European Parliament Votes to Recast the Brussels I Regulation

Yesterday (20 November 2012) the European Parliament voted, in plenary session, to adopt the report of the Legal Affairs (JURI) Committee (rapporteur: Tadeusz Zwiefka) on the Commission's Proposal (COM (2010) 748) to recast the Brussels I Regulation. A substantial majority (567-28, 6 absentions) expressed support for the Proposal, subject to the JURI Committee's amendments. As followers of the process will be aware, the result is a mixed one for the Commission. Although its primary objective of abolishing (procedural) *exequatur* is supported by the Parliament, other features of the Proposal (most notably, the recommendations to restrict the substantive grounds for opposing enforcement and to harmonise rules of jurisdiction for defendants not domiciled in a Member State) have been ejected.

The focus now moves to the Council, which is due to meet next month to consider its own position on the Proposal and on the amendments put forward by the European Parliament. The changes will not likely enter into force for another 24 months.

The wheels of European private international law keep turning.

Immunity of Warships: Argentina Initiates Proceedings against Ghana under UNCLOS

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Cross posted at EJILTalk!

Another chapter has begun in the saga of NML Capital Ltd's attempts to collect on its holdings of Argentinean bonds (see here for earlier reporting on this blog and here for earlier reporting on *EJILTalk!*) with the initiation of inter-State proceedings by Argentina against Ghana under the 1982 UN Convention of the Law of the Sea.

It will be recalled that on 2 October 2012, whilst on an official visit, the Argentinean naval training vessel the *ARA Libertad* was arrested in the Ghanaian port of Tema. Its arrest was ordered by Justice Richard Adjei Frimpong, sitting in the Commercial Division of the Accra High Court, on an application by NML to enforce a judgment against Argentina obtained in the US courts (see here for the decision of the US Court of Appeals for the 2nd Circuit). The judge considered that the waiver of immunity contained in the bond documents, which provided that:

> *To the extent the Republic [of Argentina] or any of its revenues, assets or properties shall be entitled … to any immunity from suit, … from attachment prior to judgment, … from execution of a judgment or from any other legal or judicial process or remedy, … the Republic has irrevocably agreed not to claim and has irrevocably waived such immunity to the fullest extent permitted by the laws of such jurisdiction (and consents generally for the purposes of the Foreign Sovereign Immunities Act to the giving of any relief or the issue of any process in connection with any Related Proceeding or Related Judgment).*

extended to lift the vessel's immunity from execution. Argentina has strongly resisted this assertion of jurisdiction, claiming that it violates the immunity enjoyed by public vessels, which cannot be impliedly waived. It appears that the vessel remains under the control of a skeleton crew, who have prevented any efforts by the Ghanaian authorities to move the vessel, whilst being preventing themselves from leaving port.

Both States being parties to UNCLOs, on 29 October 2012 Argentina instituted arbitration proceedings against Ghana under Annex VII UNCLOS (Ghana not having made a declaration under Article 287 UNCLOS: see Article 287(3)). On 14 November 2012 Argentina applied to the International Tribunal for the Law of the Sea for the prescription of provisional measures prior to the constitution of the Annex VII tribunal (see ITLOS press release here).

The prescription of provisional measures by ITLOs is covered by Article 290(5), which provides that:

> *Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea … may prescribe … provisional measures in accordance with this article if it considers that prima facie the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires.*

However, even given the rather low hurdle to be vaulted, it is perhaps doubtful whether the first criterion ('that *prima* facie the tribunal which is to be constituted would have jurisdiction') can be satisfied. Article 287(1) UNCLOS provides that such a tribunal 'shall have jurisdiction over any dispute concerning the interpretation or application of this Convention', and it is unclear whether the dispute falls within the provisions of UNCLOS. Argentina may well have the law on its side as regards State immunity for warships. It may be, however, that ITLOs and an UNCLOS Annex VII arbitral tribunal are not the right fora for the settlement of its dispute with Ghana.

It may well be, as argued by Argentina in its request for the indication of provisional measures (see here), that the *Libertad* is a warship for the purposes of Art 29 UNCLOs. However, Article 32 then states:

> *With such exceptions as are contained in subsection A and in articles 30 and 31, nothing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes.*

Subsection A of Section 3 of Part II of UNCLOs deals with the rules applying to all

ships concerning innocent passage in the territorial sea. Articles 30 and 31 respectively cover non-compliance with warships of the laws and regulations of a coastal State concerning passage through the territorial sea, and flag State responsibility for any loss or damage to a coastal State resulting from the non-compliance by warships with the laws and regulations of the coastal State concerning passage through the territorial sea. Put simply, therefore, the Convention states that it says nothing about the immunities of warships in the territorial sea (Article 32 falling within Part II of UNCLOs dealing with the legal regime of the territorial sea – despite the provision's blanket terms another provision does exist (Article 95) concerning the immunities of warships on the high seas), still less about the immunities of warships in internal waters (which no provision of UNCLOs covers), leaving the matter to be dealt with elsewhere.

In addition to relaying on Article 32, Argentina also refers to the right of innocent passage and freedom of navigation (Articles 18(1)(b), 87(1)(a) and 90). However, the Libertad was arrested whilst in port, within Ghanaian internal waters (Article 11 UNCLOS), so that it does not seem apt to see its seizure as impeding its right of innocent passage, still less its freedom of navigation. If so, any arrest pursuant to judicial proceedings would be a similar violation. It is also difficult to see the *Libertad's* official visit to Tema as an incident of innocent passage. Indeed, Argentina, in its request for provisional measures (paragraph 4), argues that the visit was specifically governed by an agreement between the two States, which would seem unnecessary were the vessel simply exercising an already-existing right. Moreover, Article 28 UNCLOs provides that although a coastal State can only levy execution against or arrest a ship for the purpose of civil proceedings in respect of obligations or liabilities assumed or incurred by the ship herself in the course or for the purpose of her voyage through the waters of the coastal State, this limitation is without prejudice to the right of a coastal State:

> *in accordance with its laws, to levy execution against or to arrest, for the purpose of any civil proceedings, a foreign ship lying in the territorial sea, or passing through the territorial sea after leaving internal waters*

which strongly suggests that the limitation itself only applies to vessels exercising their right of innocent passage within the coast State's territorial sea, not those within its internal waters (as does the location of Article 28 within Part II of UNCLOS). It is not Ghana's assertion of a general jurisdiction to arrest ships

within its ports and harbours that Argentina objects to, but its exercise of that jurisdiction with regard to a vessel which Argentina argues is immune from it. In reality, the dispute revolves around whether, as a matter of international law, Ghana should accord State immunity to the *ARA Libertad*. Argentina's request, by spending 18 out of its 22 paragraphs of legal grounds on the matter, makes this point clearly.

The other criterion for the prescription of provisional measures set out in Article 290(5) ('urgency') might be thought less problematic. The provisional measures sought by Argentina, however, are that Ghana 'unconditionally enables' the *Libertad* to leave Tema and Ghana's jurisdictional waters, and to be resupplied to that end (paragraph 72bis, Argentina's request for provisional measures). Provisional measures are intended 'to preserve the respective rights of the parties to the dispute … pending the final decision' (Article 290(1)). It cannot be said that the measures requested by Argentina do anything to preserve any rights Ghana might have. Indeed, it prescribed, they would seem essentially to settle the dispute. A case can be made for the release of the vessel, not least because NML has already made it clear that it would permit it on payment of US$20 million, but not, at this stage, unconditionally.

Interestingly, on 26 October 2012, just prior to commencing arbitration proceedings against Ghana, Argentina withdrew, 'with immediate effect' its declaration under Article 298 UNCLOs exempting disputes falling within Article 298(1)(a), (b) and (c) from the compulsory procedures entailing binding decisions provided for in section 2 of Part XV of UNCLOS insofar as it concerned 'military activities by government vessels and aircraft engaged in noncommercial service'. Article 298(1)(b), which covers: 'Disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service …' This may have been *ex abundanti cautela*. Although the training of naval cadets could be seen as a military activity, a goodwill visit to Tema perhaps could not, still less the arrest, following a court order, of a vessel on such a visit.

As yet, Ghana's attitude to the proceedings has not been revealed. Argentina's request for provisional measures (paragraph 39) indicates that the Ghanaian Government did argue before Justice Frimpong that the *Libertad* was immune from the jurisdiction of the Ghanaian courts. However, acts of the Ghanaian courts are equally acts of the Ghanaian State and it is the court's opinions which

have prevailed and which Argentina complains about. In general, it would seem that the Government is between a rock and a hard place. It cannot overrule its court's decisions without breaching domestic law. Indeed, it might even be, given NML's penchant for litigation, that any interference with the judicial process leading to the *Libertad's* release could give rise to a claim for denial of justice by NML under the UK-Ghana BIT.

Fourth issue of 2012's Journal du Droit International

The fourth issue of French *Journal du droit international* (*Clunet*) for 2012 was just released. It contains two articles addressing issues of private international law and several casenotes. A full table of content is accessible here.

In the first article, Walid Ben Hamida, who lectures at Evry University, discusses the application of the UNIDROIT Principles in arbitration proceedings involving states or international organizations (*Les principes d'UNIDROIT et l'arbitrage transnational : L'expansion des principes d'UNIDROIT aux arbitrages opposant des États ou des organisations internationales à des personnes privées*).

> *Originally destined to international commercial contracts, UNIDROIT principles are now experiencing a remarkable growth in transnational relationships. Due to their neutrality, universality and quality, they have been well received by the arbitrators and the parties in many arbitrations opposing private parties to States or international organizations. In this article, the author makes an inventory of the references to UNIDROIT principles in transnational arbitral jurisprudence and analyzes the reasons of their application. He analyses both traditional transnational arbitration based on classical arbitration clauses and unilateral transnational arbitration resulting from the acceptance by the private party of an offer of arbitration expressed by a State or by an international organization.*

In the second article, Olivier Dubos, who is a professor of public law at the University of Bordeaux, explores the issues raised by the different interpretations of Article 33 of the Montreal Convention adopted by French and American courts (*Juridictions américaines et juridictions françaises face à l'article 33 de la Convention de Montréal : un dialogue de sourds ?*).

> *Article 33 of the Montréal Convention « for the Unification of certain rules for International Carriage by air », gives the victims of an air transport accident an « option » to bring their action for damages before different fora that the aforementioned article designates. The French Supreme Court (Cour de cassation) recently considered that this freedom of option took on an imperative character and accordingly considers that the French jurisdictions are not available if the plaintiff first chose a jurisdiction of another State (the USA in the latter case). On the other hand, for some American jurisdictions, article 33 can be combined with the theory of « 'forum non conveniens » which allows them to refuse to adjudicate a claim grounded on the Montreal convention. However, such an interpretation of article 33 does not win unanimous support amongst American judges. The victims who, in accordance with article 33, have chosen to take their case before the American jurisdiction could find themselves in a deadlock…*

A New Title on Mediation: Civil and Commercial Mediation in Europe

Mediation is becoming an increasingly important tool for resolving civil and commercial disputes. Although it has been long since known in many legal systems, in recent years it has received an important boost and is currently one of the most topical issues in the field of dispute resolution. The European Directive

2008/52/EC of the European Parliament and of the Council of 21.5.2008 on certain aspects of mediation in civil and commercial matters, with an implementation date of 21.5.2011, prescribes a set of minimum common rules on mediation for all EU Member States with the exception of Denmark. This book, published by Intersetia (November 2012 | ISBN 978-1-78068-077-4), studies in depth the current legal framework in every EU Member State as regards mediation in civil and commercial matters, as well as the way in which the Directive has been, or is expected to be, implemented in the near future. Every chapter on national law analyses both out-of-court and court-annexed mediation in the existing legal framework; the areas of law covered by mediation; the value and formal requirements of the agreement to submit any dispute to mediation; personal features and requirements for mediators; procedural requirements in the mediation procedure; the relationship between the mediator and public authorities; the outcome of the mediation procedure; and, in the scenario in which a mediation settlement is reached, its requirements and effects. The book is written by renowned specialists on mediation in Europe and aims to provide an exhaustive account for both scholars and practitioners in Europe and outside the continent.

El Velo Integral y su Respuesta Jurídica en Democracias Avanzadas Europeas (Monograph)

This monograph written by Dr. Victoria Camarero Suárez and published by Tirant lo Blanch deals with one of the key issues of the modern conflict of laws: the multicultural society. The main thesis of the author is that the use of the full veil should not be considered as a challenge for the values and principles of democratic societies, particularly of the Spanish society, but as an ideal opportunity to demonstrate a real commitment with those principles and values.

The extensive use of the comparative law method and the thorough review of the most relevant bibliography must be highlighted; also, the exhaustive analysis of the case law of different European states' courts and of the European Court of Human Rights. Particular attention has been paid to crucial concepts such as public policy and the so-called "margin of appreciation"; in addition, other significant topics related to nationality and migration are dealt with, again through remarkable cases, like the controversial decision made by the Council of State of France (*Conseil d'état*) as regards the *Silmi* case. The balance and technical rigor with which the author has developed her research make of the monograph a pioneer study in the Spanish doctrine and abroad, at a time when the usual answers to sensitive legal issues having a great impact on minorities are based on ideological grounds and dogmatism.

Click here to access the table of contents.

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Kruger on Rome III and Parties' Choice

Thalia Kruger (University of Antwerp) has posted Rome III and Parties' Choice on SSRN.

> *This paper focusses on the possibility spouses have under the new Rome III Regulation (EC Regulation 1259/2010) to choose the law applicable to their divorce. It discusses the limits and exceptions of this freedom to choose.*

Canberra Calling – update

Following my earlier post about the Commonwealth Attorney-General's review of Australian private international law rule (text reproduced below, for ease of reference), two consultation papers have now been released on the project website. The first contains a general overview of the issues covered by the project, and the second considers the possible harmonisation of the tests for staying proceedings which apply in intra-Australian and Trans-Tasman Proceedings. All those with an interest in the subject are invited to submit comments via the website or by e-mail to pil@ag.gov.au.

Australia has often been described as the "lucky country". Blessed with spectacular coastlines and landscapes as well as bountiful natural resources, Australia's international prominence has grown throughout the past century as her products and people have become increasingly mobile.

During this period, the development of private international law rules has been left, principally, to the Courts and to the legislatures of the States and Territories that make up the Commonwealth of Australia and the focus, until very recently, has been on the regulation of internal situations involving two or more States/Territories. As a result, private international law in Australia is an interesting, but erratic, patchwork of common law rules (e.g. law applicable to contract and tort), local legislation (e.g. jurisdiction over non-local defendants) and unified Commonwealth-level regimes (e.g. enforcement of some foreign judgments).

In 2011, the Standing Committee of Law and Justice (comprising the Attorneys-General of the Commonwealth Government and of each of the States and Territories, as well as the Minister of Justice of New Zealand) recognised the need to assess the suitability of Australia's private international law rules in modern conditions. In April 2012, the SCLJ agreed to the establishment of a working group to commence consultations with key stakeholders to determine whether further reform in this area would deliver worthwhile micro-economic benefits for the community.

Having established its working group, the Commonwealth Attorney-General has

now launched a public consultation on its newly created Private International Law website, and in parallel on Twitter (@agd_pil), Linked In (AGD – Private International Law) and on Facebook (Private International Law). Online discussions have been launched on jurisdiction, applicable law and other private international law issues and all contributions are welcomed. In particular, and without wishing to exclude the contributions of experts in the field, the organisers of the consultation would like to solicit the views of businesses and individuals with practical experience of the operation of the Australian rules which currently apply to cross-border transactions and events.

There is no need to hop on a plane – follow the link now.

Third Issue of 2012's Rivista di diritto internazionale privato e processuale

(I am grateful to Prof. Francesca Villata – University of Milan – for the following presentation of the latest issue of the RDIPP)

The third issue of 2012 of the *Rivista di diritto internazionale privato e processuale* (RDIPP, published by CEDAM) was just released. It features three articles and four comments.

In the first article, *Claudio Consolo*, Professor of Law at the University of Padua, discusses the new proceedings for interim relief (with full cognizance) for the ascertainment of the effectiveness of foreign judgments in Italy after Legislative Decree No. 150/2011 ("Il nuovo rito sommario (a cognizione piena) per il giudizio di accertamento dell'efficacia delle sentenze straniere in Italia dopo il d.lgs. n. 150/2011"; in Italian).

In the second article, *Costanza Honorati*, Professor of Law at the University of

Milano-Bicocca, offers a critical appraisal of provisional measures under the proposal for a recast of the Brussels I Regulation ("Provisional Measures and the Recast of Brussels I Regulation: A Missed Opportunity for a Better Ruling"; in English).

In the third article, *Theodor Schilling*, Professor of Law at the Humboldt University of Berlin, discusses the enforcement of foreign judgments in the case-law of the European Court of Human Rights ("The Enforcement of Foreign Judgments in the Jurisprudence of the European Court of Human Rights"; in English).

In addition to these articles, the following comments are also featured:

- *Lorenzo Ascanio* (Adjunct Professor at the University of Macerata), "Equivoci linguistici e insidie interpretative sul ripudio in Marocco" (Linguistic Ambiguities and Interpretative Pitfalls on Repudiation in Morocco; in Italian);
- *Lidia Sandrini* (Researcher at the University of Milan), "La tutela del creditore in pendenza del procedimento di exequatur nel regolamento Bruxelles I" (Creditor's Protection Pending the Exequatur Proceedings under the Brussels I Regulation; in Italian);
- *Giuseppe Serranò* (Research Fellow at the University of Milano-Bicocca), "Considerazioni in merito alla sentenza della Corte internazionale di giustizia nel caso relativo alle immunità giurisdizionali dello Stato" (Remarks on the Judgment of the International Court of Justice on Jurisdictional Immunities of the State; in Italian);
- *Cristina M. Mariottini* (Senior Researcher at the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law), "Statutory Ceilings on Damages under the Rome II Regulation: Shifting Boundaries in the Traditional Dichotomy between Substance and Procedure?" (in English).

Indexes and archives of the RDIPP since its establishment (1965) are available on the website of the Department of Italian and Supranational Public Law of the University of Milan.

Bulgarian Court Strikes Down One Way Jurisdiction Clause

I am grateful to Dr. Dafina Sarbinova, an advocate to the Sofia Bar, for this report.

In a judgment of of 2 September 2011 (Judgment No. 71 in commercial case No. 1193/2010), the highest Bulgarian court – the Bulgarian Supreme Court of Cassation, Commercial Chamber – struck down a one way arbitration/choice of court clause in a loan agreement (only in favour of the lender) as void. The Bulgarian court's arguments to hold that are very similar to those of the French Supreme Court published last month, i.e. it was held that *such clauses may be interpreted as purporting to establish by way of contractual arrangements a "potestative right"* (that is, a right whereby a person may unilaterally affect the legal rights of another person/counterparty) which is not permitted under Bulgarian law, because such rights may only be established by an act of parliament in Bulgaria.

The facts may briefly be summarized as follows. A loan agreement was concluded between individuals (natural persons) in an entirely domestic situation. An arbitration clause in that agreement provided that all disputes that might arise had to be resolved by the parties amicably and if they failed to do so, the lender might initiate proceedings against the borrowers before the Court of Arbitration at the Bulgarian Chamber of Commerce and Industry (BCCI) or any other arbitration institution, or before the Regional Court of Sofia. A dispute arose and the lender brought an action before the Court of Arbitration at BCCI, which in turn, found that it was competent to hear the dispute and ruled that the borrowers under the agreement were jointly liable to pay a principal amount as well as the applicable interest rate. The borrowers initiated proceedings to set aside the arbitration award before the Supreme Court of Cassation claiming that the Court of Arbitration at BCCI lacked jurisdiction. They argued that the arbitration clause was against the good morals (a contract *contra bonos mores*) and thus illegal. Furthermore, the borrowers asserted that the arbitration clause

breached the principle of parties' equality in the process (which is a general principle under the Bulgarian civil procedural law).

According to the Supreme Court of Cassation the right of the lender in that case to choose at its own discretion the dispute solving body before which to exercise its public right to bring a claim falls within the category of "potestative" rights. The essential characteristic of a "potestative" right is the entitlement of one person (or a group of persons) to affect unilaterally the legal position of another person (or a group of persons), where the latter are obliged to bear with the consequences. Due to the intensity and potentially detrimental effects of "potestative" rights on third parties, they exist only by virtue of law and are not subject to contractual arrangements. On the basis of these arguments, the court concluded that a clause which in violation of law entitled one of the parties to unilaterally decide which dispute resolution body (an arbitration institution or a court) has a jurisdiction to resolve a particular dispute, is void pursuant to art.26, par.1 of the Bulgarian Contracts and Obligations Act. According to this provision, all contracts that violating or evading the law, as well as all contracts in breach of good morals, are void.

The arbitration/choice of court clause in that case was incorporated in a contract without an international element. However, the general character of the court's arguments makes them equally applicable to agreements with an international element (if Bulgarian law applies towards the arbitration clause or even if a foreign law applies towards the arbitration clause).

The judgment of the Bulgarian court discussed here, may be open to criticism. Furthermore that judgment, as well as other judgments of the highest Bulgarian courts, does not have the power of a precedent binding all other courts to decide subsequent cases in the same manner. Nevertheless, the tendency of sticking down arbitration clauses with such reasoning (bearing in mind the similar French case) is a concerning one.

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (6/2012)

Recently, the November/December issue of the German law journal "Praxis des Internationalen Privat- und Verfahrensrechts" (**IPRax)** was published.

- ***Dorothee Einsele***: "Overriding Mandatory Provisions in Capital Market Law – Does the Rome I Regulation Need a Special Rule Regarding Harmonized European Law?"

Capital market legal provisions can often be qualified as overriding mandatory rules in the sense of art. 9 (1) Rome I Regulation. However, third country provisions regulating the capital market are rarely applicable because they are usually not captured by art. 9 (3) Rome I. The question is whether this is different as to provisions of other EU/EEA Member States that are based on harmonized European capital market law. Since the relevant European directives separate the competence to regulate the case and allocate it to the different Member States, the relevant implementing provision of the competent Member State has to be applied or to be taken into account by the other Member States. This is true irrespective of the law applicable to the rest of the case, and could be clarified in recital 40 of Rome I.

- ***Stefan Leible/Michael Müller:*** "Die Anknüpfung der Drittwirkung von Forderungsabtretungen in der Rom I-Verordnung" – the English abstract reads as follows:

The article deals with the assignment of claims according to Art. 14 of the Rome I Regulation. The focus lies with the third-party effects of an assignment. The pending revision envisioned in Art. 27 (2) of the Rome I Regulation as to the third-party effects of an assignment prompts the discussion which law should apply to an international assignment in this regard. The article mainly addresses three options: the law of the assignor's habitual residence, the law of the assigned claim or the law of the contract of assignment. The final vote of the Special Committee among the options provided for in the annex of the

article reflects a continuing diversity of opinions.

- ***Michael Grünberger:*** "Relative Autonomie und beschränkte Einheitlichkeit im Gemeinschaftsmarkenrecht" – the English abstract reads as follows:

The Community trade mark is a specific European Union intellectual property right with an unitary character and equal effect throughout the Union. In an aversion of the principle of subsidiarity, Union law depends on member state's procedural and substantive law in order to enforce the rights granted by the Community Trade Mark Union effectively. Thus, there is tension between the uniform nature of the substantive rules on the Community trade mark as well as its uniform judicial protection and the means to achieve these goals. The ECJ's decision resolves two issues: (1st) The scope of the prohibition against further infringement issued by a Community trade mark court with territorial jurisdiction over the entire Union extends to the entire area of the Union. However, if the trade mark proprietor restricts the territorial scope of its action or, if the use of the sign at issue does not affect the functions of the trade mark, the court must limit the territorial scope of its injunction. (2nd) The Community trade mark court must order coercive measures to ensure compliance with its injunction. Their territorial scope is identical to the scope of the injunction. The article also tries to answer the remaining questions regarding the jurisdiction for adopting and/or for quantifying or otherwise assessing the coercive measure pursuant to the court's lex fori and how to enforce a coercive measure adopted and assessed by a Community trade mark court in the territory of another member state.

- ***Peter Schlosser:*** "Death-blow to the so-called „Supplementary Interpretation of Contracts („ergänzende Vertragsauslegung") in the Case of Invalid Terms in Consumer Contracts?"

The focus of the ruling (C-618/10) – and its explosive force – is on the reply to the second question of the referring court. The issue – often coming up in judicial practice relating to general contract terms – is: what is the content of the remaining contract should one of its pre-drafted terms had turned out to be invalid. Mostly, indeed, the respective term is to be taken for non-existing without any adaptation of the contract other than by taking recourse to general

legal rules. However, to apply this approach slavishly without any element of a supplementary solution leads sometimes to inacceptable injustice, for example to excessive windfall benefits for hundreds of thousands of consumers. Therefore, the Spanish law vested the courts with a discretionary power (and not a mandatory one, as the translation into some of the languages of the Union, including the English language, makes us believe) to grant a modification of the incriminated term, which power is termed as "facultades moderadoras". According to the Court of the Union to grant such a power contravenes the Directive on Abusive Contract Terms.

The author is very critical with this narrow-minded approach of the European Court's ruling. This narrow-mindedness is the consequence of the total refusal to take into consideration the solutions which the legislations and courts of the Member States (particularly in Germany and Austria) had developed for the purpose of avoiding said excessive injustice. Hence, his proposition is to develop an understanding of the ruling as narrow as possible. According to him one must strictly stick to the Court's words "[…] which allows a national court […] to modify that contract […]" (in the official Spanish original: "atribuye al juez nacional […] la facultad de integrar dicho contrato modificando el contenido de la cláusula abusiva".). Therefore, even in consumer contracts the following must still remain permissible:

1. Often the national legislation implementing the Directive is stricter than the Directive itself. Hence, it is possible that under such a national legislation a contractual term is taken for inadmissible, notwithstanding the fact that its content does not amount to the shocking degree to be qualified as "abusive". In such a case the ruling of the court does not apply.

2. The very Court of the Union makes it clear that for dealing with the remaining part of the contract the national court must take recourse to "the interpretive methods recognized by domestic law", "taking the whole body of domestic law into consideration". Since in German and Austrian law dealing with a gap in a contract, even if the gap is due to the inadmissibility of a contract term, is a matter of contract interpretation rather than of a court's "modifying power" the court which is disposing of such an approach may still take recourse to it.

3. The main argument of the Court of the Union is the proposition that the

Directive must be implemented in a manner to built up a "dissuasive effect" for the co-contracting party of the consumer. In many situations, however, a mitigating power of the court cannot possibly have any influence on the dissuasive effect to be established by the implementation of the Directive. This is particularly the case when the co-contracting party of the consumer had been loyal and has adapted its terms to the case law and where thereafter, however, the courts tighten the latter.

- ***Christian Heinze/Stefan Heinze***: "Striking off a foreign company branch from the German commercial register"

As a result of the freedom of establishment in the European Internal Market, companies are increasingly expanding beyond national borders and establish branches in other Member States. Under the Eleventh Council Directive 89/666/EEC, these branches are subject to registration and compulsory disclosure in the Member State of establishment. The following article discusses a judgment of the Oberlandesgericht Frankfurt a.M. which had to decide whether the German branch of an English private company limited by shares could be struck from the German commercial register according to the German procedural rules which provide for deletion from the register if a company does not own any assets. The article supports the negative answer given by the Frankfurt court and discusses alternative ways to clear commercial registers of "phantom branches" of inoperative foreign companies.

- ***Bettina Heiderhoff***: "Habitual Residence of Newborns – Application of German PIL in Cases of Same-sex Parents and of Surrogacy"

The two cases have different factual backgrounds. One concerns a married, same-sex couple seeking recognition of double motherhood to a girl that was born by one of the spouses. The child was born in Spain, where both women were recorded as mothers in the birth register. In the other case a child was born via a surrogate mother in India and the intended parents want to bring it to Germany.

By applying the general rules of PIL, and in particular Art. 19 EGBGB, both cases boiled down to the question of where a new-born has its habitual

residence. While this was relatively easy to determine with respect to a girl born from a German mother, with a German habitual residence, and merely a few weeks of factual residence in Spain, it was more difficult in the case of the Indian child. Habitual residence does not depend on legal parenthood, but on the real-life situation. It is important to consider where the baby lives and is cared for. As the period of time that the Indian child will spend in India is open-ended, one would probably rule for habitual residence in India. That decision, however, may have the consequence that the child might leave India immediately, as an Indian residence leads to the application of Indian law and, thereby, most probably to the parenthood of the intended German parents.

Both cases feature strong political aspects which are not, however, mirrored in the decisions. While it seems safe to say that Germany should open up to the recognition of double motherhood or fatherhood in same-sex couples, it is much more complicated to determine the correct position in respect of surrogacy. However, when a child has already been born, and surrendered, by the surrogate mother, and she shows no further interest in the infant, while the intended parents wish to obtain legal parenthood and raise the child, German ordre public must not be used to prevent them so doing or force them to leave the child behind.

- ***Götz Schulze***: "The principal habitual residence"

The decision concerns the disputed question among commentators of whether a person can have several habitual residences at the same time and if so, according to which criterion one of the habitual residences takes precedence over the other.

The wife concerned in the case was a Norwegian national. She demanded maintenance under Art. 18 para. 4, 17 para. 1 sentence 1 in conjunction with Art. 14 para. 1 EGBGB (Introductory Act to the Civil Code), her husband was German. Until their separation the couple lived together in Germany. Thereafter the woman moved out of the matrimonial home and lived with the couple's 17- and 11-year-old children in Norway. Following the separation the husband split his time between stays with his children in Norway and Germany, where he operated a nightclub with his brother. The Higher Regional Court of Oldenburg denies a change of the habitual residence to Norway and thereby a

mutual habitual residence in this country. However, the court leaves the question unanswered as to whether the application of German law is here based on a relative weighting of the habitual residences or whether Art. 5 para. 1 sentence 1 EGBGB concerning multistate nationalities is to be applied equally.

If a clear classification in favour of a country is not possible and if the grouping of contacts leads – as in this case – to an impasse, a multiple habitual residence must be assumed. The principal habitual residence is to be determined by an accordant application of Art. 5 para. 1 sentence 1 EGBGB. The decisive factors are nationality and continuity of living conditions.

- ***Dagmar Coester-Waltjen***: "Die Abänderung von Unterhaltstiteln – Intertemporale Fallen und Anknüpfungsumfang" – the English abstract reads as follows:

The decision of the Nürnberg Court of Appeal concerned the modification of a post-divorce maintenance order. The court rightly applied German family law to the maintenance obligation of the former husband towards his divorced wife. However, some tricky questions arose in determining the applicable law. This applies with regard to the transitional rules of the EU Maintenance Regulation (Art. 75), the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations (Art. 22). The Maintenance Regulation applies only to proceedings initiated from 18 June 2011 on. As in this case the proceedings for modification were instituted already in December 2010, neither the EU Regulation nor the Hague Protocol 2007 applied. However, if the proceedings had been instituted as from 18 June 2011 on, then the rules of the Hague Protocol would have determined the law applicable to maintenance claimed even for periods prior to the entry into force of the protocol – despite the general rule of sec. 22 Hague Protocol 2007. This transitional rule of the „Council decision of 30 November 2009 on the Conclusion by the EU Commission of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations" (OJ L 331 16/12/2009 p.17) is easily overlooked. Other problems concerned the determination of the law applicable to the modification of maintenance orders and to the conflict between several maintenance obligations.

- ***Martin Gebauer***: "Forum non Conveniens, Foreign Plaintiffs and

International Forum Selection Agreements”

One of the most important normative objections against the forum non conveniens doctrine lies in the concern that it attributes a stronger presumption of convenience to the forum chosen by a domestic plaintiff, whereas the suit of a foreign plaintiff is significantly more often dismissed on the basis of forum non conveniens. On the other hand, many courts do not attach importance to the (domestic) defendant's domicile in the forum state when dismissing a suit on the basis of forum non conveniens. This kind of different treatment is confirmed in Cessna Aircraft where the Court of Appeals for the 11th Circuit seems to presume that a foreign plaintiff does not choose to litigate in the United States for convenience.

In Wong v. Party Gaming, the Court of Appeals for the 6th Circuit decided that federal and non state law applies to the enforceability of forum selection agreements in diversity cases. The question had raised unsettled issues under the Erie doctrine. The reasoning of the Court also demonstrates the impact of a forum selection clause on the forum non conveniens analysis.

- ***Dieter Martiny:*** “Beachtung ausländischer kulturgüterrechtlicher Normen im internationalen Schuldvertragsrecht” – the English abstract reads as follows:

The case note analyses a judgment of the Austrian Supreme Court of Justice (Oberster Gerichtshof, OGH) in a case concerning the sale of a Chinese cultural object in Austria which was alleged to have been illegally imported from China via Hong Kong. While it is undisputed that China's Regulations of cultural objects are internationally mandatory rules in the sense of Article 7 para. 1 of the 1980 Rome Convention on the law applicable to contractual obligations, it is difficult to determine whether the other prerequisites are met which would allow the rules under the Convention to be taken into account. Particularly, the „close connection“ is hard to define. However, under the circumstances of the case the Court's correctly reasoned that there was no close connection. The second possible path for the protection of foreign cultural objects, a determination that the contract is immoral under Austrian substantive law, was also rejected and the contract was upheld. Under the new Article 9 para. 3 Rome I Regulation on the law applicable to contractual obligations foreign

overriding mandatory rules may also be given effect under certain conditions which are not easy to define in cases of illegal exports. The case note discusses the continuing legitimacy of taking foreign mandatory laws into account under national substantive law as a factor for immorality such that the nullity of the contract may result.

- ***Sabine Corneloup***: "Zur Unterscheidung zwischen Bestimmungen, von denen nicht durch Vereinbarung abgewichen werden darf, und dem ordre public-Vorbehalt bei internationalen Arbeitsverträgen" – the English abstract reads as follows:

Pursuant to Art. 6 n 1 of the Rome Convention, in a contract of employment a choice of law made by the parties shall not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable in the absence of choice. In the decision of the French Cour de cassation the issue was the mandatory character of French prescription rules. The parties had chosen Spanish law under which the claim of the employee was subject to a limitation period of 20 days whereas the time limit set by French law was of 30 years. The Cour de cassation holds Spanish law to be applicable since the employee has not been deprived of the right of access to the court. This motivation is to be criticized.

- ***Christa Jessel-Holst***: "Approximation of the Macedonian Law with the Rome II-Regulation"

The present contribution discusses the amendment of 2010 to the Macedonian Private International Law Act of 2007. The purpose of this amendment consists in the introduction of the concept of habitual residence as a connecting factor and in the harmonization of Macedonian PIL with the Rome II-Regulation. The Macedonian legal definition of habitual residence is analyzed in comparison with existing models in Belgium, Bulgaria and Romania and contrasted to countries that have decided against a legal definition, like Germany, Turkey or Poland. Before the background of the case Mercredi ./. Chaffe, the introduction of a time-based delimination (Art. 12a MacePILAct: six months period) for establishing habitual residence is criticized. The implementation of the Rome II-Regulation has for the most part been effected verbatim. However, some inconsistencies remain (e.g. renvoi, infringement of intellectual property). The

Rome I-Regulation has so far not been integrated in Macedonia. The contribution also addresses ongoing reforms of PIL in other countries of the region.

- ***Burkhard Hess*** on the conference on the revision of the Brussels I Regulation: "Mailänder Tagung zur Revision der Verordnung Brüssel I, 25./26.11.2011"
- ***Nicolas Nord/Gustavo Cerqueira*** on the conference at the University of Tsinghua on international contracts under the new Chinese PIL: "Internationale Verträge nach dem neuen chinesischen IPR-Gesetz: ein rechtsvergleichender Blick aus Europa – Tagung an der Universität Tsinghua am 28./29.3.2011"
- ***Elsabe Schoeman:*** "New Zealand Conflict of Laws Electronic Database"