German Judgment on Rome II

Even though the decision is not really new anymore and the case has been discussed already – at least with regard to certain aspects concerning the temporal scope of Rome II – it might still be worth mentioning since it is the first judgment of the German Federal Court of Justice (Bundesgerichtshof, BGH) applying the Rome II Regulation.

The case concerns an action brought by a registered association in terms of § 4 Unterlassungsklagengesetz, UKlaG (Injunctive Relief Act) seeking an injunction to prevent an airline established in Latvia from using a particular clause in its general terms and conditions towards consumers.

With regard to the question of **international jurisdiction**, the BGH held that German courts were competent to hear the case on the basis of Art. 5 No. 3 Brussels I Regulation since the use of unfair general terms of conditions constituted a "harmful event" in terms of Art. 5 No. 3 Brussels I Regulation. In this respect, the BGH referred to the ECJ's judgment in *Henkel* (C-167/00) where the ECJ had held that "[t]he concept of 'harmful event' within the meaning of Article 5 (3) of the Brussels Convention is broad in scope […] so that, with regard to consumer protection, it covers not only situations where an individual has personally sustained damage but also, in particular, the undermining of legal stability by the use of unfair terms which is the task of associations such as […] to prevent." (ECJ, C-167/00, para. 42).

With regard to the **applicable law** concerning the claim for injunctive relief against the use of unfair terms, the BGH referred to Regulation (EC) No. 864/2007 (Rome II) and held that German law – and therefore §§ 1, 2, 4a UKlaG – was applicable in this case: According to Art. 4 (1) Rome II the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country in which the indirect consequences of that event occur. In the present context, the country in which the damage occurs or is likely to occur (Art. 2 (3) b) Rome II) is, according to the court, the country where the unfair general terms were used or are likely to be used and therefore the country in which the consumers' protected collective interests were affected or are likely to be affected. In support of this

interpretation, the BGH referred to Art.6 (1) Rome II according to which the law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the country where the collective interests of consumers are, or are likely to be, affected. In this respect, the BGH left the question open whether Art. 6 Rome II is directly applicable in the present context, since, according to the court, the underlying rationale – namely that consumers should be protected by the law of that country where their collective interests are affected – applied in the present context as well.

With regard to the **temporal scope of application** of Rome II – which is contentious in view of the not unambiguous provisions of Art. 31 and Art. 32 of the Regulation (see in this respect the abstracts of the articles by *Glöckner* and *Bücken* which can be found here) – the BGH seems to adopt, as it has been pointed out already by *Professor von Hein* in his recent comment, the point of view according to which the Regulation entered into force on 11 January 2009. The BGH, however, did not discuss the problems surrounding Artt. 31 und 32 Rome II.

Concerning the applicable law, the BGH emphasised that a distinction had to be drawn with regard to the law applicable to the claim for injunctive relief and the law applicable to the validity of the term in question (para. 15, 24 et seq.): In this respect, the BGH stated that according to § 1 UKlaG an injunction could be sought if general terms and conditions were used which are invalid under German law (§§ 307-309 Civil Code, BGB). Thus, injunctive relief under this provision presupposed that German law applied with regard to the validity of the terms in question. The court emphasised that the application of German law with regard to the claim for injunction did not imply that the validity of the standard term in question was governed by German law as well (para. 25). In this context, the court pointed out that this resulted from an interpretation of § 1 UKlaG and § 4a UKlaG: While an injunction under § 1 UKlaG required an infringement of German law, injunctive relief could be sought according to § 4a UKlaG in case of intra-Community infringements of laws that protect consumers' interests in terms of Art. 3 b) Regulation (EC) No. 2006/2004. Thus, according to § 4a UKlaG, claims for injunctive relief could be brought irrespective of whether German consumer protection laws had been infringed, but rather also in cases where any other consumer protection laws – which were encompassed by § 4a UKlaG – had been violated. As a consequence, the court stated that the applicable consumer

protection law had to be determined independently. The validity of general terms was governed by the law of the contract (para. 29). In this respect the court held that Latvian law had to be applied according to German PIL rules (Artt. 28 (1), 31 (1) EGBGB (German Introductory Act to the Civil Code)) with regard to the validity of the questioned standard terms since Latvia was the country the contract was most strongly connected with: According to Art. 28 (2) S. 1, 2 EGBGB – which was applicable in the absence of a special choice of law rule with regard to contracts for the carriage of passengers by air – it is presumed that the contract shows the closest connection to the country in which the party who is required to perform the duty characterising the contract has its principal establishment at the time of the conclusion of the contract. Since in case of contracts as the one in question the transport had to be regarded as the characteristic duty and the air line had its principal place of establishment in Latvia, Latvian law was applicable with regard to the validity of the standard term.

The court's further considerations on the question whether the contract is more closely connected with another country – which would have rebutted the presumption provided by Art. 28 (2) EGBGB according to Art. 28 (5) EGBGB – are of particular interest with regard to Rome I and the Brussels I Regulation: According to the court, a closer connection to another country, in particular to Germany, could neither be assumed only due to the fact that the defendant's website was directed at customers in Germany (para. 36), nor could a more closer connection to Germany be assumed on the basis that Germany was the place where the services were provided (para. 37) since in case of cross-border flights it was not possible to determine exactly in which country the characteristic performance was actually provided. In this context, the BGH referred to the ECJ's judgment in C-204/08 (*Rehder*) on the interpretation of Art. 5 No. 1 b) Brussels I Regulation.

Further, the court held that also the aim of consumer protection did not result in a closer connection to German law: Even though Art. 29 (2) EGBGB reflected this aim by stating that "in the absence of a choice of law consumer contracts […] are governed by the law of the country where the consumer has his or her habitual residence", this provision was not applicable according to Art. 29 (4) EGBGB with regard to contracts of carriage (see para. 38). In this context the BGH referred to the Rome I Regulation and pointed out the difference between Art. 5 (2) Rome I

(which was not yet applicable in this case) and Art. 29 (4) No. 1 EGBGB (i.e. Art. 5 (4) Rome Convention): While Art. 5 (2) Rome I Regulation now states that – in the absence of a choice of law – the law applicable to a contract for the carriage of passengers shall be the law of the country where the passenger has his habitual residence, provided that either the place of departure or the place of destination is situated in this country, Art. 5 (4) (a) Rome Convention (Art. 29 (4) No. 1 EGBGB) did not attribute such a significance to consumer protection.

The judgment of 9th July 2009 (Xa ZR 19/08) can be found (in German) at the website of the German Federal Court of Justice.

There are, as far as I could see, two case notes (in German) by now:

Wolfgang Hau, LMK 2009, 293079

Ansgar Staudinger/Paul Czaplinski, NJW 2009, 3375

Many thanks to Dr. Carl-Friedrich Nordmeier and Professor Jan von Hein.