term and more satisfactory solution would be to rethink the underlying structure of the law.

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ORALLY AGREED JURISDICTION AGREEMENTS UNDER THE BRUSSELS I REGULATION RECAST

IN 2016/17, British litigants accounted for only 28% of the Commercial Court's cases. Many disputes involving non-British litigants have no connections at all with England other than an English jurisdiction agreement. The way in which English courts give effect to jurisdiction agreements is accordingly of considerable commercial importance. In relation to a jurisdiction agreement in favour of the courts of a Member State, the approach is governed by Article 25(1) of the Brussels I Regulation recast (1215/2012) (BIR recast).

In *Saey Home & Garden NV/SA v Lusavouga-Maquinas e Acessorios Industriasis SA*, Case C-64/17 (EU:C:2018:173), the CJEU considered the application of Article 25 when a jurisdiction agreement is contained in standard terms and conditions which follow oral negotiation. The CJEU took a strict view, holding that the requirements of Article 25 were not satisfied and the jurisdiction clause did not apply.

Saey, a Belgian company, specialised in the manufacture and sale of kitchen equipment with the "Barbecook" trademark. Saey entered into a commercial concession agreement with Lusavouga, a Portuguese company, under which Lusavouga agreed to become the (nearly) exclusive promotor and distributor of Barbecook products in Spain. In July 2014, Saey terminated the arrangement. Lusavouga brought an action against Saey in Portugal seeking compensation for the termination of the agreement. Saey challenged the jurisdiction of the Portuguese court.

The BIR recast rules on jurisdiction apply in civil and commercial cases (Art. 1) where the defendant is domiciled in a Member State (Art. 4). The defendant, Saey, was a company domiciled in Belgium and accordingly the BIR recast rules engaged. The general rule of jurisdiction under the Regulation requires a defendant to be sued in the courts of its domicile (Art. 2), here Belgium. However, special grounds of jurisdiction may apply to give additional courts jurisdiction. In this case, Lusavouga relied on Article 7(1) arguing that this was a matter relating to contract and that the place of performance of the obligation in question was Portugal (where the goods were delivered). Saey disputed the application of Article 7(1) and sought to rely on Article 25, arguing that the contract

was subject to an exclusive jurisdiction agreement in favour of the courts of Belgium.

There was no written contract between the parties, but the referring court considered that a concession agreement had been established (presumably orally and/or through conduct). The jurisdiction clause was contained in written general terms and conditions of sale which were mentioned in invoices issued by Lusavouga.

In English domestic contract law, whether a term is incorporated (if it is not a contract in writing signed by both parties) depends on whether reasonable notice has been given. It is possible that a clause in standard terms and conditions can be accepted by conduct, but the courts adopt a flexible multi-factoral approach, considering, for example, how onerous the term is, the nature of the document containing the term and the timing of the contract and the alleged notice.

In a case governed by Article 25 of the BIR recast, a different approach is required in two main respects. First, the CJEU has consistently held that the provisions of Article 25 must be interpreted strictly in so far as they exclude both the jurisdiction of the defendant's domicile and the special jurisdiction provided for in Articles 7 to 9. Second, the validity of a jurisdiction agreement for the purposes of Article 25 is not a matter for any individual national law, but rather is an independent and autonomous concept. In particular, Article 25 lays down three alternative formality requirements which must be satisfied to ensure that consensus between the parties is established.

In *Saey*, it was argued that the jurisdiction clause was "evidenced in writing" (pursuant to Article 25(1)(a)) by the standard terms and conditions mentioned in invoices sent by one of the parties. Adopting a strict approach, the CJEU (having dispensed with the need for an Advocate General's Opinion) noted (at [27]–[28]):

> [W] here a jurisdiction clause is stipulated in the general conditions, the Court has already held that such a clause is lawful where the text of the contract signed by both parties itself contains an express reference to the general conditions which include a jurisdiction clause …
>
> In the present case, it is clear from the documents before the Court that the commercial concession agreement at issue in the main proceedings was concluded verbally and was not evidenced in writing, and the general terms containing the jurisdiction clause concerned were mentioned only in the invoices issued by [Lusavouga].

Having regard to the case law, and given those facts, the requirements of Article 25 were not satisfied.

Agreements conferring jurisdiction are of immense importance in international litigation. In order to expedite trade, it must be possible to conclude jurisdiction agreements orally, even if they must be confirmed in writing. In *Berghoefer GmbH & Co. KG v ASA*, Case C-221/84 (EU: C:1985:337), the CJEU held that where there was an oral agreement on

jurisdiction, written confirmation was sent and received and the recipient raised no objection, it would be contrary to good faith for the party which raised no objection to dispute the application of the oral jurisdiction agreement. The CJEU in *Saey* reasserted a stricter approach: for Article 25 to be satisfied there must be an express reference to the general terms and conditions at the time of the oral negotiations. Since that had not happened in *Saey*, the court did not need to consider whether that would have been enough or whether the jurisdiction agreement itself would have needed to be explicitly referred to.

To require an express reference to the general terms and conditions (which contain the jurisdiction clause) is a more rigid approach than in English contract law. A balance must be drawn. The formality requirements in Article 25 are intended to ensure that there is real consensus between the parties and reflect the need for certainty and the protection of the weaker party. But failing to give effect to jurisdiction agreements could undermine party autonomy and predictability of venue. Furthermore, there are already special rules in place in the BIR recast which protect consumers, employees and insured parties who are identified as being particularly vulnerable. The strict approach taken in *Saey* is a return to the original conception in the Brussels regime of explicit consent to the jurisdiction agreement itself. However, the fact that the CJEU adopted a relatively rigid approach should not be surprising. In applying the uniform provisions in the BIR recast, the CJEU favours a certain and predictable rule over a more flexible test which might be able to do justice in individual cases. The result is that it will be less easy to agree jurisdiction clauses under the BIR recast in the many cases of orally made contracts.

Having ruled that there was no exclusive jurisdiction agreement in favour of Belgium, the CJEU considered whether the Portuguese court had jurisdiction under Article 7 of the BIR recast. Under Article 7(1), special rules apply to contracts for the sale of goods and contracts for the provision of services (Art. 7(1)(b)). The first question was accordingly whether the commercial concession agreement was a sale of goods, a provision of services or neither.

The characterisation of this sort of mixed or hybrid contract can cause difficulty in private international law. Part of the arrangement between the parties concerned the sale of the products to the distributor. But it was not simply a sale; the goods were supplied under an arrangement whereby the distributor would then market and sell the goods in Spain.

The CJEU held (at [36]) that the national court must identify the obligation which "characterises" the contract. In concession or distribution agreements, the characteristic obligation is the service provided by the concessionaire which, by distributing the products, is involved through marketing etc. in increasing their distribution (*Corman-Collins SA*, Case C-9/12 (EU:C:2013:860)). The remuneration received by the concessionaire includes the

competitive advantage of having an exclusive right to sell and the assistance provided by the supplier in communicating knowhow, training etc.

In a contract for the supply of services, the next question, under Article 7 (1)(b), is where, under the contract, the services were provided. Where there are several places of performance, the court must identify the place of the main provision of services, or if that place cannot be determined, the place where the agent is domiciled (*Wood Floor Solutions*, Case C-19/09 (EU: C:2010:137)). That determination was for the national court. Lusavouga argued that the obligations were to be performed in Portugal, where the goods were delivered. However, given the emphasis on the importance of the marketing services provided, there must be a strong argument that the place of the main provision of services was Spain where the marketing took place and the goods were eventually sold.

Exclusive distribution agreements, which are often performed in a number of different countries, can be difficult to fit into the BIR recast rules on jurisdiction, and this decision provides welcome guidance on how they might. However, parties will need to have in mind that the restrictive approach taken to orally agreed jurisdiction agreements may require more explicit drafting and/or written reference to standard terms and conditions.

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FOREIGN LAW ILLEGALITY: WHERE ARE WE NOW?

HOW should an English court react when an English law contract produces a result which is illegal under foreign law?

There is a well-established rule of English public policy that the courts will not enforce a contract if the object and intention of the parties is an endeavour "to perform in a foreign and friendly country some act which is illegal by the law of such country" (*Foster* v *Driscoll* [1929] 1 K.B. 470, 521, per Sankey L.J.) It has been held to be "an essential and necessary element" that the arrangement should involve the carrying out of prohibited acts *within the territory* of a foreign state (*Ispahani v Bank Melli Iran* [1998] Lloyds L.R. (Banking) 133, 140).

One might say there is good reason for limiting the rule in that way: it should be an exceptional case in which a contract which is legal under its governing law is refused enforcement on the basis of illegality under some other law. Ideally, the circumstances in which the exception is engaged should be predictable.

Similar considerations arise in cases involving illegality under *domestic* law, but the majority in *Patel v Mirza* [2016] UKSC 42, [2017] A.C. 467,