels I Regulation will be relevant for the interpretation of the Rome I and Rome II Regulations. There is currently no European case law on the Rome I and Rome II regulations nor for that matter any relevant case law on the predecessor of the Rome I Regulation, the Rome Convention. However, the preamble to the Rome I Regulation specifically states that the scope of application of this instrument should be interpreted in a way so as to ensure consistency with both the Brussels I Regulation and the Rome II Regulation.

### 1. Civil and commercial matters

The Brussels I Regulation, like the Brussels Convention before it, covers a wide range of issues of a ‘civil and commercial’ nature. Its precise scope of application is defined in Article 1 which states in paragraph 1 that ‘this regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.’

According to paragraph 2 the Regulation shall not apply to

- (a) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession;
- (b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;
- (c) social security;
- (d) arbitration.

The provision is identical to the text of the Brussels Convention.<sup>2</sup>

For the current research only two questions seem to be relevant:

- 1) Does the limitation to civil and commercial matters restrict the applicability of the Regulation in the area of enforcement of TCA’s?
- 2) Does the exclusion of ‘social security’ and ‘revenue’ affect its effectiveness as regards enforcement of TCA’s?

The reference to civil and commercial matters excludes both criminal law proceedings and what in continental law systems is referred to as ‘administrative law’ or ‘public law’ matters. Especially the latter category has posed problems of definition as this category is not known in all European jurisdictions. Moreover, in those jurisdictions that do recognize the concept, it is not always delineated in the same manner.

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<sup>2</sup> English versions. Some language versions may display minor differences in editing.

## ANNEX I

It is standard case law that the concept of civil and commercial matters has to be given an autonomous meaning. This meaning must be found by referring first to the objectives and scheme of the regulation and second to the general principles which stem from the corpus of the national legal systems.<sup>3</sup> In a series of cases the ECJ has been given the opportunity to define ‘civil and commercial matters’ in a variety of contexts. According to the ECJ certain legal actions and judicial decisions will be excluded from the scope of the Brussels Convention, by reason either of the legal relationships between the parties to the action or of the subject-matter of the action. Broadly, the case law encompasses three different situations depending on the parties to the conflict. The most common case to date is the one in which a government body (or other official authority) acts as a plaintiff.<sup>4</sup> In those cases, the claim does not fall within the scope of application when the claim is based in any way on the exercise of public powers; in other words if the rules determining the claim and its enforcement derogate from the rules of law applicable to relations between private individuals.<sup>5</sup> Accordingly, the concept of ‘civil matters’ encompasses an action under a right of recourse whereby a public body seeks to recover sums paid by way of social assistance or as student loan from the maintenance debtor ... provided that the basis and the detailed rules relating to the bringing of that action are governed by the rules of the ordinary law and the public body is not acting upon a prerogative of its own. In the maintenance cases that would mean that the government body can only reclaim monies that would also be payable under the maintenance obligation.<sup>6</sup>

Reversely, the government body or official authority may be the defendant in the procedure. The most notorious case to date is C- 292/05 (Lechouritou) in which a large number of plaintiffs seek damages from the Federal Republic of Germany for war crimes committed against them<sup>7</sup> during World War II.<sup>8</sup> Again, the

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<sup>3</sup> Case C-292/05, *Irini Lechouritou and Others v Dimosio tis Omospondiakis Dimokratias tis Germanias*, 2007 ECR I-01519, para 29 referring to inter alia, Case 29/76, *Lufttransportunternehmen GmbH & Co. KG v Eurocontrol*, 1976 ECR 01541, paragraphs 3 and 5; Case 814/79, *Netherlands State v Reinhold Rüffer*, 1980 ECR 03807, paragraph 7; Case C-271/00 *Gemeente Steenbergen v Luc Baten*, 2002 ECR I-10489, paragraph 28; Case C-266/01, *Préservatrice foncière TIARD SA v Staat der Nederlanden*, 2003 ECR I-4867, paragraph 20; and Case C-343/04, *Land Oberösterreich v ČEZ*, 2006 ECR I-4557, paragraph 22. See also B. Hess, T. Pfeiffer & P. Schlosser, report on the Application of Regulation Brussel I in the Member States, Heidelberg, Institut für Ausländisches und Internationales Privat- und Wirtschaftsrecht, 2007, p. 34 ff. See also Case C-265/02, *Frahuil SA v Assitalia SpA*, 2004 ECR I-01543.

<sup>4</sup> Similar problems will arise when a government body seeks to enforce a monetary judgement – compare the Eurosparks project on cross-border traffic enforcement.  
<http://www.sparksproject.org/Eurosparks-g.asp>.

<sup>5</sup> Case C-167/00, *Verein für Konsumenteninformation v Karl Heinz Henkel*, 2002 ECR I-08111, para 30, Case C-271/00 *Gemeente Steenbergen v Luc Baten*, 2002 ECR I-10489 para 37.

<sup>6</sup> The ECJ takes this stance to considerable lengths: in the Tiard case ( Case C-266/01, *Préservatrice foncière TIARD SA v Staat der Nederlanden*, 2003 ECR I-04867) a (compulsory) warranty was given off by a third party for the payment of a tax debt. The claim by the tax authorities under the warranty was considered to concern a civil and commercial matter. Compare also Case C-265/02, *Frahuil SA v Assitalia SpA*, 2004 ECR I-01543.

<sup>7</sup> Or against their relatives.

## ANNEX I

distinguishing criterion is whether or not the claim is related to the exercise of public authority (in this case by the defendant). Typically in these cases, the claim will sound in tort. In the *Lechouritou* case the ECJ decided that ‘operations conducted by armed forces are one of the characteristic emanations of State sovereignty’. Hence the damage which underlies the claim for damages is caused by acts conducted in the exercise of public powers. This basis in state sovereignty takes the claim outside the scope of the convention/regulation. In the *Sontag*-case however, the ECJ decided that a claim for negligence against a German public school teacher did not fall outside the Convention’s scope of application for the sole reason that Germany has created a public law liability scheme in which public school teachers are granted immunity. Defining point is again whether the school teacher acted under special prerogatives which are typical of the state and do not befall private law teachers (*quod non*).

In the case of TCA’s it will be rare to see a government body as either plaintiff or defendant. So, it is of special interest to see whether procedures between two civil law parties can also fall outside the scope of the regulation because of their public law character. The ECJ does not exclude that, given that the status of the parties is not in itself decisive. In the *Hess/Pfeiffer/Schlösser* report on the application of the Brussels I Regulation in the Member States, the authors dwell quite extensively on the issue of private enforcement of public laws. In several areas of law – e.g. environmental law and competition law – rules with a public policy rationale can be enforced by private parties. Public interest groups may try to enforce environmental law rules, competitors may try to enforce the rules of competition. Does the public interest involved in enforcement take these types of claims outside the scope of the directive? The case law of the ECJ suggests that this is not the case.

In the *Henkel* case (C-167/00) the UK had militated against application of the Convention in a case in which a consumer organisation was seeking an injunction against a manufacturer with regard to the use of unfair contract terms in consumer contracts. According to the UK such general authority to seek an injunction typically constituted a public power. It stems from statute, independent of any private law relationship between the professional user of the unfair terms and a specific private individual or organisation. In the UK the relevant entity to demand such injunctions is a public consumer authority rather than a private consumer association.<sup>9</sup> Again, the ECJ based its judgement on the relationship between the parties and the subject-matter of the action. In para 30 it stated:

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<sup>8</sup> These procedures have by now reached the international court of justice, where Germany filed a claim against Italy for proceeding in violation of the rules of state immunity. See <http://www.icj-cij.org/docket/files/143/14925.pdf>.

<sup>9</sup> In the UK this authority lies with the Office of Fair Trading, which is a public law body. These days, a public authority with enforcement possibilities is prescribed by EU law for transnational cases: Regulation (EC) no 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation OJ L 364/1 and the Green Paper On Consumer Collective Redress Com (2008)794 final .

## ANNEX I

“Not only is a consumer protection organisation such as the VKI [the Austrian consumer association which was a party to the dispute AH/FH] a private body, but in addition, as the German Government correctly observed, the subject-matter of the main proceedings is not an exercise of public powers, since those proceedings do not in any way concern the exercise of powers derogating from the rules of law applicable to relations between private individuals. On the contrary, the action pending before the national court concerns the prohibition on traders' using unfair terms in their contracts with consumers and thus seeks to make relationships governed by private law subject to review by the courts. An action of that kind is a civil matter within the meaning of the first paragraph of Article 1 of the Brussels Convention.”

Hence, in our view, any action by a private entity aimed at the enforcement under private law rules of obligations taken on voluntarily by another private entity will come within the scope of application of the Brussels I Regulation as being a civil and commercial matter.<sup>10</sup> The concept of entity seems to be a wide one, including inter alia association of individuals and/or legal entities.<sup>11</sup>

This is not changed by the public policy character which collective labour law has in some of the member states. This public policy aspect might be taken into account when devising the most appropriate jurisdiction rule. Alternatively, public policy may play a (corrective) role at the level of the conflict of laws. In our opinion, it does not take the conflict outside the scope of application of the Brussels I Regulation (nor for the matter, the Rome I and Rome II Regulations). Likewise, we disagree with the point of view described in the German report, which would have it that in matters involving German works councils, the German court can claim exclusive jurisdiction as the matter is deemed to fall outside the scope of application of the Regulation. The argument used here is the incomplete standing of the works councils. But the issue of *ius standi* is not a determining factor in the case law on the scope of application of the Regulation.

## 2. Social Security and Revenue

Though labour law is not excluded from the scope of application – the Regulation even contains special jurisdictional rules for individual labour contracts – social security is. This exclusion works independently from the general restriction of the Regulation to civil and commercial matters.<sup>12</sup> When a claim falls within the concept

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<sup>10</sup> In the Green Paper on Consumer Collective Redress Com (2008)794 final p. 16 para 58 the European Commission even seems to take the position that the enforcement of private law (consumer)rights by a public authority comes within the scope of application of the Brussels I Regulation. The relevant criterion is hence the character of the right which is safeguarded by the action.

<sup>11</sup> Compare Article 22 (2)of the Regulation.

<sup>12</sup> In *Steenbergen/Baten* the ECJ insists that the problem of exclusion under Article 1 para 2 sub c will only arise when the claim is deemed to be civil and commercial in the first place. (Case C-271/00 *Gemeente Steenbergen v Luc Baten*, 2002 ECR I-10489.)

## ANNEX I

of social security, it becomes irrelevant whether it could be classified as civil and commercial according to the preceding criteria or not.

The exclusion of social security does not seem to have a large practical relevance or lead to major interpretation problems. Thus far, only one ECJ case touches upon the matter: a case between the municipality of Steenberg and Luc Baten. In this case Steenberg claims compensation of municipal social assistance costs paid to his ex-wife and kid from Baten, a maintenance creditor in default.<sup>13</sup> The claim was not only deemed to be 'civil and commercial', according to the ECJ it also did not pertain to 'social security'. For a definition of the latter concept, the ECJ referred to the Regulation on social security no 1408/71.<sup>14</sup> This regulation contains rules both on the type of risks covered by the regulation<sup>15</sup> and the sources of social security obligation covered by the system ('legislation').<sup>16</sup> From these rules it becomes apparent that social benefits which are based on collective agreements and other types of private commitments will generally not come within the European concept of social security. A recent German case confirms this stance. In that case the claim of a social fund against an employer for contributions due under a generally binding collective agreement was deemed to be civil and commercial in nature and not excluded by Article 1 (2) (c) of the Brussels I Regulation.<sup>17</sup> Accordingly, obligations in TCA's, even if they pertain to protection against one of the risks mentioned in Reg 1408/71 (e.g. sickness and unemployment) will not be excluded from the scope of application of Reg 2001/44.

Likewise 'revenue' is a very limited concept. The reference to revenue in Article 1 was introduced at the time of accession of the UK to the Brussels Convention. It was meant to ensure that revenue claims were to be excluded from the concept of 'civil and commercial matters', even if they were classified as civil law debts under

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<sup>13</sup> Case C-271/00 *Gemeente Steenberg v Luc Baten*, 2002 ECR I-10489.

<sup>14</sup> Case C-271/00 para 45. "It must therefore be held that the substance of the concept of 'social security' in the second paragraph of Article 1 of the Brussels Convention encompasses the matters covered by Regulation No 1408/71, as defined in Article 4 thereof and clarified in the Court's case-law." Reg 1408/71 will shortly be replaced by Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the Coordination of Social Security Systems, 2004, OJ L 166 (Text with relevance for the EEA and for Switzerland).

<sup>15</sup> Reg 883/2004 Article 3 sub 1. "This Regulation shall apply to all legislation concerning the following branches of social security:..."

<sup>16</sup> Reg 883/2004, Article 1 sub (l): "legislation" means, in respect of each Member State, laws, regulations and other statutory provisions and all other implementing measures relating to the social security branches covered by Article 3(1); This term excludes contractual provisions other than those which serve to implement an insurance obligation arising from the laws and regulations referred to in the preceding subparagraph or which have been the subject of a decision by the public authorities which makes them obligatory or extends their scope, provided that the Member State concerned makes a declaration to that effect, notified to the President of the European Parliament and the President of the Council of the European Union. Such declaration shall be published in the Official Journal of the European Union.

<sup>17</sup> BAG vom 2.7.2008 – 10 AZR 355/07 – AP Verordnung Nr. 44/2001/EG Nr. 1, para 12: 'Die Beitragsklage der ZVK betreffe nicht die soziale Sicherheit.' Idem, U. Magnus & P. Mankowski, *European Commentaries on Private international law: the Brussels I Regulation*, München, Sellier Europa Law Publishers 2007, introduction Rdnr 94 p. 32 note 146.

## ANNEX I

national law. But this exception is construed narrowly and restricted to claims by public authorities based on government prerogatives. When private parties make arrangements in their contract with regard to payment of taxes over certain payments, such agreements will not be excluded from the scope of application of the Brussels I Regulation. The relevant claim will be a ‘civil and commercial matter’.<sup>18</sup>

### 3. Main findings as to the general scope of application of the Regulations

Both the Brussels I Regulation on jurisdiction and the Rome I and Rome II Regulations on applicable law restrict their scope of application to ‘civil and commercial matters’. This concept poses restrictions on claims by and against public law entities. Theoretically the concept of ‘civil and commercial matters’ could also be used to exclude claims between private parties that are made in the public interest and/or represent public policy. The ECJ however, does not leave much room for such interpretation.<sup>19</sup> Only when a private party acts upon special state prerogatives, can such action be considered to escape the framework established by the regulations discussed here.<sup>20</sup> Accordingly, when private organisations try to enforce private law rules against other private entities, their actions come within the scope of application of these regulations.<sup>21</sup> This remains true even if the private entity bases its enforcement policy on public interests and/or if the private law entity has wide powers to defend the interests of others. This would seem to cover all the possible claims by stakeholders to a TCA: as the TCA is a private law construct, any claim to uphold it entered by a private law entity will be civil and commercial in the meaning of Article 1 Brussels I and the parallel provisions of the Rome I and Rome II

#### B. Contractual versus non-contractual obligations.

According to the ECJ the concepts of contract and tort are mutually exclusive. In *Kalfelis*, the Court held that the term ‘matters relating to tort, delict or quasi-delict’ in Article 5(3) of the Brussels Convention covers all actions to establish liability which are not related to a ‘contract’ within the meaning of Article 5(1) of the same

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<sup>18</sup> Compare Case C-266/01, *Préservatrice foncière TIARD SA v Staat der Nederlanden*, 2003 ECR I-4867 and Case C-265/02, *Frahuil SA v Assitalia SpA*, 2004 ECR I-01543 discussed above.

<sup>19</sup> Compare U. Magnus & P. Mankowski, *European Commentaries on Private international law: the Brussels I Regulation*, München, Sellier Europa Law Publishers 2007, Rdnr 13, p. 51.

<sup>20</sup> Compare Case C-265/02 *Frahuil SA v Assitalia SpA*, 2004 ECR I-01543 and BAG vom 2.7.2008 – 10 AZR 355/07 – AP Verordnung Nr. 44/2001/EG Nr. 1.: ‘Sie (Die EuGVVO) erfasse auch arbeitsrechtliche Streitigkeiten’.

<sup>21</sup> The (private or public law) nature of the court is irrelevant in this respect. Compare Article 1(1): ‘This Regulation shall apply in civil and commercial matters *whatever the nature of the court or tribunal* [emphasis added].’ U. Magnus & P. Mankowski, *European Commentaries on Private international law: the Brussels I Regulation*, München, Sellier Europa Law Publishers 2007, Article 1, Rdnr 21, p. 55.



## ANNEX I

convention. Hence, the key concept dividing the two provisions is the concept of contract.

### 1. The concept of contract under the Brussels I Regulation.

In a series of cases the ECJ has consistently held that the concept of contract has to be interpreted autonomously.<sup>22</sup> It refers to a situation in which obligations are freely entered into by one party towards another.<sup>23</sup> This description contains two distinctive elements

- the voluntary character of the obligations taken on by the defendant
- the fact that the obligation must be assumed by one identifiable party towards another identifiable person or persons.

The concept of contract is wide enough to encompass unilateral commitments as the definition does not require consideration: it is not necessary that each of the parties to the contract has assumed obligations under the 'contract'.<sup>24</sup> TCA's fit into this definition: they contain commitments by the employer which the employer has taken on voluntarily towards the other signatories. Accordingly, a claim for enforcement between the signatories to a TCA will be characterized as contractual under the Brussels I Regulation. The classification of obligations arising under a TCA as contractual obligations is relatively independent from the question whether or not the TCA actually contains legally binding commitments: Whenever a claim is made for enforcement of a specific commitment, the claimant will have to base this claim on the assumption that the commitment taken on by the employer is legally binding. Hence, the *claim* is sounding in contract. It is then up to the court seized to decide whether or not the claim regarding the legally binding character of the TCA holds true under the applicable law. If not, the claim is denied. This situation is comparable to situations in which the claimant bases himself on contract, but the defendant claims nullity or non-existence of the contract. This defence – even if

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<sup>22</sup> See, *inter alia*, Case C-265/02, Frahuil SA v Assitalia SpA, ECR 2004 I-01543 para 22.

<sup>23</sup> The category contains *inter alia* the obligations of a share holder towards his company (C-214/89 Powell Duffreyn plc v Peterait [1992] ECR I-1745) and claims based on the bylaws / internal rules of a club (Case 34/82 Peters v. ZNAV [1983] ECR 987).

<sup>24</sup> See, *inter alia*, ECJ Case C-180/06, Renate Ilsinger v Martin Dreschers (Ilsinger), 2009 ECR. It is interesting to note that the Principles of European Contract Law likewise contain such a wide concept of contract. The concept covers

1 agreements under which two or more parties have undertaken an obligation

2 agreements where the offeree accepts the offer by acting or submitting itself to acts or procedures

3 unilateral obligations which need acceptance

4 unilateral obligations: promises which are meant to be binding without acceptance

Principles of European contract law Parts I and II, Lando/Beale, 2000, p. 137-139.

The Draft common frame of reference proclaims a more restricted concept as unilateral commitments are treated separately (Article 1:101 for contracts, Article 4:310 for unilateral act). *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame Reference (DCFR)*, Outline edition, Prepared by the Study Group on a European Civil Code and the research group on EC Private Law (Acquis Group), München, Sellier European Law Publishers, 2009.

## ANNEX I

honoured – does not remove the claim from the scope of application of Article 5(1) of the Brussels I Regulation.<sup>25</sup>

Accordingly, the classification under Article 5 of claims between the signatories to a TCA seems pretty straightforward. However, TCA's may contain obligations for and commitments towards others than the direct signatories. Are these other relationships also covered by Article 5(1)? The first question would be against whom can the TCA be enforced under Article 5(1). A second question relates to the question of possible claimants: by whom can the TCA be enforced under Article 5(1)?

The answer to the first question hinges on the requirement of a voluntary commitment entered into by the defendant on behalf of the claimant. The classical cases in which this provision is tested, is the multiparty complex business transaction. The necessity of a direct link between the parties excludes the possibility to bring 'upstream' claims against previous sellers in a chain of contracts of sale. A subbuyer in a chain of contracts does not have a contractual claim against the original seller and/or manufacturer as there is no voluntary commitment of the manufacturer towards this particular party. Any product liability claim between these parties will sound in tort.<sup>26</sup> For the same reasons, an action for compensation by a consignee of goods which were damaged during a transport operation by sea against the actual maritime carrier who did not issue the bill of lading does not sound in contract either.<sup>27</sup> However, if a contract of guarantee with regards to custom duties is entered into by a forwarding agent which covers the monies due on goods imported on behalf of his clients, the claim of the guarantor against one of the importers for restitution of duties paid may very well sound in contract.<sup>28</sup> According to the ECJ, the national court would have to examine the legal relationship between the importer and the forwarding agent in order to establish whether that relationship permitted the agent to enter into the contract of guarantee *on behalf of the importer*. 'Matters relating to a contract' do not cover the restitution claims under a contract of guarantee if the party against whom restitution is sought under the rules of subrogation and who was not a party to the contract of guarantee, did not authorise the conclusion of that contract. With this judgement the ECJ seems to suggest that a contractual relationship between the principal and the third party may come into existence when the agent acts in his own name, but the third party is aware of the existence of the agency relationship – as would be the case with forwarding agents.<sup>29</sup>

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<sup>25</sup> Case 38/81 Effer/Kantner [1982] ECR 825. Clarkson/Hill p. 72, Briggs p.76

<sup>26</sup> Case C-26/91 Jakob Handte & Co. GmbH v Traitements Mécano-chimiques des Surfaces SA, 1992 ECR I-3967.

<sup>27</sup> Case C-51/97, Réunion européenne SA and Others v Spliethoff's Bevrachtungskantoor BV and the Master of the vessel Alblasgracht V002, 1998 ECR I-6511

<sup>28</sup> Case C-265/02, Frahuil SA v Assitalia SpA, 2004 ECR I-01543.

<sup>29</sup> A similar stance seems to be taken in both the DCFR and the TECL. However, this position is not undisputed. Compare COM (2007) 447 final, p. 9-10, PECL, p. 200 and 2005, DCFR, Article 6:105/6:106.

## ANNEX I

Transposed to the topic at hand (enforcement of TCA's), it would depend on the relationship between the signatory parent company and its daughter companies whether or not a signature by the parent would also bind the daughters. Likewise, the relationship (including specific agreements of representation) between the (European) trade unions who signed the TCA and the other interested national trade unions will determine whether or not the national trade unions have assumed obligations under the contract. Accordingly, there will be no difficulties as regards classification of the claim in those cases in which the signatories were specifically authorised to enter into the TCA on behalf of the daughter companies and/or national workers' organisations.<sup>30</sup> More difficult would be the situation described in the French report, in which a parent company is authorised by French law to bind its daughter companies to a collective agreement covering the entire group of companies.<sup>31</sup> It would seem that this kind of legal representation can not be equated to a voluntary taking on of obligations. Hence, it seems advisable to ensure either signatory status for all relevant parties or proper representation arrangements in the context of a TCA – assuming the parties aim for a legally binding text.

With regard to the question who could possibly claim under Article 5(1), the second requirement mentioned above comes into play. The concept of contract seems wide enough to cover unilateral commitments<sup>32</sup> and commitments towards third parties, but does it in any way restrict the scope of beneficiaries? In the recent case of *Renate Ilsinger v. Martin Dreschers* the question arose whether a claim under which a consumer demands payment of a price purportedly awarded to her under a direct advertising campaign constitutes a claim under contract – even if no contract of sales is concluded between the consumer and the professional vendor. In its judgment the ECJ extended the scope of 'consumer contract' to include also these kind of unilateral promises.<sup>33</sup> According to the court it is necessary for a contract to exist within the meaning of the provision on consumer contracts, that the vendor should assume a legal obligation by submitting a firm offer which is sufficiently clear and precise with regard to its object and scope as to give rise to a link of a contractual nature.<sup>34</sup> In the context of a prize notification, this means that the vendor must have expressed clearly its intention to be bound by such a commitment, if it is accepted by the other party, by declaring itself to be unconditionally willing to pay

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<sup>30</sup> Presuming the other signatories to the TCA are aware of the underlying agency relationship – which is defensible as the TCA itself specifically refers to rights and duties of the underlying 'principals'.

<sup>31</sup> Question 1d).

<sup>32</sup> Compare French report Question 2b).

<sup>33</sup> According to the ECJ in *Ilsinger* the Convention contains a more restricted definition of 'consumer contract' than the Regulation. Hence, the interpretation of the concept 'consumer contract' for the interpretation of contract in general has become more relevant.

<sup>34</sup> Compare DCFR II 4:103 en II 4:301. *Ilsinger* Para 54: "As regards that condition, it is, of course, conceivable, in the context of Article 15(1)(c) of Regulation No 44/2001, that one of the parties merely indicates its acceptance, without assuming itself any legal obligation to the other party to the contract (see paragraph 51 of the present judgment). However, it is necessary, for a contract to exist within the meaning of that provision, that the latter party should assume such a legal obligation by submitting a firm offer which is sufficiently clear and precise with regard to its object and scope as to give rise to a link of a contractual nature as referred to by that provision."

## ANNEX I

the prize at issue to consumers who so request.<sup>35</sup> In other words, the only thing lacking for a valid contract is acceptance by the other party (consideration not being a necessity). Both the beneficiary and the commitment taken on towards this person (or legal entity) should be sufficiently clear. We can assume a similar criterion will be used to delimit the scope of application of Article 5 (1).<sup>36</sup>

Accordingly, general obligations relating to corporate social responsibility seem to lack the specificity demanded by the ECJ for application of Article 5 sub 1. The public at large will not be able to claim enforcement of such promises on the basis of Article 5(1).<sup>37</sup> However, as between the signatories, and assuming the TCA is meant to be binding, the mutual obligations under the TCA would qualify as contractual. And as was discussed above, so would the claim of an individual worker against his employer, even if the rights claimed by the employee are based on a TCA. Finally, we need to categorize the rights and obligations of the non-signatory subsidiaries who are covered by the TCA and (local) trade unions and works councils. This classification will depend on the underlying relationship between the signatories and the entities covered. Claims against a non-signatory local entity (subsidiary, works council or union) may still sound in contract if one can establish a relationship of consensual representation between the local entity and one of the signatories. Claims by a non-signatory local entity can also be based on contract through third party stipulations and/or unilateral promises. In those cases a signatory voluntary takes on obligations for the benefit of a non-signatory party.

## 2. The concept of non-contractual liability under the Brussels I Regulation

According to the ECJ Article 5(3) of the Brussels I Regulation covers all actions which seek to establish the liability of a defendant and are not related to matters of contract within the meaning of Article 5, point 1.<sup>38</sup> This does not mean that all monetary and/or patrimonial claims are covered by these two provisions. The main restriction on Article 5(3) seems to be that it is concerned with the establishment of liability. Other types of claims, e.g. of a more restitutionary character, may not be covered.<sup>39</sup> In the case of *Reichert and Kockler / Dresdner Bank*<sup>40</sup> the ECJ decided

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<sup>35</sup> IIsinger Para 55 “That latter requirement may be regarded as being satisfied only where, in the context of a prize notification, such as that at issue in the main proceedings, there has been a legal commitment contracted by the mail-order company. In other words, the latter must have expressed clearly its intention to be bound by such a commitment, if it is accepted by the other party, by declaring itself to be unconditionally willing to pay the prize at issue to consumers who so request. It is for the national court to determine whether that requirement is fulfilled in the dispute before it.”

<sup>36</sup> Compare AG and ECJ in the IIsinger case on the diminished differences between the concepts used in Article 5(1) and the specific provision for consumer contracts respectively.

<sup>37</sup> If anything, they will have to use Article 2 or Article 5(3) on non-contractual obligations.

<sup>38</sup> Case C-51/97, *Réunion européenne and others v. Spliethoff*, 1998 ECR I-6511, para. 22; Case 189/87, *Kalfelis v Schröder*, 1988 ECR I-5565, para 18.

<sup>39</sup> Compare Briggs, p. 81.

<sup>40</sup> Case C-261/90, *Mario Reichert, Hans-Heinz Reichert and Ingeborg Kockler v Dresdner Bank AG*, 1992 ECR 1992 I-2149.

## ANNEX I

that “an action provided for by national law, such as the so-called ‘action paulienne’ in French law, the purpose of which is not to have the debtor ordered to make good the damage he has caused his creditor by fraudulent conduct, but to render ineffective, as against his creditor, the disposition which the debtor has made, cannot be regarded as a claim seeking to establish the liability of a defendant in the sense in which it is understood in Article 5(3)”. These types of claims seem unlikely to arise under a TCA.<sup>41</sup>

This aside, Article 5(3) covers a wide range of liability claims. Cases which were put before the ECJ include a defamation action against a newspaper, a claim against a Swedish trade union for instigating a collective (labour) action against a Danish ship and a procedure of a collective interest organisation (a consumer association) against a professional user of general conditions in consumer contracts.<sup>42</sup> The latter case is interesting, because the position of consumer organisations as enforcers of consumer rights does show certain similarities to the position of trade unions with regard to workers’ rights. In the Henkel case, a trader based in Germany was accused of using unfair general conditions in his contracts with Austrian consumers. Austrian law grants the VKI, a consumer association, the right to demand an injunction against any trader violating the Austrian consumer protection legislation (which on this point is based on a European Directive). According to the ECJ, the demand for an injunction can be brought under Article 5(3)<sup>43</sup> as it does not relate to contract in the meaning of Article 5(1). Though the action of the association might affect both existing and future contracts, it is not itself based on a contractual relationship between the association and the foreign trader. “The legal basis for its action is a right conferred by statute for the purpose of preventing the use of terms which the legislature considers to be unlawful in dealings between a professional and a private final consumer.”<sup>44</sup>

As mentioned above, both unions and works council may have statutory rights of enforcement against employers. Such a claim will sound in tort for the purpose of jurisdiction. Examples taken from the national report include the right of French unions who are not themselves party to a collective agreement to claim equal treatment with regard to union benefits and a similarly statutory right of French unions to safeguard the statutory rights of foreign workers. Dutch law contains specific rights granted to the Dutch trade unions with respect to the enforcement of generally applicable collective agreements against non-signatory employers.

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<sup>41</sup> However, it could be argued that a claim by a works council that a management decision can not be implemented (or is null and void) for violation of the consultation rights granted to the works council under a TCA, is also not about compensation for damage caused by wrongdoing but for restitution of some kind. In most cases, however, we assume a claim by a works council for enforcement of a provision in a TCA to be contractual in nature.

<sup>42</sup> ECJ Case C-167/00, Verein für Konsumenteninformation v Karl Heinz Henkel, ECR 2002 I-08111.

<sup>43</sup> Article 5(3) can be used for different purposes: to claim damages, to assert the illegality of an action (even if this is a purely declaratory judgement) and to ask for injunctions or take other preventive measures. The damage does not have to be sustained for the provision to apply.

<sup>44</sup> ECJ Case C-167/00, Verein für Konsumenteninformation v Karl Heinz Henkel, ECR 2002 I-08111. para 39.

## ANNEX I

Moreover, the Dutch system has a general provision on general interest actions which can be used by the trade unions. All these enforcement actions will sound in tort and be covered by Article 5(3). Claims by competitors, potential customers and other outsiders to the TCA, based on misrepresentation or unfair competition, would clearly come within the scope of application of this provision.

Reversely, a union or works council could use industrial action to persuade the employer to honour commitments in a TCA. If the employer wants to have a court establish liability of the unions, or order an injunction, this claim will sound in tort unless the parties to the conflict are also parties to a contract. The TCA (and/or a national collective agreement) may contain a peace obligation – a breach thereof would be a breach of contract.<sup>45</sup>

### **3. Main findings as to the concepts of contractual and non-contractual liability**

The distinction between contractual and non-contractual liability determines the application of Article 5(1) as opposed to Article 5(3) of the Brussels I Regulation as well as the respective scope of application of the Rome I and Rome II Regulations. The concept of ‘contractual matters’ has to be interpreted autonomously and refers to obligations taken on voluntarily by one party towards another. The obligations do not have to qualify as contractual under national law. The concept is a relatively wide one. We conclude from the case law that the commitments of an employer as laid down in a TCA may come within the concept of contract when the commitments are claimed to be legally binding<sup>46</sup> and specific enough as to their scope and content.

The reach of the contractual commitments can go beyond the direct signatories to the TCA. Others may be bound under ‘contract’ through representation/agency. They may also derive rights from the TCA as third party beneficiaries. In the latter case, the commitment of the employer may not be met with reciprocal commitments from the side of the beneficiaries. Such unilateral commitments may be covered by Article 5(1) as well. However, for such unilateral commitments to result in contractual relationships, it would seem that the offer must be precise enough as to both its contents and its beneficiary. Less clear is whether the offer must have been accepted.

Accordingly, many claims by unions, works councils and individual workers will be contractual in the meaning of the Brussels I and Rome I Regulations – as long as the TCA contains legally binding obligations with regard to them. A caveat must be

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<sup>45</sup> Compare F. Dorssemont, T. Jaspers, A.A.H. Van Hoek, *Cross-border Collective Actions In Europe: A Legal Challenge: A Study Of The Legal Aspects Of Transnational Collective Actions From A Labour Law And Private International Law Perspective*, Antwerpen, Intersentia, 2007.

<sup>46</sup> The fact that one party to the TCA may deny the legally binding effect of the TCA does not take the TCA outside the concept of contract for private international law purpose. Compare the fact that a defense of non-existence or voidability of a contract does not change the contractual nature of the original claim.

## ANNEX I

given for automatic extension of collective agreements and/or situations of legal representation: the ECJ limits the concept of contractual obligations to those obligations which have been voluntarily assumed by the parties. Hence it is advisable to ensure either signatory status or proper representation for all parties who are meant to benefit from the TCA. Enforcement by unions or works councils of obligations which are not voluntarily taken on by the employer will not be covered by the concept of contract but will rather be covered by the concept of non-contractual liability.

Outsiders (competitors, end consumers) will rarely be able to rely on the provision on contract of the Brussels I Regulation. If they want to enforce the TCA obligations through claims of unfair competition or misleading advertising, they will have to base the jurisdiction of the courts on Article 5(3) rather than Article 5(1). Article 5(3) covers all claims which aim to establish the liability of the defendant and which do not sound in contract. Likewise the law applying to such claims will be determined on the basis of the Rome II Regulation.