ECJ: Recent Judgments and References on Brussels I and Brussels II bis

I. Judgments on Brussels I:

1. SCT Industri AB i likvidation v. Alpenblume AB (C-111/08)

The *Högsta domstolen* (Sweden) had referred the following question to the ECJ for a preliminary ruling:

> *Is the exclusion under Article 1(2)(b) of Regulation [No 44/2001] of bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings from the scope of that regulation to be interpreted as meaning that it covers a decision given by a court in one Member State (A) regarding registration of ownership of shares in a company having its registered office in Member State A, the shares having been transferred by the liquidator of a company having its registered office in another Member State (B), where the court based its decision on the fact that, in the absence of an international agreement on the mutual recognition of insolvency proceedings, Member State A does not recognise the liquidator's powers to dispose of property situated in Member State A?*

The ECJ now held:

> *The exception provided for in Article 1(2)(b) of Council Regulation No 44/2001 (EC) of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as applying to a judgment of a court of Member State A regarding registration of ownership of shares in a company having its registered office in Member State A, according to which the transfer of those shares was to be regarded as invalid on the ground that the court of Member State A did not recognise the powers of a liquidator from a Member State B in the context of insolvency proceedings conducted and closed in Member State B.*

See with regard to this case also our previous post on the reference which can be found here.

2. Peter Rehder v. Air Baltic Corporation (Case C-204/08)

The *Bundesgerichtshof* (Germany) had referred the following questions to the ECJ for a preliminary ruling:

> *1. Is the second indent of Article 5(1)(b) of Regulation [No 44/2001] to be interpreted as meaning that in the case also of journeys by air from one Member State to another Member State, the single place of performance for all contractual obligations must be taken to be the place of the main provision of services, determined according to economic criteria?*
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> *2. Where a single place of performance is to be determined: what criteria are relevant for its determination; is the single place of performance determined, in particular, by the place of departure or the place of arrival of the aircraft?*

The ECJ now held:

> *The second indent of Article 5(1)(b) 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, in the case of air transport of passengers from one Member State to another Member State, carried out on the basis of a contract with only one airline, which is the operating carrier, the court having jurisdiction to deal with a claim for compensation founded on that transport contract and on Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, is that, at the applicant's choice, which has territorial jurisdiction over the place of departure or place of arrival of the aircraft, as those places are agreed in that contract.*

See with regard to this case also our previous post on the reference which can be found here.

II. References: Further, several questions on the interpretation of Brussels I – as well as one reference on Brussels II *bis* – have been referred to the ECJ for a preliminary ruling:

1. Ceská podnikatelská pojišt'ovna, a.s., Vienna Insurance Group v Michal Bílas(Case C-111/09)

The *Okresní Soud v Cheb* (Czech Republic) has referred the following questions to the ECJ for a preliminary ruling:

> *Should Article 26 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 ('the Regulation') be interpreted as not authorising a court to review its international jurisdiction where the defendant partipates in the proceedings, even when the case is subject to the rules on compulsory jurisdiction under Section 3 of the Regulation and the application is brought contrary to those rules?*
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> *Can the defendant, by the fact that he partipates in the proceedings, establish the international jurisdiction of the Court within the meaning of Article 24 of the Regulation even where the proceedings are otherwise subject to the rules of compulsory jurisdiction in Section 3 of the Regulation and the application is brought contrary to those rules?*
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> *If the answer to question (2) is in the negative, may the fact that the defendant participates in the proceedings before a court which otherwise under the Regulation does not have jurisdiction in a case concerning insurance, be regarded as an agreement on jurisdiction within the meaning of Article 13(1) of the Regulation?*

*2.*Hotel Alpenhof GesmbH v. Oliver Heller (Case)C-144/09)

The *Oberster Gerichtshof* (Austria) has referred the following question to the ECJ for a preliminary ruling:

> *Is the fact that a website of the party with whom a consumer has concluded a contract can be consulted on the internet sufficient to justify a finding that an activity is being 'directed', within the terms of Article 15(1)(c) of Regulation (EC) No 44/2001 ('the Brussels I Regulation')?*

3. Ronald Seunig v. Maria Hölzel (Case C-147/09)

The *Oberlandesgericht Wien* (Austria) has referred the following quesitons to the ECJ for a preliminary ruling:

> *1. (a) Is the second indent of Article 5(1)(b) 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 ('Regulation No 44/2001') applicable in the case of a contract for the provision of services also where the services are, by agreement, provided in several Member States?*
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> *If the answer to that question is in the affirmative,*
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> *Should the provision referred to be interpreted as meaning that*
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> *(b) the place of performance of the obligation that is characteristic of the contract must be determined by reference to the place where the service provider's centre of business is located, which is to be determined by reference to the amount of time spent and the importance of the activity;*
>
> *(c) in the event that it is not possible to determine a centre of business, an action in respect of all claims founded on the contract may be brought, at the applicant's choice, in any place of performance of the service within the Community?*
>
> *2. If the answer to the first question is in the negative,*
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> *Is Article 5(1)(a) of Regulation No 44/2001 applicable in the case of a contract for the provision of services also where the services are, by agreement, provided in several Member States?*

4. Peter Pammer v. Reederei Karl Schlüter GmbH & Co. KG (C-585/08)

This reference, made by the *Oberster Gerichtshof* (Austria) concerns first the interpretation of "a contract which, for an inclusive price, provides for a combination of travel and accomodation" in terms of Art. 15 No. 3 Brussels I and second the question whether it is sufficient to assume that activities are "directed" to a certain Member State if a website can be consulted via the internet.

Those questions have arisen in this case between a claimant domiciled in Austria and a company having its seat in Germany. The claimant booked a sea voyage on a freighter with the sued company via the website of an agent seated in Germany. As submitted by the claimant, the offer should – according to the agent's website – include inter alia a cabin for two persons with bath room, separate living room, TV, further a gym and a swimming pool. In addition, several shore leaves should be encompassed as well. According to the claimant's submission, most of these statements were incorrect why the claimant declined to start the journey and sues for repayment before Austrian courts.

Thus, the first question arising in this case is the question of international jurisdiction of Austrian courts. Art. 15 No. 3 Brussels I, however, states that Section 4 – which would, in principle, be relevant due to the existence of a consumer contract – is not applicable to contracts of transport other than a contract which, for an inclusive price, provides for a combination of travel and accomodation. Consequently, Section 4 is applicable with regard to package travel – which raises the question whether the present contract can be regarded as package travel.

Since the Austrian Supreme Court had doubts as to whether the present contract can be compared with a cruise – which is classified as package travel by the predominant opinion – it has referred the following question to the ECJ:

> *Does a 'voyage by freighter' constitute package travel for the purposes of Article 15(3) 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?*

In case the ECJ should answer this first question in the affirmative, a second issue would need clarification – the question of whether it can be regarded as sufficient for the application of Art. 15 No. 1 (c) Brussels I if a website can be consulted on the internet in another Member State. With regard to this question, the Supreme Court emphasises – with reference to the Joint Council and Commission Statement on Articles 15 and 73 (14139/00) – that the mere fact that a website is accessible is not sufficient for the application of Art. 15. Rather it is necessary that the website solicits the conclusion of distance contracts and that a contract has actually been concluded.

Since, according to the Supreme Court, the requirements of "directed" in terms of Art. 15 No. (c) Brussels I need clarification, the court referred also the following question to the ECJ for a preliminary ruling:

> *If the answer to Question 1 is in the affirmative: Is the fact that an agent's website can be consulted on the internet sufficient to justify a finding that activities are being 'directed' within the terms of Article 15(1)(c) of Regulation No 44/2001?*

The referring decision of the Austrian OGH can be found (in German) here.

5. Wood Floor Solutions Andreas Domberger GmbH v. Silva Trade, SA (C-19/09)

Futher, the *Oberlandesgericht Wien* (Austria) has referred to the ECJ interesting questions on the interpretation of Art. 5 No. 1 (b) Brussels I with regard to cases where the services are provided in several Member States:

> *1. (a) Is the second indent of Article 5(1)(b) of Council Regulation (EC) No 44/201 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('Regulation No 44/2001') applicable in the case of a contract for the provision of services also where the services are, by agreement, provided in several Member States?*
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> *If the answer to that question is in the affirmative,*
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> *Should the provision referred to be interpreted as meaning that*
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> *(b) the place of performance of the obligation that is characteristic of the contract must be determined by reference to the place where the service provider's centre of business is located, which is to be determined by reference to the amount of time spent and the importance of the activity;*
>
> *(c) in the event that it is not possible to determine a centre of business, an action in respect of all claims founded on the contract may be brought, at the applicant's choice, in any place of performance of the service within the Community?*
>
> *2. If the answer to the first question is in the negative: Is Article 5(1)(a) of*

> *Regulation No 44/2001 applicable in the case of a contract for the provision of services also where the services are, by agreement, provided in several Member States?*

6. German Reference on Brussels II *bis*

Further, the *Bundesgerichtshof* has referred with decision of 10 June 2009 a question on the interpretation of Brussels II *bis* to the ECJ for a preliminary ruling: The case concerns the question whether provisional measures in terms of Art. 20 Brussels II *bis* constitute "judgments" in terms of Art. 2 No. 4 Brussels II *bis* and thus whether provisional measures can be recognised under Artt. 21 Brussels II *bis* et seq.

As stated by the *Bundesgerichtshof*, this question is debated controversially by legal writers and there is no constant jurisdiction so far. Consequently, the Bundesgerichtshof decided to refer the following question to the ECJ:

> *Are Articles 21 et. seq. Regulation (EC) No. 2201/2003 (Brussels II bis) also applicable with regard to provisional measures concerning the rights of custody in terms of Art. 20 Brussels II bis?*

(Approximate translation from the German decision. The case is apparently not available at the ECJ's website so far, but can be found (in German) under XII ZB 182/08 at the website of the Federal Court of Justice).

Many thanks to Jens Karsten (Brussels) for the tip-off with regard to several of these cases.

***Update**: As we have been kindly informed by Professor Christian Kohler, the reference has been received by the ECJ in the meantime and is pending under C-256/09 (Purrucker).*