

THE REVISED LUGANO CONVENTION FROM THE SWISS PERSPECTIVE

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Abstract:

The Lugano Convention is a set of rules, enacted to facilitate the recognition and enforcement of foreign judgments within the European Union and states outside of the EU, namely three members of the European Free Trade Association (Switzerland, Norway and Iceland). This article briefly describes the Swiss perspective, explaining the Swiss legislation relevant to the revised Lugano Convention, with a particular focus on the newly enacted Swiss Federal Civil Procedure Code on January 1, 2011. Other amendments in the codified law, are also relevant to the application of the revised Lugano Convention because matters related to the recognition and enforcement of judgments have to be applied in connection with the civil procedure law of the *lex fori*, that is the forum where the lawsuit is pending. These legislative changes are relevant for every party from a signatory state of the revised Lugano Convention which expects to face a lawsuit in Switzerland or wants to avoid a lawsuit there.

Keywords: International Civil Procedure, Lugano Convention, Brussels I Regulation, Civil Procedure, Enforcement and Recognition, European Law

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I. INTRODUCTION

The “Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters of 16 September 1988”¹ (hereinafter “LugC”) has been effective since January 1, 1992. The LugC, which is a ‘parallel convention’ to the “Brussels Convention of 27 September 1968”² (hereinafter “Brussels Convention”), was concluded between Member States of the European Communities (EC) and certain members of the European Free Trade Association (EFTA).³ After a few years, the number of the EC Member States—later, the European Union (EU)—increased, and not all present EU Member States are parties to the LugC. As a consequence, the rules for jurisdiction, recognition and enforcement between the new Member States of the EU and the parties to the LugC diverged. Moreover, ambiguities and deficiencies in the text of the LugC soon became apparent. As a consequence, a joint expert group consisting of representatives of the Member States of the EU and EFTA created a revised version of the LugC in 1999, which aimed to clarify important questions of its application. However, the EU Member States abstained from ratifying the revised version as a convention, enacting it instead under the Brussels I Regulation⁴—in lieu of a revised

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¹ See ÜBEREINKOMMEN ÜBER DIE GERICHTLICHE ZUSTÄNDIGKEIT UND DIE ANERKENNUNG UND VOLLSTRECKUNG VON ENTSCHEIDUNGEN IN ZIVIL- UND HANDELSACHEN (MIT PROT. UND ANHÄNGEN) [LUGC] [CONVENTION ON JURISDICTION AND THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS (INCL. PROTOCOLS AND APPENDICES)] Sep. 16, 1988, SR 0.275.11 (Switz.). The English version is *available at* <http://curia.europa.eu/common/recdoc/convention/en/c-textes/lug-idx.htm> (last visited June 24, 2011).

² Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1972 O.J. (L 299).

³ See BBL 272 (1990).

⁴ Council Regulation 44/2001, Jurisdiction and the Recognition and Enforcement of Judgments in Civil and

Convention. This is because it is substantially simpler for the EU to modify a Regulation through the majority decision procedure rather than an international treaty, which would require the consent of all parties. However, EFTA countries which were not members of the EU—Switzerland, Norway and Iceland—could not implement the Regulation and still wanted to harmonize their regime again with the EU. They achieved this goal with the “Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial matters”, signed in Lugano on October 30, 2007 (hereinafter “revLugC”).⁵ The signatories of this revised Convention are the Swiss Confederation, the European Community, the Kingdom of Denmark, the Kingdom of Norway and the Republic of Iceland.⁶ The revLugC has essentially the same content as the Brussels I Regulation, viz., the revLugC amends the rules regarding jurisdiction⁷, recognition and enforcement and additionally expands their scope in certain ambits.⁸

Furthermore, many of the provisions of the revLugC must be read in connection with the national laws applicable where the lawsuit is brought. This article describes the Swiss perspective, explaining the Swiss legislation relevant to the revLugC, with a particular focus on the newly enacted Swiss Federal Civil Procedure Code (hereinafter “CPC”) on January 1, 2011.⁹ Other amendments in the codified law, are also relevant to the application of the revLugC because matters related to the recognition and enforcement of judgments have to be

Commercial Matters, 2001 O.J. (L 12) 1 (EC) (hereinafter “Brussels I Regulation”).

⁵ See ÜBEREINKOMMEN ÜBER DIE GERICHTLICHE ZUSTÄNDIGKEIT UND DIE ANERKENNUNG UND VOLLSTRECKUNG VON ENTSCHEIDUNGEN IN ZIVIL- UND HANDELSACHEN (MIT PROT. UND ANHÄNGEN) [REV LUGC] [CONVENTION ON JURISDICTION AND THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS (INCL. PROTOCOLS AND APPENDICES)] Oct. 30, 2007, SR 0.275.12 (Switz.). The English version is *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32007D0712:EN:HTML> (last visited June 24, 2011).

⁶ Denmark is a Member State of the EU, however, there are historical reasons why both, Denmark and the EU, have signed the revLugC separately; *see* BBL 1788 (2009).

⁷ *See infra* Part II.

⁸ *See infra* Part III; *infra* Part V.

⁹ *See* SCHWEIZERISCHE ZIVILPROZESSORDNUNG [CPC] [SWISS CODE OF CIVIL PROCEDURE] Dec. 19, 2008, SR 272 (Switz.). Switzerland’s civil procedure law operated on an individual Canton level, until the end of 2010 Switzerland had 26 cantonal civil procedure codes (plus an insignificant Federal Civil Procedure Code which had a very limited scope of application). The CPC replaces all these codes.

applied in connection with the civil procedure law of the *lex fori*, that is the forum where the lawsuit is pending.¹⁰ These legislative changes are relevant for every party from a ‘revLugC-country’ which expects to face a lawsuit in Switzerland or wants to avoid a lawsuit there.

II. AMENDMENTS REGARDING JURISDICTION

A. Sale of Goods, Provision of Services, and Other Contracts

The LugC contained a number of ambiguous provisions. Art. 5 No. 1 LugC—jurisdiction for “matters relating to a contract”¹¹— among all the articles caused the most problems in its application.¹² Roughly fifty percent of LugC cases involved interpretative ambiguities related to this provision.¹³ The RevLugC tries to clarify this ambiguity with a revised version of Art. 5:

“Article 5

A person domiciled in a State bound by this Convention may, in another State bound by this Convention, be sued:

1. (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;

(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:

- in the case of the sale of goods, the place in a State bound by this Convention where, under the contract, the goods were delivered or should have been delivered;
- in the case of the provision of services, the place in a State bound by this Convention where, under the contract, the services were provided or should have been provided.

(c) if (b) does not apply then subparagraph (a) applies; [...]¹⁴

Art. 5 No. 1 revLugC only applies if a contract or the claims arising from a contract are the subject of a civil lawsuit.¹⁵ The structure of Art. 5 No. 1 distinguishes between two groups of

¹⁰ See BBL 1778-79 (2009).

¹¹ Art. 5 No. 1 LugC; see also Alexander R. Markus, *Vertragsgerichtsstände nach Art. 5 Ziff. 1 revLugC/EuGVVO – ein EuGH zwischen Klarheit und grosser Komplexität*, 19 AJP 971-986 (2010) (Switz.).

¹² See BBL 1778 (2009).

¹³ See *id.*

¹⁴ Art. 5 No. 1 revLugC.

¹⁵ *Id.*

contracts, (1) contracts involving the sale of goods and the provision of services¹⁶ and (2) those remaining contracts which do not belong to the first group^{17, 18}. In addition to the jurisdiction of Art. 5 No. 1 revLuC, claims can always be brought against “persons domiciled in a Member State [...] in the courts of that Member State” (i.e., *actor sequitur forum rei*).¹⁹ In other words: Art. 5 No. 1 revLugC allows a claimant to bring a lawsuit in a Member State in which no party is resident if the place of performance lies in that (third) state.

1. Contracts Relating to the Sale of Goods and Provision of Services

Art. 5 No. 1 lit. b revLugC introduces new rules relating to jurisdiction for contracts involving the sale of goods and provision of services. For the purposes of the Convention, the place of performance of the contract and the jurisdiction of the contract has to be determined in a multi-step sequence. Where the parties agree on a place of performance for the contract, that agreement is binding and will constitute one possible forum for litigation related to the contract.²⁰ In cases where there is no agreement regarding the place of performance, Article 5 introduces a default rule: the “place with the closest linking factor between the contract and the court”²¹ shall be a forum for litigation. For example, in the case of contracts for sale of goods or services, the “place with the closest linking factor between the contract and the court”²² is where the goods were delivered or should have been delivered, or where the services were provided or should have been provided.²³ However, it is still not clear whether the determination of ‘*place of performance*’ is completely governed by the Convention, or if the substantive law of the *lex causae* (i.e., the law that governs the contract according to the

¹⁶ See *infra* Part II.A.1.

¹⁷ See *infra* Part II.A.2.

¹⁸ Please note that individual contracts of employment are now subject of Art. 18-21 revLugC; they do not belong into the jurisdiction rule set of Art. 5 No. 1 revLugC.

¹⁹ See Art. 2 revLugC.

²⁰ See Art. 5 No. 1 lit. b revLugC. This provision says “[...] unless otherwise agreed [...]”]; see also Markus, *supra* note 11, at 981.

²¹ Case C-386/05, *Color Drack*, 2007 E.C.R. I-3699, ¶ 40.

²² *Id.*

²³ See Art. 5 No. 1 lit. b revLugC; BBL 1791-92 (2009).

relevant conflict of laws principles) must also be considered in matters of interpretation.²⁴ For the ease of use of the Convention and for the harmonization of international law, a completely convention-specific determination of the place of performance (i.e., an interpretation derived solely from the Convention) should be preferred.²⁵ In fact, if the *lex causae* (or even *lex fori*) were to be considered for the determination of the jurisdiction of the revLugC, the very purpose of the Convention—to facilitate the determination of jurisdictions for EU Member States, Switzerland, Iceland and Norway—would be undermined.²⁶

2. Other Contracts

The jurisdiction for contracts which are not for the sale of goods or provision of services²⁷ has to be determined separately for each “place of performance of the obligation in question”²⁸. The courts have to analyze each claim independently;²⁹ and such inquiry must also take into consideration the *lex causae*.³⁰ One potential problem with this approach is the undesirable fragmentation³¹ of jurisdictions within one contract; for example, one country’s court might decide the claim about the main performance obligation and another country’s court might adjudicate matters of payment. Having several jurisdictions decide elements in multiple

²⁴ See BBL 1791 (2009).

²⁵ See *id.* at 1791-92.

²⁶ See revLugC, preamble. The place of performance of a contract depends on the national applicable conflict of laws principles and the applicable national laws. Compare e.g. FEDERAL ACT ON THE AMENDMENT OF THE SWISS CIVIL CODE (PART FIVE: THE CODE OF OBLIGATIONS) [CO], Mar. 30, 1911, SR 220 (Switz.), Art. 74 Sec. 2 (“Except where otherwise stipulated, the following principles apply: [...] where a specific object is owed, it must be delivered at the place where it was located when the contract was entered into”) with BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Aug. 18, 1896, REICHSGESETZBLATT [RGL] 195 (Ger.), § 269 para. 1 (“Where no place of performance has been specified or is evident from the circumstances, in particular from the nature of the obligation, performance must be made in the place where the obligor had his residence at the time when the obligation arose”). See also Anastasia Vezyrtzi, *Jurisdiction and International Sales under the Brussels I Regulation: Does Forum Shopping Come to an End?*, 15 COLUM. J. EUR. L. ONLINE 83 (2009), available at http://www.cjel.net/online/15_2-vezyrtzi-2/ (last visited June 24, 2011) for a discussion with other rules, e.g., the United Nations Convention on Contracts for the International Sale of Goods (CISG).

²⁷ See Art. 5 No. 1 lit. b and c revLugC.

²⁸ *Id.* If the place of performance is situated in a state which has not ratified the revLugC, Art. 5 No. 1 lit. c revLugC is applicable.

²⁹ See BBL 1790 (2009).

³⁰ See *id.* at 1790-91; Case C-12/76, *Industrie Tessili Italiana Como v. Dunlop AG*, 1976 E.C.R. 1473, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61976J0012:EN:HTML> (last visited June 24, 2011). If Swiss law is the *lex causae*, see Art. 74 CO.

³¹ See Markus, *supra* note 11, at 972.

lawsuits over a single contract is inefficient because at least two different courts would judge different parts of the same contract. Even if all the parties, evidence, etc., involved are the same: one court would adjudicate the issues related to the payment; the other court would determine the legal situation related to the main performance of the obligation. In such cases, the ‘division of labor’ of the courts caused by the contract-jurisdiction-fragmentation does not reduce the paperwork of the all involved parties; it would increase the red tape for them. If a contract consists of multiple parts where a party has to perform in different jurisdictions, this jurisdiction-fragmentation issue would become even more aggravating. Therefore, it would be more efficient if the proceedings were concentrated in a single jurisdiction.

Before the revised provision was enacted, similar issues of jurisdiction-fragmentation occurred in the context of contracts for the sale of goods and provision of services; these contracts are now governed arguably by better rules, as discussed above.³² In future revisions of the Convention, it is advisable that this fragmentation of jurisdictions be conclusively resolved under a single, definite standard.

B. Additional Amendments

Additional amendments have clarified the application of other articles of the revLugC.³³ For example, the provisions on matters relating to consumer contracts (particularly matters concerning electronic commerce)³⁴ have been amended. The determination of the place of domicile for a company or other legal persons or associations³⁵ is now convention-specific. In addition, the revLugC amends the articles regulating the jurisdiction for disputes relating to employment contracts,³⁶ insurance contracts and matters concerning rights *in rem* in

³² See *supra* Part. II.A.1. See also Art. 5 No. 1 LugC; Markus, *supra* note 11, at 972.

³³ See BBL 1792-1804 (2009).

³⁴ See Art. 15-17 revLugC.

³⁵ See Art. 60 revLugC; BBL 1804 (2009).

³⁶ See Art. 18-21 revLugC.

immovable property and intellectual property.³⁷

C. *Lis pendens*

Lis pendens (Latin for “pending lawsuit”) is the doctrine that confers exclusive jurisdiction on a specific court for a certain matter between parties. As soon as a lawsuit is pending, the same parties cannot file a lawsuit about the same matter in another court.³⁸ For the determination of the date when *lis pendens* is established, the revLugC must be interpreted in connection with the applicable national law where a lawsuit is brought; in Switzerland, generally, Swiss civil procedure laws have to be applied. If parties were to engage in forum shopping before the 2011 Swiss Civil Procedure reform had been enacted, the party who wanted to sue in Switzerland had a comparative disadvantage under the *lis pendens* rules of Art. 21-23 LugC compared to the non-Swiss claimant.

In fact, before the CPC and the revLugC became effective in 2011, *lis pendens* was determined by the applicable cantonal civil procedure code. This often meant that parties had to engage in a conciliation procedure before a lawsuit could be filed to create the effect of *lis pendens*. In other countries, this step was not necessary and therefore provided a timing advantage for the other (non-Swiss) party.³⁹ If Art. 30 revLugC were not applied in many European countries, *lis pendens* could only be established after filing the lawsuit *and* serving the document to the other party residing in a foreign jurisdiction. This is usually a lengthy procedure, burdened with highly technical rules on service of process.⁴⁰ In several European states, the court documents must be served by the administration or the courts of the

³⁷ See Art. 6 No. 1 revLugC; BBL 1778 (2009).

³⁸ See BBL 1801 (2009).

³⁹ See *id.* at 1802-03.

⁴⁰ See Art. I Sec. 1 of Protocol 1 revLugC; for Switzerland, all necessary practitioner’s materials are prepared on the website of the Swiss Federal Department of Justice and Police: Eidgenössisches Justiz- und Polizeidepartement, Zivilrecht, available at <http://www.rhf.admin.ch/rhf/de/home/zivil/wegleitungen.html> (last visited June 24, 2011). For an English summary see Federal Department of Justice and Police, International Judicial Assistance in Civil Matters, Guidelines, 3rd Ed. 2003 (updated July 2005), available at <http://www.rhf.admin.ch/etc/medialib/data/rhf.Par.0064.File.tmp/wegl-ziv-e.pdf> (last visited June 24, 2011).

defendant's country of residence, a process which can take many months and requires international judicial assistance.⁴¹ Under the rules of Art. 21 LugC, *lis pendens* is constituted as soon as all the necessary requirements of the applicable civil process rules were satisfied. In some jurisdictions these requirements included adequate service of process and conciliatory meetings.⁴² In order to create a level playing field for all signatory states of the revLugC, Art. 30 revLugC instead applies the "earliest possible step"⁴³ of the various European rules of civil procedure to determine when *lis pendens* comes into effect. This effectively eliminates all incentive to forum shop on this aspect, and as such renders *lis pendens* a partially convention-specific manner.⁴⁴ Jurisdiction of a court can either be established (1) "at the time when the document instituting the proceedings or an equivalent document is lodged with the court"⁴⁵ or (2) "if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service."⁴⁶ In both cases, the plaintiff is required to fulfill the following requirements for correct service of process to satisfy the requirement of Art. 30 revLugC and thereby establish *lis pendens*.⁴⁷

As mentioned before, Art. 30 revLugC is to be read in connection with the national civil procedure rules. The rules for *lis pendens* in Switzerland are *inter alia* defined in Art. 62 CPC. Article 62 tries to level the playing field between Swiss plaintiffs and other (non-Swiss) parties to the suit. Pursuant to Art. 62 CPC, Swiss courts acquire jurisdiction with the filing of a lawsuit⁴⁸ or a conciliation procedure.⁴⁹ However, a conciliation procedure⁴⁹ can only be used

⁴¹ See BBL 1818 (2009).

⁴² See BGE 123 III 414; Case C-129/76, *Zelger v. Salinitri*, 1984 E.C.R. 2397, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61983J0129:EN:HTML> (last visited June 24, 2011).

⁴³ BBL 1803 (2009). However, this earliest possible step is only known in civil law countries. Common law countries in Europe have a different system.

⁴⁴ See Art. 27-30 revLugC.

⁴⁵ Art. 30 No. 1 revLugC.

⁴⁶ Art. 30 No. 2 revLugC.

⁴⁷ See Art. 30 revLugC.

⁴⁸ See Art. 198 and Art. 199 CPC in combination with Art. 62 CPC; see also Thomas Sprecher, *Prozessieren zum*

to acquire jurisdiction of a court if the plaintiff subsequently files a lawsuit. Eventually, if all necessary steps in the litigation procedure are satisfied, the new regime of Art. 30 revLugC and Art. 62 CPC eliminates the disadvantage which Swiss plaintiffs face in forum shopping because it accelerates the Swiss procedure aimed at constituting *lis pendens*.

III. RECOGNITION AND ENFORCEMENT

According to Art. 31 No. 1 revLugC, “[a] judgment given in a State bound by this Convention shall be recognized in the other States bound by this Convention without any special procedure being required.”⁵⁰ The recognition and enforcement procedure has been simplified because the available justifications for non-recognition have been substantially reduced by Art. 34 revLugC.⁵¹ For example, it is no longer possible to argue on first instance for denial of recognition of a judgment because it is “manifestly contrary to public policy.”⁵² Such claims can only be the subject of an appeal, according to Art. 43 revLugC in connection with Art. 327a CPC.⁵³

Another material novelty is the revision of rule, contained in Art. 27 No. 2 LugC, concerning the denial of the recognition of a judgment “if the defendant was not duly served.” Art. 34 No. 2 revLugC allows for the recognition and enforcement of a judgment, even if the defendant was not duly served, as long as the defendant was able to arrange for his defense within “sufficient time.”⁵⁴

IV. SIGNIFICANT REVISIONS IN SWISS CODES RELATED TO THE REV LUGC

As stated in the introduction of this article, some provisions of the revLugC must be applied

SchKG unter neuer ZPO, 107 SJZ 273, 280 (2011) (Switz.).

⁴⁹ See Art. 197 CPC in combination with Art. 62 CPC.

⁵⁰ See Art. 31 No. 1 revLugC. See Art. 32 revLugC for the definition of the term “judgment.”

⁵¹ Compare Art. 34 revLugC to Art. 26 revLugC.

⁵² Art. 34 No. 1 revLugC.

⁵³ See BBL 1825-26 (2009).

⁵⁴ See Art. 34 No. 2 revLugC. This Article is an amended version of Art. 26 LugC.

in connection with the national laws of the jurisdiction where a lawsuit is brought. On January 1, 2011, along with the enactment of the revLugC in Switzerland, several amendments in the Swiss Procedural Codes also became effective. Furthermore, the CPC itself was introduced with important consequences (especially regarding issues of *lis pendens*). Also noteworthy is the facilitated process for the enforcement of monetary liabilities contained in the Federal Code of Debt Enforcement and Bankruptcy (hereinafter “FCDEB”).⁵⁵ With the amendment of Art. 83 Sec. 1 FCDEB, a review of *exequatur*⁵⁶ (i.e., the declaration of a court that a foreign judgment is recognized or enforceable) is no longer allowed. Therefore, it is easier to enforce monetary liabilities in Switzerland. Another amendment facilitates the provisional protective measures relating to the seizure of money from a debtor (“arrest”).⁵⁷ Before this amendment became effective, a creditor who wanted to arrest money from a debtor had to ask for a judgment of the court from each Canton where the debtor had his assets; now, a single judgment is sufficient to arrest the defendant’s assets throughout the whole of Switzerland.⁵⁸

V. EXPANSION OF TERRITORIAL VALIDITY

One of the important innovations for the practitioner results from the expansion of the territorial validity of the revLugC. The revised Convention is now valid vis-à-vis all present and future Member States of the EU. Moreover, non-member states are also free to join the revLugC.⁵⁹ On May 1, 2011, the revLugC also became effective in Iceland. Since then, the revLugC is also applicable for international civil procedures between Switzerland and Iceland.⁶⁰

⁵⁵ See BUNDESGESETZ ÜBER SCHULDBETREIBUNG UND KONKURS [FCDEB] [FEDERAL CODE OF DEBT ENFORCEMENT AND BANKRUPTCY] Apr. 11, 1889, SR 281.1 (Switz.).

⁵⁶ See Art. 39-42 revLugC.

⁵⁷ See Art. 271 FCDEB.

⁵⁸ See BBL 1823 (2009).

⁵⁹ See *id.* at 1779.

⁶⁰ See Bundesamt für Justiz, DAS LUGANO-ÜBEREINKOMMEN 2007 (Feb. 2, 2011), *available at*

VI. CONCLUDING REMARKS

Important factors in the recent changes instituted by the revLugC are the enhanced territorial validity of the Convention, the new rules of jurisdiction—especially regarding contracts for sales of goods and provision of services, the amendments relating to the *lis pendens*, and the recognition and enforcement of judgments. Furthermore, with the enactment of the revLugC, the relevant legal regime for Switzerland, Norway and the EU is harmonized again. However, as a reform of the Brussels I Regulation is being discussed by the Commission,⁶¹ a further revision of revLugC might be foreseeable.

http://www.ejpd.admin.ch/content/ejpd/de/home/themen/wirtschaft/ref_internationales_privatrecht/ref_lugue2007.html (last visited June 24, 2011).

⁶¹ See *Commission Report to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, COM (2009) 174 final (Apr. 21, 2009); *Commission Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* COM (2010) 748 final (Dec. 14, 2010).