UAE GENERAL ASSEMBLY

PRAGUE 29th-30th NOVEMBER 2013

"INTERNATIONAL CONTRACTS" CONFERENCE

MR. BRUNO TELCHINI – PRESIDENT OF THE UAE

As transnational and global approaches become increasingly widespread on the economic scene, international contracts have taken on a central role. Against this backdrop, it is essential for economic players to pay ever more attention not only to commercial matters but also to legal ones. This is especially true for small and medium enterprises, which form the backbone of the European economy. Working in this way allows companies to protect their economic interests and ensure that business is done properly with their partners, while also preventing or resolving any breaches of contractual relationships.

In the field of international contracts, a high degree of harmonisation is necessary between the rules in force. There must be a series of provisions that are capable of breaking down the barriers imposed by states and reconciling the differences between national legal systems. Consequently, it is fundamental to be supported by a professional who can use the most suitable method to deal with the matters at hand while drawing on expert knowledge of EU law and the relevant international conventions.

As we will see during this conference, the vast and varied array of commercial dynamics and types of contracts means that the regulatory scenario is extremely broad and disjointed, so it is perhaps wise to make an in-depth examination of individual contracts. Every effort will be made to give an overview that covers general issues while also looking into the more delicate matters that legal figures have to contemplate when drawing up agreements that are transnational in some way.

The first thing that a professional figure must do when preparing to draw up an international contract is decide which law should be applied in the contract and what kind of legal agreement should be used. The answer to the first question is given by the provisions in international conventions and EU regulations (the Rome I and II Regulations), while the choice of the legal form of the agreement must naturally be based on the matter to be regulated by the contract.

The regulatory framework does not cover all of the issues that must be considered by legal professionals. Even when they are dealing with "typical" contracts for the sale of goods and the provision of services, they must always bear in mind any factors that make it necessary to include specific clauses in contracts. For example, take the intellectual and industrial property rights that are often involved in legal relationships between companies, especially when it comes to the use of corporate brands and the justifiable limitations that must be imposed on the other party in order to prevent any illicit use of trademarks.

Everything mentioned so far applies for “traditional” contracts, which go through a drafting phase followed by negotiations over the clauses. It is worth looking separately at online contracts and those that are drawn up by filling in forms. In these cases, the contracting parties are in a “weak” position and the only real choice that they have is whether to sign the agreement as it stands or nullify it by refusing to do so. EU regulations clearly play a part in this area by laying down essential consumer protection rules. Nonetheless, it is only natural for new challenges to present themselves when it comes to intangible rights, partly because the associated territorial criteria are not well defined. For example, it can be problematic to establish which court has jurisdiction for disputes resulting from breaches of contract or the awarding of damages.

With regard to this last matter, it is worth taking a close look at the recent judgement of the European Court of Justice of 3 October 2013, in case C-170/12 (Pinckney / KDG Mediatech AG). The court was asked to give a preliminary ruling by the French Cour de Cassation concerning a claim for damages resulting from the infringement of Mr Pinckney’s copyright for audiovisual output by a company domiciled in another Member State which was using websites to market the works without authorisation.

The author, composer and performer of the songs lives in France and discovered that they had been reproduced without his authority on CDs pressed in Austria and marketed by UK companies through various internet sites that were also accessible from France.

The author sought compensation for damages sustained on account of the infringement of his intellectual property rights at the Court of Toulouse and the case subsequently reached the most senior court in France, largely due to a dispute over the jurisdiction of the French courts and whether they are able to rule on the alleged infringements. The matter was then referred to the European Court of Justice.

In its preliminary ruling, the European Court of Justice stated that in the event of infringements made using IT resources and in particular over the internet, if there are no territorial links and infringements can take place simultaneously in a number of locations, in order to establish the jurisdiction of the court seised it is necessary to assess the nature of the right being asserted in court. In other words, in accordance with Council Regulation (EC) No. 44/2001, the connecting factors with the place where the damage occurs should not be based on the actual location in cases such as this, as the damages are numerous and essentially abstract. Instead, the court best placed to assess the alleged infringement should have jurisdiction. Therefore, in cases involving intangible rights such as copyright, jurisdiction must be exercised by the court of the Member State protecting the rights asserted and in which the damage can be tangibly evaluated. It can be inferred from this that the jurisdiction for intellectual property rights cases will be exercised by the Member State where the patent was registered when part of the damage occurs in the territory where the intellectual property rights are registered, even if a person who does not reside in the Member State in question is responsible for the infringement because it was carried out over the internet.

However, the Court of Justice made it clear that national courts only have jurisdiction to rule on the damages within the territories of their respective member states. In order to claim damages in other territories, it is necessary to bring the matter before the courts of the respective countries.

The judgement in question highlights the importance of taking into account all of the factors that can have an impact on the proper fulfilment of agreements, both directly and indirectly. Furthermore, it is always necessary to bear in mind any transnational aspects of agreements, even if they are not immediately apparent.

Legal relationships must always involve specially tailored support for each matter and cater to the individual needs of the parties. I believe that good legal professionals must have a “European” and “international” outlook every time they draw up a contract.