Multiple defendants and territorial intellectual property rights: Painer revisits Roche through Freeport

Our colleague Dr. Mireille van Eechoud, currently of double affiliation as an Associate Professor at the Institute for Information Law, Universiteit van Amsterdam and a Visiting Scholar at the University of Cambridge Centre for Intellectual Property and Information Law, was kind to share with us her views on the Painer case (Case C-145/10) and its relation to the preceding EU Court of Justice case law on the matter. Here is her full opinion:

> *Could the CJEU's new stance on art. 6(1) Brussels Regulation 44/2001 be explained by the fact that the Court is very activist of late in shaping areas of copyright law which were not considered harmonized – of which the Painer case is itself an example? Or has the Court taken to heart the criticism unleashed by its Roche judgment on multiple defendants jurisdiction? The Advocate General certainly seemed to, citing among others the position of the European Max Planck Group on Conflict of Laws in Intellectual Property (CLIP). Whatever the reason, the Painer judgment from 1 December 2011 (Case C-145/10) signals a departure from the strict formalist-territorial approach to jurisdiction in intellectual property matters. The Court says that joining defendants under art. 6(1) Brussels Regulation is not precluded 'solely because actions against several defendants for substantially identical copyright infringements are brought on national legal grounds which vary according to the Member States concerned'.*
>
> *In the case at hand, a freelance photographer from Austria claimed infringement of her copyright in portrait photos. She had made a series of portrait photos of a 6 year old girl at a nursery. The girl was later abducted and spent 8 unspeakably horrible years in captivity. The photographer gave prints of the portrait photos to the parents and police. Some of them were subsequently released by Austrian authorities in the context of the search. The girl's eventual escape was a major news item across Europe. Lacking current photos, the defendant newspapers published the old portrait photos. The photographer had not been asked for permission, nor credited.*

The photographer brought various actions in Austrian courts. In these disputes the question whether there was copyright in the photos, or some other right, and what the scope of such protection is under German and Austrian law was hotly debated. The proceedings which led to a preliminary reference were against five newspapers: one established in Austria, the other four in Germany. The Austrian newspaper was only distributed in Austria; the German newspapers had primary distribution in Germany with additional distribution in Austria.

So could the Austrian court assume jurisdiction for the infringements in Germany and Austria, with the Austrian newspaper as anchor-defendant under article 6 Brussels Regulation? The provision allows a plaintiff to consolidate actions against different defendants resident in the EU in one domestic court, 'provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings'. Previously, in the much criticized case C-539/03 – Roche Nederland v. Primus, the Court ruled that a close connection requires a same situation of law and of fact. When claims concern the infringement of territorially distinct patent rights (as granted under the European Patent Convention), for that reason alone there can be no risk of irreconcilable judgments because there is no 'same situation of law'.

In Painer, the Court seems to abandon that reading. The fact that the claims against the defendants concern infringement of the territorially distinct copyrights for Germany and Austria does not of itself preclude the possibility of consolidating them on the basis of article 6 Brussels Regulation. This is the more so, the Court adds, if the applicable laws in question are very similar. The referring Austrian court had concluded that was the case: German and Austrian copyright and related rights law share essentially the regimes for photographs (which is partly due to EU harmonization).

Oddly enough, and unlike the Advocate General, the Court does not refer to its Roche judgment. Rather, it builds its reasoning primarily on Freeport *(case C 98/06). There the Court stated that the fact that claims against defendants have different legal bases (e.g. in contract and tort) does not preclude application of art. 6 per se. The more obvious parallel in intellectual property matters isof course in situations where say the claim against one defendant is based in copyright infringement, and the claim against the co-defendant in contract*

(breach of a distribution agreement for example). I am not so sure that Freeport is easily applied to cases where infringement of copyright in different countries is at stake.

In Roche, A European Patent had been granted through the European Patent Office, which resulted in a bundle of patents for the plaintiff, each equivalent to a national patent for each of the countries applied for. The subsistence and scope of these national patents is very similar across European Patent Convention states. The criticism of (among others) CLIP is that in cases where national intellectual property rights have been unified or harmonized to a great degree, it is artificial to bar a plaintiff from joining claims merely because formally speaking different territorial rights are involved (see the CLIP position).

The defendants in Roche were all part of the same parent company, and basically sold the same allegedly infringing products in their respective local markets. Yet because each defendant acted locally (albeit under the direction of the parent), allegedly infringing the local patent, the Court did not accept there was a same situation of law and fact. In Painer, it is not clear whether there is any connection between the defendants. They may have acted similarly from the perspective of the plaintiff: each published photographs she made, over a similar period and as illustration of news about roughly the same matter. But I don't see how that qualifies as a 'same situation of fact' for art. 6 purposes. Surely, the fact that persons behave in similar ways with respect to a (potentially) copyrighted image does not make the claims closely connected?

The answer to that question is in the Court's observation that 'It is, in addition, for the referring court to assess, in the light of all the elements of the case, whether there is a connection between the different claims brought before it, that is to say a risk of irreconcilable judgments if those claims were determined separately. For that purpose, the fact that defendants against whom a copyright holder alleges substantially identical infringements of his copyright did or did not act independently may be relevant [my italics].' I would argue that whether or not the co-defendants acted independently is in cases like these not a potentially relevant factor, but a crucial factor. If not, in this case our Austrian photographer could sue before Austrian courts any of the German publishers for distributing newspapers with the photos in Germany, because a completely different unrelated paper based in Austria happened to have printed the same

photo. There has to be some relationship between the defendants, or at least between the anchor-defendant and the co-defendants. If not, all that is left is the foreseeability escape the Court articulated in Freeport.

Festschrift for Bernd von Hoffmann has been released

On the occasion of *Bernd von Hoffmann's* 70th birthday *Herbert Kronke* and *Karsten Thorn* have edited a Festschrift entitled **"Grenzen überwinden – Prinzipien bewahren"** (Overcoming Borders – Preserving Principles). It has been published by *Ernst und Werner Gieseking* and contains contributions relating to Private International Law, International Civil Procedure, Comparative Law and International Commercial Arbitration.

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Franzina (Ed.), Commentary on Rome III Regulation

The Italian journal *Le Nuove Leggi Civili Commentate* has published in its latest issue (no. 6/2011) an **extensive commentary of the Rome III Regulation** (Council Regulation (EU) No 1259/2010, implementing enhanced cooperation in the area of the law applicable to divorce and legal separation). The same journal had published, back in 2009, the first article-by-article comment of the Rome I Reg. (see our previous post here).

The commentary has been written, under the editorship of *Pietro Franzina* (Univ. of Ferrara), by a team of Italian scholars: *Giacomo Biagioni* (Univ. of Cagliari), *Zeno Crespi Reghizzi* (Univ. of Milano), *Antonio Leandro* (Univ. of Bari) and *Giulia Rossolillo* (Univ. of Pavia). Here's the comments' list:

> *Introductory remarks: P. Franzina, Z. Crespi Reghizzi; Art. 1: G. Rossolillo; Arts. 2-3: P. Franzina; Art. 4: A. Leandro; Arts. 5-7: G. Biagioni; Art. 8: Z. Crespi Reghizzi; Art. 9: G. Rossolillo; Arts. 10-13: A. Leandro; Arts. 14-15: P. Franzina; Art. 16: G. Rossolillo; Art. 17: G. Biagioni; Art. 18: Z. Crespi Reghizzi; Art. 19: G. Biagioni; Art. 20: G. Rossolillo; Art. 21: Z. Crespi Reghizzi.*

A detailed table of contents is available here.

Katia Fach on Arbitration

Dr. Katia Fach (Universidad of Zaragoza) is author of “Rethinking the Role of Amicus Curiae in International Investment Arbitration”, to be found in 35 *Fordham International Law Journal 510,* and also here (SSRN)

> The intervention of amicus curiae in investment arbitration is a matter of great interest and it will continue generate a legal debate in the future. In the wake of multiple courts and some tribunals, several rules on investment arbitration have increasingly recognized the possibility that the general interest is protected through amicus submissions. The fact that a party of the investment arbitration is a state and problems transcend the interests of the specific parties involved in the arbitration justify the progressive implementation of the principle of transparency, which has been traditionally rejected in commercial arbitration, in the field of investment arbitration.The acceptance of the institution of amicus curiae in BITs and arbitration rules has resulted recently in various NGOs submitting amicus briefs in relevant international arbitrations. Additionally, UNCITRAL and ICC are currently developing two projects in the field of investment arbitration that are going to address the issue of amicus briefs. Taking all of this data as reference, this Note reflects on the most appropriate regulation of the institution of amicus curiae. This means taking into account a multiplicity of factors, both internal -concerning the content and the submission process- and external -referring to the relationship of these non-parties with other participants in investment arbitration-. The approach taken regarding this regulation is multiple, since the institution of amicus curiae is controversial. Against the multiple benefits preached mainly by NGOs, investors believe that the acceptance of amicus curiae brings various injustices. The proposal advocated by this Note is twofold. On the one hand, the acceptance of unsolicited amicus briefs should be governed by a set of criteria able to block any submission that do not benefit the outcome of arbitration and are excessively detrimental to the

> parties and arbitrators of the investment dispute. On the other hand, institutions managing investment arbitrations could establish a new institution exclusively and permanently dedicated to defending the collective interest. This proposal, although suggestive, would imply a major change in the system and therefore their perspectives of success would possibly materialize in the medium to long term.

Also from Katia Fach, see "Ecuator's Atteinment of the Sumak Kawsay and the Role Assigned to International Arbitration", the *Yearbook of International Investment Law and Policy*, 2010-2011, pp. 451-487:

> Article 422 of the 2008 Ecuadorian Constitution prevents the Ecuadorian State from ceding its sovereign jurisdiction to international arbitration entities through entering into Treaties or international instruments. This provision is a clear manifestation of the rejection generated in Ecuador by an *ex ante* and general submission to international tribunals. This chapter discusses in detail the wording of Article 422, highlighting the doubts and difficulties of interpretation posed by this constitutional provision. It also reflects on two events derived from the approval of Article 422: the denunciation of the ICSID Convention and the denunciation of a number of Bilateral Treaties on the Promotion and Guarantee of Investments signed by Ecuador. The chapter also studies some recent judgments of the Ecuadorian Constitutional Court, which have declared many BITs as unconstitutional. A detailed review of these decisions will lead us to make a critical assessment. Finally, it analyzes the most recent manifestations of the Ecuadorian government regarding international investments. These latest contractual and legislative developments force us to reconsider the real impact that Article 422 of the Constitution is having on Ecuadorian economic life.

Cuniberti on the Efficiency of

Exequatur

I have posted Some Remarks on the Efficiency of Exequatur on SSRN. The abstract reads:

> *After the European Council announced that it wanted to suppress intermediate measures in the enforcement of foreign judgments within the European Union, the European Commission has proposed to abolish the procedure whereby courts of the Member states may verify whether foreign judgments meet some basic requirements of the forum (exequatur).*
>
> *The project of abolishing exequatur has attracted strong criticism among European scholars. It has been pointed out that the most important function of exequatur is to verify whether the foreign court did not violate human rights, and that suppressing it would entail dramatically reducing human rights protection in the European Union.*
>
> *Most of these scholars have dismissed the economic argument made by the European lawmaker to justify its project that the existing procedure, which delays and increases the costs of cross-border debt recovery, is simply too costly. This short paper offers some preliminary thoughts on the efficiency of the exequatur procedure. It argues that as human rights violations are, in practice, almost exclusively violations of procedural rights, the impact of human rights violations is essentially to decrease the chances to win on the merits in cases where the symbolic dimension of the right to a fair trial is negligible. The paper thus distinguishes between two categories of cases and argues that, in commercial and consumer cases, exequatur is clearly too costly and should be abolished, while the situation might be different in tort and labor cases.*

The paper is forthcoming in the *Festschrift für Bernd von Hoffmann.*

Stephan on Germany v. Italy

Paul Stephan, who is the John C. Jeffries, Jr. Distinguished Professor of Law at the University of Virginia, comments on the recent judgment of the International Court of Justice in *Jurisdictional Immunities of the State* over at the lawfareblog.

Prize in International Insolvency Studies, 2012

The International Insolvency Institute has announced its 2012 Prize in International Insolvency Studies. The Prize in International Insolvency Studies comprises a Gold Medal Prize for the winning submission as well as a Silver Medal Prize, a Bronze Medal Prize, and several Finalist Prizes. The Prizes are accompanied by an honorarium for the Medal winners.

PRIZE DETAILS: The III Prize is awarded for original legal research, commentary or analysis on topics of international insolvency and restructuring significance and on comparative international analysis of domestic insolvency and restructuring issues and developments. The Prize Competition is open to full and part-time undergraduate and graduate students and to practitioners in practice for less than eight years. Entries must not have been published prior to October 2011 and must be available to be posted on the International Insolvency Institute website. Medal-winning entries will be considered for publication in the Norton Journal of Bankruptcy Law and Practice (West), the Norton Annual Review of International Insolvency (West) and for inclusion in the Westlaw electronic database.

JURY: Entries will be judged by a distinguished panel of leading international insolvency academics and practitioners. The Jury will consist of Co-Chairs Professor Christoph Paulus, Humboldt University, Berlin and Professor Jay L. Westbrook, University of Texas, Austin and Hon. Samuel L. Bufford, Pennsylvania State University, University Park, Pennsylvania; Professor Junichi Matsushita,

University of Tokyo, Tokyo; Hon. Adolfo Rouillon, Senior Counsel, Legal Department, World Bank, Washington, D.C., Professor John A.E. Pottow, University of Michigan, Ann Arbour, Professor Jingxia (Josie) Shi, China University of International Business & Economics, Beijing and Professor Ulrik Rammeskow Bang-Pedersen, University of Copenhagen, Denmark.

SUBMISSIONS/FURTHER INFORMATION: Entries may be of any length but a limit of 20,000 – 30,000 words is preferred. Entries must be received by March 31, 2012. The Gold Medal winner will be honoured at the III's Twelfth Annual International Insolvency Conference in Paris on June 21-22, 2012 and will have all Conference registration fees waived. All Medal Winners and Finalists will be invited to attend the Conference and will be provided with complementary Conference registration. For further details and the terms of the III Prize in International Insolvency Studies, please contact the Executive Director of the International Insolvency Institute, Shari Bedker, at the III's offices in Washington, D.C. at (telephone) (703) 273-6165, (fax) (703) 830-0610 or (email) info@iiiglobal.org

SUMMARY OF TERMS AND CONDITIONS: The International Insolvency Institute will award its 2012 Prize in International Insolvency Studies, for outstanding writing, research or analysis in the insolvency field. The terms of the 2012 Prize Competition are as follows:

1. Candidates must be full or part-time undergraduate or graduate students, researchers or practitioners in practice for less than seven years.
2. The article or research must be on an international or comparative insolvency topic and must be submitted in English.
3. Articles or research in preparation for publication or already published are eligible, provided they were not published before October, 2011.
4. Candidates may submit only one contribution.
5. The Jury may decide not to award the Prize if, in its opinion, no contribution of sufficient quality has been submitted.
6. Entries must be eligible and available to be posted on the III website and published in the Journal of Bankruptcy Law and Practice or the Annual Review of International Insolvency (West and Westlaw).
7. Articles must be submitted before March 31, 2012.
8. Candidates will be informed of the final decision of the jury on or before April 30, 2012.

9. All contributions should be sent to the III c/o Shari Bedker at: info@iiiglobal.org and must be marked as submissions for the III Prize in International Insolvency Studies, 2012.
10. The Gold Medal Prize will be US $3,000; the Silver Medal Prize will be US $2,000; the Bronze Medal Prize will be US $1,000; and up to 6 Finalist Prizes of US $500 may be awarded.
11. The Gold Medal Winner will be invited to attend the III's Twelfth Annual Conference in Paris in June, 2012 to present their work and the III will cover his/her reasonable travel expenses. All Medal Winners and Finalist Prize recipients may attend the 2012 Annual Conference and their Conference registration fees will be waived.

Seminar on Private International Law: Programme

As already announced, the Facultad de Derecho of the Complutense University of Madrid is hosting a new edition of the International Seminar on Private International Law, organised bu Prof. Fernández Rozas and Prof. De Miguel Asensio, on March 2012, the 22 and 23. Prof. Fausto Pocar, Sabine Corneloup, Juan José Álvarez Rubio, Mark D. Rosen, Justyna Balcarczyk, Eva Inés Obergfell, Santiago Álvarez González, Bertrand Ancel, Constanza Honorati, Michael Wilderspin, Janeen M. Carruthers and Darío Moura Vicente, will be main speakers; each lecture will be followed by the presentation of papers on the same subject.

The full schedule is here. Registration is free; just send an email to seminariodiprucm@gmail.com before March, the 15.

Jurisdictional Immunities of the State: the ICJ to Deliver its Judgment in the Germany v. Italy Case

According to a press release, **on 3 February 2012 the International Court of Justice will deliver its judgment in the case concerning *Jurisdictional Immunities of the State*** (Germany v. Italy: Greece intervening) (see our previous post here).

A public sitting will take place at the Peace Palace in The Hague, during which the President of the Court, *Judge Hisashi Owada*, will read the judgment. The public sitting will be broadcast live and in full on the Court's website (see Multimedia, in the Press Room section), **from 10 a.m. local time**.

At the end of the sitting, a press release, the full text of the judgment and a summary of it will be distributed. All of these documents will be made available at the same time on the Court's website, where all the documentation relating to the proceedings is accessible.

Joint Conference European Commission- Hague Conference

At the meeting of the Council on General Affairs and Policy of the Hague Conference, 5-7 April 2011, the EU managed to keep on the agenda the project on accessing the content of foreign law; a joint conference with the Hague

Conference was foreseen in February 2012. Latest news are that it will indeed be held in Brussels in two weeks (Wednesday 15-Friday 17, Borschette Conference Centre). The programme is not yet available on the official websites, but a draft has already been published by Prof. Garau here.