Jurisdiction of Greek courts in insurance matters – A follow up on FBTO Schadeverzekeringen NV (C-463/06)

By Apostolos Anthimos.

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A number of rulings of the Greek Supreme Court have been rendered within the last five years on the issue of jurisdiction in matters relating to insurance, as stipulated in Regulation 44/2001, Arts 9(1)(b) and 11(2). To be precise, seven decisions of Areios Pagos have applied the findings of the ECJ in the case *FBTO Schadeverzekeringen NV v Jack Odenbreit*. In a nutshell, the line of the European Court, according to which "*the reference in Article 11(2) 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 to Article 9(1)(b) of that regulation is to be interpreted as meaning that the injured party may bring an action directly against the insurer before the courts for the place in a Member State where that injured party is domiciled, provided that such a direct action is permitted and the insurer is domiciled in a Member State*", has been followed literally, unlike 1st & 2nd instance decisions, where motions to declare the court as lacking jurisdiction had prevailed (see Athens CoA 5419/2007, Theory & Practice of Civil Law 2008, 956, Athens CoA 392/2008, Hellenic Justice 2009, 838, Athens CoA 7270/2007, 5152/2008, 6364/2009 & 2352/2010 [unreported]). Admittedly, for some of the instance rulings, it was not possible to take into account the fresh news coming from Luxemburg, given the fact that they were tried or published before December 13, 2007 (the publication date of the ECJ ruling).

The Supreme Court took a firm stance on the matter, starting from 2009. In a series of decisions (2163/2009, Civil Procedure Law Review 2010, 68, 599/2010, unreported, 640/2010, Commercial Law Review 2010, 640, 487/2011, Civil Procedure Law Review 2011, 468, 37/2012, Chronicles of Private Law 2012, 449,

and 442/2013, not yet reported) the Court reiterated the ruling of the ECJ and reversed all 2nd instance decisions. The exception to the rule was the decision Nr. 379/2013 (not yet reported): In this case, the Supreme Court denied the cassation (appeal), because the German foreign company proved that the appellant was not a resident of Greece. In light of the unambiguous wording of the European Court in the *FBTO* case, namely that the injured party may bring an action directly against the insurer before the courts for the place in a Member State where (s)he is domiciled, the CoA judgment was reaffirmed.

Two final comments on the situation in Greece: First, it is no coincidence that all cases were tried before the courts of the capital. As it is well known, articles 9 & 11 Regulation 44/2001 deal with the issue of international jurisdiction, leaving the venue of the court to be decided pursuant to domestic law provisions. Apparently the claimants (i.e. their lawyer) made use of Article 6.1 Brussels I Regulation, in conjunction with Article 37.1 Greek Code of Civil Procedure, in order to establish the venue of the Athens court. In particular, by filing a claim against both the foreign insurance company and its agent in Greece (it is common ground that all agents of foreign enterprises are situated in the capital), the Athens court become territorially competent by virtue of a joinder of parties. Second, no decision has been yet rendered on the merits, thus leaving ample space for speculation about the problems that Greek courts will eventually face in terms of applicable law [see in this respect *Jayme*, Der Klägergerichtsstand für Direktklagen am Wohnsitz des Geschädigten (Art. 11 Abs. 2 i.V.m. Art. 9 EuGVO): Ein Danaergeschenk des EuGH für die Opfer von Verkehrsunfällen, in: Grenzen überwinden – Prinzipien bewahren, Festschrift für Bernd von Hoffmann zum 70. Geburtstag (2011), p. 656-663, and *Fuchs*, Internationale Zuständigkeit für Direktklagen, IPRax 2008, p.104-107].

US Supreme Court Hears New

Hague Abduction Case

See this post of Ann Laquer Estin over at Families Across Borders

> *The Supreme Court heard arguments on December 11 in Lozano v. Alvarez, a case raising issues regarding "equitable tolling" under Article 12 of the Hague Child Abduction Convention. (For background, please see our previous post.) The Court makes available both an audio recording of the oral arguments and the transcript.*
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> *An analysis of the arguments by Amy Howe of SCOTUSblog is available here. SCOTUSblog also has links to the briefs filed in the case , including amicus briefs filed by the United States and by the Mexican Association for Abducted and Missing Children, the International Academy of Matrimonial Lawyers (IAML), Reunite International Child Abduction, the National Center for Missing and Exploited Children, A Child Is Missing, Inc., and the Domestic Violence Legal Empowerment & Appeals Project (DV LEAP).*

Coffee on Extraterritorial Financial Regulation

John Coffee Jr (Columbia Law School) has posted Extraterritorial Financial Regulation: Why E.T. Can't Come Home on SSRN.

> *Systemic risk poses a classic "public goods" problem. All nations want systemic stability, but most would prefer that other nations pay for it, allowing them to "free ride." Moreover, because global financial institutions can park their higher risk operations almost anywhere, some nations can profit from regulatory arbitrage by keeping their regulatory controls laxer than in the more financially developed nations (which bear the principal share of the costs from financial contagion). As a result, the free riders do not need to internalize the*

full costs of systemic risk, but profit from imposing costs on others.

Under these conditions, all the preconditions for a "tragedy of the commons" are satisfied, because (i) the nations that profit from regulatory arbitrage cannot be excluded from offering under-regulated markets, and (ii) they do not need to internalize the costs they impose on others. While the "tragedy of the commons" literature has been much used in environmental law and related fields, it applies equally well to international financial markets. The solution to this problem lies in finding ways to tax the free riders or otherwise subject them to stronger controls. But here is exactly where current "soft law" approaches to international financial regulation fail. Because "soft law" is almost by definition non-binding and unenforceable, it cannot control a financial services industry that wishes to pursue highly profitable, higher risk strategies.

Aspirational theorists of international "soft law" thus misconceive the problem. To expect "soft law" to be kinder and gentler than formal law and to give every nation an equal voice is to prescribe the essential conditions for a "tragedy of the commons."

Instead, as this article argues, only the major financial nations have the right incentives to curb systemic risk, precisely because they are exposed to it. Thus, bilateral negotiations among them (particularly between the U.S. and the E.U.) and the assertion of extraterritorial jurisdiction by them is necessary to create a governance structure under which highly mobile financial institutions cannot flee to less regulated venues. Ultimately, this assertion of extraterritorial authority (which both the U.S. and the E.U. have now done) may be an interim stage in the longer term development of adequate international "soft law" standards. But, absent the assertion of such authority, the commons will predictably collapse again into tragedy.

This article examines recent negotiations over the international regulation of OTC derivatives markets and the uncertain status of the Volcker Rule as cases in point. With respect to the latter, it poses the question: how should a legal regime of "substituted compliance" deal with the Volcker Rule where no other nations has adopted or proposed a close financial equivalent? Finally, it asks: how "extraterritorial" does U.S. law need to be and proposes some limits.

Colangelo on Extraterritorial Jurisdiction

Anthony Colangelo (Southern Methodist University – Dedman School of Law) has posted What is Extraterritorial Jurisdiction? on SSRN.

> *The phenomenon of extraterritorial jurisdiction, or the exercise of legal power beyond territorial borders, presents lawyers, courts, and scholars with analytical onions comprising layers of national and international legal issues; as each layer peels away, more issues are revealed. U.S. courts, including the Supreme Court, have increasingly been wrestling this conceptual and doctrinal Hydra. Any legal analysis of extraterritorial jurisdiction leans heavily on the answers to two key definitional questions: What do we mean by "extraterritorial"? And, what do we mean by "jurisdiction"? Because the answer to the first question is often conditional on the answer to the second, the questions are probably better addressed in reverse order, that is: What type of "jurisdiction" is at issue? And, is its exercise "extraterritorial"?*
>
> *This Article aims to supply legal thinkers, practitioners, and decision-makers with tools to go about answering these increasingly prevalent and multi-layered questions of U.S. law — the answers to which hold potentially massive consequences for a rapidly and diversely growing number of cases and fields, from corporate and securities law, to human rights, to anti-drug trafficking and terrorism. The Article addresses major issues of constitutional law, statutory construction (including the Supreme Court's most recent decisions in Morrison v. National Australia Bank and Kiobel v. Royal Dutch Petroleum), and common law choice-of-law methodology.*
>
> *The proliferating phenomenon of extraterritoriality across diverse fields has thus far resisted trans-substantive and systematic analysis. Yet the legal and practical stakes of resolving a mounting array of extraterritorial jurisdiction issues have never been higher. This Article seeks to approach extraterritoriality as a fundamentally singular phenomenon with myriad doctrinal manifestations*

> *instead of a scattershot smattering of discrete legal issues in isolated areas. My principal aim in doing so is to help legal thinkers and decision makers not only to resolve extraterritoriality issues but also to comprehend how their resolutions fit within a larger jurisprudence on increasingly important questions of when and how the United States may exercise legal power beyond U.S. borders.*

The paper is forthcoming in the *Cornell Law Review*.

UK Supreme Court Rules on Inherent Jurisdiction to Order Return of Children

On 4 December 2013, the UK Supreme Court delivered its judgment in In the matter of KL (A Child).

The Court issued the following press summary.

BACKGROUND TO THE APPEAL

This appeal arises from proceedings under the Hague Convention on the Civil Aspects of International Child Abduction ('the Convention'). The Convention establishes procedures to ensure the prompt return of children to the state of their habitual residence. The question arising is the approach that the courts of this country should take when a child is brought here pursuant to an order made abroad in Convention proceedings which is later overturned on appeal.

The proceedings concern a child, K, who was born in 2006 in Texas and is a United States citizen. His father is also a US citizen; his mother came to the UK from Ghana as a very young child and she has indefinite leave to remain in the UK. They married in Texas in December 2005 and lived together there. The marriage broke up and in March 2008 the father issued divorce proceedings in

the Texas state court. That court made orders by consent providing for the mother to take care of K (in the former matrimonial home) while the father was posted abroad on military service. In July 2008 she took him to London. In March 2010 a welfare-based custody hearing took place in the Texas court in which both parents were represented. The judge in those proceedings decided that it was in K's best interests that he reside with his father and have contact with his mother. As a result K moved back to the US.

The mother applied to the US Federal District Court for an order under the Convention, alleging that K had been habitually resident in the UK in March 2010 and that K had been wrongfully retained in Texas by the father. This argument succeeded in the District Court in August 2011. The father complied with the order to return K and his passport to the mother, whereupon the mother returned to the UK with K and they have lived here ever since. The father appealed against the order. On 31 July 2012 the US Court of Appeals for the Fifth Circuit overturned the decision of the District Court and on 29 August 2012 the District Court ordered K's return to the US. When the mother did not comply, the father issued applications under the Convention in the UK. He argued that the mother's retention of K in the UK was wrongful because K's habitual residence had remained in the US. He further argued that the UK court should exercise its inherent jurisdiction to return K to the US in the circumstances of his case, even if it was not required to do so under the Convention.

On 17 January 2013 the judge in the High Court dismissed the father's applications, and his decision was upheld on appeal to the Court of Appeal. The Supreme Court granted the father permission to appeal on the grounds that K had been wrongfully retained in the UK after 29 August 2012 under the Convention and/or that the court should order his return to the US under its inherent jurisdiction.

JUDGMENT

The Supreme Court unanimously allows the appeal by the father and orders the return of K to the US on the basis of the undertakings offered by the father to enable the mother to live in Texas, independently of the father and sharing the care of K between them, pending any application she might make to the Texas court to modify the order relating to K's residence. The sole judgment is given by Lady Hale.

REASONS FOR THE JUDGMENT

Convention proceedings

The father's application could only succeed if K was habitually resident in the US when the US Court of Appeals overturned the earlier order of the District Court in the mother's favour. [17]. The Convention does not define habitual residence but the UK applies the concept of habitual residence adopted by most member states of the European Union, namely that it is a question of fact and corresponds to the place which reflects some degree of integration by the child in a social and family environment [20]. Parental intention plays a part in establishing or changing a child's residence and this has to be factored in with all the other relevant factors in deciding whether a move from one country to another has a sufficient degree of stability to amount to a change of habitual residence [23].

In this case, the move of the mother with K to the UK in August 2011 was intended by her to be permanent and neither she nor K will have perceived it as temporary, notwithstanding the appeal. K became integrated into a social and family environment in the UK during the year before the appeal succeeded [26]. The judge was entitled to hold that K had become habitually resident in the UK by 29 August 2012 [27]. Thus the father was not entitled to an order for K's return under the Convention.

Inherent jurisdiction

Under the Family Law Act 1986 the High Court has power to exercise its inherent jurisdiction in relation to children by virtue of the child's habitual residence and presence here. Before the Convention was adopted this jurisdiction was used to secure the prompt return of children who had been wrongfully removed from their home country. The existence of an order made by a competent foreign court is a relevant factor in deciding whether to exercise it [28].

The judge did not ask himself the correct question, which is whether it is in K's best interests to remain in the UK, so that the dispute between his parents is decided here, or to return to Texas so that the dispute can be decided there. The Supreme Court is in as good a position as the judge was to answer this as he heard no oral evidence [32]. The approach and procedure of the Texan and English courts are very similar and the father's evidence is that an application by the mother in Texas would be decided in less than three months [30, 33]. In

favour of K's remaining in the UK is the fact that he has been living here with his mother for over two years, is at school and apparently doing well [34]. In favour of return to the US is the fact that he was born in Texas, has a large extended family in the US, and has spent half his life living there, most recently in the sole care of his father, who has facilitated contact with his mother [35]. The crucial factor is that K is a Texan child who is currently being denied a proper opportunity to develop a relationship with his father and with his country of birth. While the conflicting orders remain in force he has effectively been denied access to the US. It is necessary to restore the synthesis between the two jurisdictions which the mother's actions have distorted [36]. Despite the passage of time there is no reason to consider that K would suffer any significant harm by returning to Texas on the basis proposed by the father and accordingly the Supreme Court allows the appeal and orders K's return on these terms. This order is to stand even if the mother chooses not to avail herself of the opportunity to return with her son [38].

ECJ Rules on Scope of European Enforcement Order

On December 5, 2013, the Court of Justice of the European Union delivered its judgment in Vapenik v. Thurner (Case 508/12).

The case was concerned with a loan contract concluded between two persons not engaged in commercial or professional activities. The issue for the Court was whether a claim based on this contract was eligible to benefit from Regulation 805/2004 on the European Enforcement Order for uncontested claims.

More specifically, the issue was whether such contract fell within the scope of Article 6(1)(d).

> ***Article 6.*** *A judgment on an uncontested claim delivered in a Member State shall, upon application at any time to the court of origin, be certified as a European Enforcement Order if:(a) the judgment is enforceable in the Member*

State of origin; and

(b) the judgment does not conflict with the rules on jurisdiction as laid down in sections 3 and 6 of Chapter II of Regulation (EC) No 44/2001; and

(c) the court proceedings in the Member State of origin met the requirements as set out in Chapter III where a claim is uncontested within the meaning of Article 3(1)(b) or (c); and

(d) the judgment was given in the Member State of the debtor's domicile within the meaning of Article 59 of Regulation (EC) No 44/2001, in cases where

– a claim is uncontested within the meaning of Article 3(1)(b) or (c); and

– it relates to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession; and

– the debtor is the consumer.

The Court ruled that the Regulation does not apply. It relied on the language of Article 6, but also, and to a much larger extent, on Regulation 44/2001.

25 In that connection, and in order to ensure compliance with the objectives pursued by the European legislature in the sphere of consumer contracts, and the consistency of European Union law, account must be taken, in particular, of the definition of 'consumer' in other rules of European Union law. Having regard to the supplementary nature of the rules laid down by Regulation No 805/2004 as compared with those in Regulation No 44/2001, the provisions of the latter are especially relevant.

(…)

33 It must be stated that there is also no imbalance between the parties in a contractual relationship such as that at issue in the main proceedings, namely that between two persons not engaged in commercial or professional activities. Therefore, that relationship cannot be subject to the system of special protection applicable to consumers contracting with persons engaged in commercial or professional activities.

34 That interpretation is supported by the structure and broad logic of the rules

of special jurisdiction over consumer contracts laid down in Article 16(1) and (2) of Regulation No 44/2001, which provides that the courts for the place where the consumer is domiciled are to have jurisdiction with respect to actions brought by and against him. It follows that that provision is applicable only to contracts in which there is an imbalance between the contracting parties.

35 Furthermore, account must be taken of the supplementary nature of the rules laid down by Regulation No 805/2004 as compared with those on recognition and enforcement of decisions laid down by Regulation No 44/2001.

36 In that connection, it must be stated that, although certification as a European enforcement order under Regulation No 805/2004 of a judgment with respect to an uncontested claim enables the enforcement procedure laid down by Regulation No 44/2001 to be circumvented, the absence of such certification does not exclude the possibility of enforcing that judgment under the enforcement procedure laid down by the latter regulation.

37 If, in the context of Regulation No 805/2004, a definition were to be adopted, which is wider than that in Regulation No 44/2001, that might lead to inconsistencies in the application of those two regulations. The derogation laid down by Regulation No 805/2004 might lead to refusal of certification as a European enforcement order of a judgment, whereas it could still be enforced under the general scheme laid down by Regulation No 44/2001 since the circumstances in which that scheme allows the defendant to challenge the issue of an enforcement order, on the ground that the jurisdiction of the courts for the State in which the consumer is domiciled has not been respected, would not be satisfied.

Final ruling:

Article 6(1)(d) of Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims must be interpreted as meaning that it does not apply to contracts concluded between two persons who are not engaged in commercial or professional activities.

New Book on the Hague Child Abduction Convention

Rhona Schuz (Sha'arei Mishpat Law School) has published The Hague Child Abduction Convention: A Critical Analysis (Hart Publishing).

> *International child abduction is one of the most emotionally charged and fascinating areas of family law practice. The 1980 Hague Convention on the Civil Aspects of International Child Abduction was the response of the international community to the increase in the phenomenon of parental child abduction. However, behind the widely acclaimed success of this Convention – which has now been ratified by more than 90 states – lie personal tragedies, academic controversy and diplomatic tensions.*
>
> *The continuing steady flow of case-law from the various Member-States has resulted in the emergence of different approaches to the interpretation of key concepts in the Convention. In addition, over the years other global and regional legal instruments and the recommendations of the Special Commissions have had an impact on the implementation of the Convention.*
>
> *This book brings together all these strands and provides an up-to-date, clear and highly readable discussion of the international operation of the Abduction Convention together with in-depth critical academic analysis in light of the objectives of the Convention and other relevant legal norms, such as the 1989 UN Convention on the Rights of the Child. Throughout the book, examples are brought from case-law in many jurisdictions and reference is made to relevant legal and social science literature and empirical research.*
>
> *Over the past decade, increasing focus has been placed on what might be seen as procedural issues, such as separate representation for children, undertakings, judicial liaison and mediation. The book analyses the significance of these developments and the extent to which they can help resolve the continuing tension between some of the objectives of the Convention and the interests of individual children.*

ERA / MPI Conference on Arbitration and EU Law

The Academy of European Law (ERA) and the Max Planck Institute Luxembourg will co-organize a conference on Arbitration and EU Law in Trier, Germany, on March 10 and 11, 2014.

Monday, 10 March 2014

I. AFTER THE RECAST OF BRUSSELS I
Moderator: *Stefania Bariatti*

09:30 Consequences and interpretation of the arbitration exception

10:00 *West Tankers*, antisuit injunctions and beyond: recent developments and latest case law
Alexander Layton

10:30-11:00 Discussion

11:30 Brussels I and the New York Convention: recognition and enforcement of judgments and awards
Catherine Kessedjian

12:00 Discussion

Moderator: *Catherine Kessedjian*

12:15-13:00 Panel discussion: How to ensure the effective coordination of judicial and arbitration proceedings?
• *Massimo Benedettelli*
• *Alexander Layton*

II. THE CROSS-OVER BETWEEN INSOLVENCY AND ARBITRATION
Moderator: Burkhard Hess

14:00 Effects of insolvency in arbitral proceedings taking into account the Insolvency Regulation and the proposals for its review
Stefania Bariatti

14:30 Effects of foreign insolvency on arbitration seated in Switzerland
Martin Bernet

15:00-15:30 Discussion

III. PROCEDURE, MINIMUM STANDARDS AND HUMAN RIGHTS

16:00 Innovative systems for dispute resolution in sport – and in other areas?
Dirk-Reiner Martens

16:30 Procedural minimum standards and the applicability of Article 6 ECHR in arbitration
Massimo Benedettelli

17:00-17:30 Discussion

Tuesday, 11 March 2014

IV. INVESTMENT ARBITRATION
Moderator: *Alexander Layton*

09:30 Compatibility of bilateral investment treaties (BITs) with EU law
Luca Radicati di Brozolo

10:00 Investment arbitration under extra-EU BITs
Patricia Nacimiento

10:30-11:00 Discussion

Moderator: *Luca Radicati di Brozolo*

11:30 Recent developments in investment arbitration
Maxi Scherer

12:00 Discussion

12:15 Panel discussion: Challenges and opportunities for investment arbitration
• *Patricia Nacimiento*

• *Maxi Scherer*

13:00 Lunch and end of the conference

Bar Associations Lend Support to Hague Choice of Court Convention

The Hague Conference on Private International Law has announced that the German Bar Association (*Deutschen Anwaltverein*, or DAV) has encouraged the European Union to ratify the Choice of Court Convention. In a statement released in October 2013 (official version in German; a courtesy translation performed by the Permanent Bureau of the Hague Conference can be found here), the DAV, which represents the interests of the German bar at the national, European and international level, emphasised the significance of the Convention for EU litigants, and recommended that the EU extend the recognition and enforcement regime of the Convention to non-exclusive choice of court agreements (pursuant to Art. 22).

The statement follows support for the Convention from other national and international bar associations. In June, the Inter-American Bar Association recommended that States join the Convention. In 2006, the American Bar Association passed a resolution urging the United States to join the Convention, which was followed in 2009 by the US signing the Convention.

Milan Conference on the Reform

of the Brussels I Regime (13 December 2013)

The University "Luigi Bocconi" of Milan will host on **Friday 13 December** (9h30 – 13h00) a conference on the recast of the Brussels I reg., organized in collaboration with the International Law Association: **"The Reform of the 'Brussels I' Regime – The Recast Regulation (EU) No 1215/2012"**. A substantial part of the colloquium will be held in English. Here's the programme (available as a .pdf file):

Welcome Address: *Giorgio Sacerdoti* (Università Bocconi)

Opening Remarks: *Alberto Malatesta* (Secretary, ILA-Italy)

Chair: *Fausto Pocar* (Università degli Studi di Milano)

- The Revised Brussels I Regulation – A general outlook: The Rt. Hon. Lord *Jonathan Mance* (Judge, Supreme Court of the UK and Chair, Executive Council, ILA);
- Does the Recast Regulation Make Choice-of-Court Agreements More Effective?: *Gianluca Contaldi* (Università di Macerata);
- The New Rules on Parallel Proceedings with Particular Regard to Relations with Third States: *Pietro Franzina* (Università degli Studi di Ferrara);
- The Abolition of Exequatur and the New Rules on the Free Movement of Judgments: *Paola Mariani* (Università Bocconi).

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Roundtable (held in Italian): "Il ruolo di Bruxelles I nel contesto globale: quale ruolo per le norme UE?"

Chair: *Riccardo Luzzatto* (Università degli Studi di Milano)

Speakers:

- *Luigi Fumagalli* (Università degli Studi di Milano);
- *Alberto Malatesta* (LIUC Università Carlo Cattaneo);

- *Gian Battista Origoni della Croce* (Attorney at Law, Milan);
- *Fausto Pocar* (Università degli Studi di Milano).

Further information and the registration form are available on the conference's webpage.