ECJ: Judgments on Brussels I Regulation

Today, the ECJ delivered two judgments on the interpretation of the Brussels I Regulation.

1. Falco Privatstiftung and Rabitsch (C-533/07)

The first case, which had been referred to the ECJ by the Austrian *Oberster Gerichtshof* (*OGH*), concerns the interpretation of Art. 5 Brussels I Regulation (see with regard to the background of the case our previous post on the opinion of *Advocate General Trstenjak* which can be found here).

With the **first question** referred to the ECJ, the *OGH* basically aims to know whether a contract under which the owner of an intellectual property right grants its contractual partner the right to use the right in return for remuneration, constitutes a contract for the provision of services within the meaning of the second indent of Art. 5 (1) (b) Brussels I Regulation.

The Court followed the opinion of the AG and held that

> *The second indent of Article 5(1)(b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and enforcement of judgments in civil and commercial matters, is to be interpreted to the effect that a contract under which the owner of an intellectual property right grants its contractual partner the right to use that right in return for remuneration is not a contract for the provision of services within the meaning of that provision.*

In its reasoning, the Court *inter alia* stated that the concept of "provision of services" cannot be interpreted in the light of the Court's approach with regard to the freedom to provide services within the meaning of Art. 50 EC since Art. 50 EC requires a broad interpretation (para. 34 et seq.) while Art. 5 (1) Brussels I has to be interpreted narrowly due to the fact that it derogates – as a special jurisdiction rule – from the general principle that jurisdiction is based on the defendant's domicile (para. 37).

While it was – in the light of the answer given to the first question – not necessary

to answer the second question referred to the ECJ, the *OGH* aims to know with its **third question** whether jurisdiction as regards payment of royalties under Art. 5 (1) (a) and (c) Brussels I is still to be determined in accordance with the principles which result from the case law on Art. 5 (1) Brussels Convention.

Also in this respect the Court followed the opinion given by the AG and held – in particular in view of the identical wording and the aim of Community legislature to ensure continuity which is also apparent from Recital 19 of the Brussels I Regulation (paras. 48 et seq.):

> *In order to determine, under Article 5(1)(a) of Regulation No 44/2001, the court having jurisdiction over an application for remuneration owed pursuant to a contract under which the owner of an intellectual property right grants to its contractual partner the right to use that right, reference must continue to be made to the principles which result from the case-law of the Court of Justice on Article 5(1) of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, as amended by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic.*

2. Draka NK Cables Ltd. (C-167/08)

The second case has been referred to the ECJ by the Belgian *Hof van Cassatie* and concerns Art. 43 Brussels I.

With its reference, the Belgian court aims to know whether Art. 43 (1) Brussels I Regulation has to be interpreted as meaning that a creditor may lodge an appeal against a decision on the request for a declaration of enforceability even then if he has not formally appeared as a party in the proceedings in which another creditor of that debtor applied for that declaration of enforceability.

According to the referring Belgian court, this question arises due to the different wording of Art. 36 Brussels *Convention* and Art. 43 Brussels *Regulation*: While Art. 36 of the Convention stated that the party against whom enforcement of the judgment in the main proceedings was sought could appeal against the decision authorising that enforcement, Art. 43 of the Regulation provides that the decision on the application for a declaration of enforceability may be appealed against by "either party". Due to these differences, the Belgian court took the view that the

approach which had been taken by the ECJ with regard to Art. 36 of the Convention according to which only the parties to the foreign order or judgment may appeal against the declaration of enforceability (see case C-148/84), was no longer obvious.

The Court answered the referred question in the negative and held that

> *Article 43(1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that a creditor of a debtor cannot lodge an appeal against a decision on a request for a declaration of enforceability if he has not formally appeared as a party in the proceedings in which another creditor of that debtor applied for that declaration of enforceability.*

In its reasoning, the ECJ stated that Art. 43 Brussels Regulation may not be compared only with Art. 36 Brussels Convention, but rather with a combination of Artt. 36 and 40 (para. 22). Thus, it is, according to the Court, apparent "from the wording of both those provisions […] that either party to the enforcement proceedings is able to appeal against the decision authorising enforcement, which corresponds to the content of Article 43 (1) of Regulation No 44/2001" (para. 23). Consequently, the differing wording in Art. 43 Brussels Regulation does not result in a substantive change which leads to the result that the Court's interpretation of the Convention in this respect – according to which Art. 36 of the Convention excludes procedures whereby interested third parties may challenge an enforcement order under domestic law (see para. 27 and C-148/84 (para. 17)) – can be transferred to the Regulation (paras. 24, 30).