On Regulation (EC) no 2201/2003, art. 20

Among ECJ decisions on Regulation (EC) no. 2201/03, there are already two, both of 2009, affecting art. 20; and another one is pending – aff. 256/09. Such situation highlights the importance of an article which has not yet been paid the attention it deserves: perhaps because much interest has already been given to its antecedent in the Convention on the jurisdiction and enforcement of judgments in civil and commercial matters of 27 September 1968 (art. 24-art. 31 of Regulation no. 44/01). But not everything that has been said about art. 24, or about art. 12 of Regulation (EC) no. 1347/00, forerunner of the current rule, applies in relation to the latter. For example, art. 20 includes two special requirements not listed in art. 24 of the Brussels Convention: urgency, and that the measure is adopted "in respect of persons or assets in that State". According to academics these textual differences do not necessarily carry consequences in terms of a different understanding of art. 20 Reg. 2201/03 and art. 31 Reg. 44/01. But the assert may be discussed: the Borrás Report to the 1998 Convention that precedes Reg. 1347/00, stated in no. 59 that the "presence" condition (persons or assets in the State) is laid down in order to limit the effect of the measures to the State in which they are adopted, whilst measures under art. 24 of the Brussels Convention do not suffer such limitation on their scope.

Art. 20 is also said to closely follow art. 12 of Regulation (EC) no 1347/00: in fact, that's the only useful information provided about the article in the Explanatory Report of the Proposal submitted in 2002 by the Commission [COM (2002) 222 final / 2 of 17 May 2002]. However, one may doubt whether this is true. Let's take the question of the scope of both provisions: art. 12 is said – as it was also said before about art. 12 of the 1998 Convention – to extend to matters not covered by the Regulation. The explanation was as follows: as the main issue in Regulation (EC) no 1347/00 was that of the couple's marital status, a provision on measures concerning assets could not be understood without extending art. 12 beyond the material scope of the Community instrument. In relation to art. 20 of the current Regulation, and in light of the prominence acquired by parental responsibility, this point should be reconsidered: art. 20 could refer only to measures concerning the child's property, taken in the context of matters covered under the

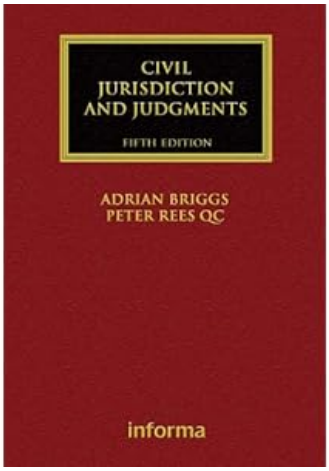
term “parental responsibility”.

The truth is that art. 20 still raises many doubts. There is no definition of “provisional or protective *measures*“, and it is debatable that the jurisprudence of the ECJ on art. 24 Brussels Convention will be enough to solve this absence. Nor is clear what *provisional* means, although we must probably rule out the ECJ’s idea in aff. C-391/95, *Van Uden*, where “provisional” was said to indicate “return to the original status quo”. The “urgency” condition, which must concur even if not required by the applicable national law, raises several questions: what’s an emergency situation, and whether the urgency is a condition to be fulfilled only when measures are adopted by the support court, or also when they stem from the courts having jurisdiction as to the substance of the matter. The “in respect of persons or assets in the State” condition is also a controversial one: does it mean that the measure is territorially limited? Another source of discomfort turns up when it comes to considering the relationship between art. 20 and the relevant provision in the Hague Convention 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the protection of children. The issue is nevertheless unavoidable, due to the Council Decision of 5 June 2008, authorizing certain Member States to ratify or accede to the Hague Convention (OJ, L, no. 151 of 11 June 2008).

With this scenario, is not surprising that the ECJ rulings on art. 20 are awaited with interest; and that we feel a certain disappointment when reading reasonings like those of *Deticek v Sgueglia,* (2009) ECJ C-403/09 PPU. But on this subject we refer to our larger study, forthcoming in the Spanish journal *La Ley*.

Publication: Briggs & Rees, Civil Jurisdiction and Judgments (5th

edn)



Just in case you have not already ordered your copy, or one for your library, the 5th edn (2009) of Briggs & Rees, *Civil Jurisdiction and Judgments* is available. Insofar as there is blurb available, here it is:

> *The new edition has been thoroughly updated to include:*
>
> - *Major decisions of the European Court on the Brussels I Regulation, especially in relation to injunctions and arbitration, but also arising in almost every other area of civil jurisdiction and judgments*
> - *The re-worked provisions for service out of the jurisdiction*
> - *Countless new cases from the English courts*
> - *Damages claims for breach of agreements of jurisdiction and choice of law*

That doesn't really do justice to the work, or the work put into its revision (it last appeared in 2005, so some of the changes are very significant). It isn't cheap, though: £395 from either Informa or Amazon. But delve deeply, for this is worth every penny.

French Case on Foreign Mandatory Rules

There are very few cases ruling on the application of foreign internationally

mandatory rules (*lois de police*). Readers of this blog should therefore be interested by this recent decision of the French *Cour de cassation* discussing the application of a mandatory law of Ghana to a contract governed by French law.

A French company had sold frozen meat (beef) to a buyer based in Ghana. The goods were carried to Ghana by sea, but they could not be delivered because Ghana had passed a law providing for an embargo of French beef. The goods had thus to be repatriated to Le Havre, France. The seller sued various parties involved in the carriage for breach of contract.

In the French proceedings, nobody disputed that the law governing the contract of carriage was French law. But the carrier argued that the contract was void for illegality because it violated the embargo law of Ghana. More specifically, the carrier argued that the contract was void pursuant to one of the provisions of the French Civil code avoiding contracts for illegality, namely Article 1133 which provides that contracts with an illegal *cause* are void. In other words, the carrier argued that the contract was void pursuant to French law, but as the consequence of the existence of the foreign embargo law. This did not convince the Court of appeal of Angers which ruled that the law of Ghana did not govern the contract, that it had thus no authority over the parties, and that the argument that the contract was void, as a matter of French law but because of the law of Ghana, had to be dismissed.

In a decision of March 16th, 2010, the *Cour de cassation* ~~affirmed~~ reversed the decision of the Court of appeal. It held that the Court of appeal should have explored whether the law of Ghana was a mandatory rule in the meaning of Article 7.1 of the 1980 Rome Convention on the Law Applicable to Contractual Obligations, and should thus, as such, have produced effect in France.

The *Cour de cassation* referred explicitly to the first sentence of Article 7.1, which provides

> *When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract.*

It then ruled that the Court of appeal should have explored whether "effect should

have been given" to the foreign law pursuant to Article 7.1. The words "giving effect" were probably chosen with care. The preparatory report written by one of the members of the *Cour de cassation* makes clear that the *Cour de cassation* was well aware of the fact that the issue in the case might not have been to actually *apply* foreign law, but rather to take into consideration its existence and impact on the contract for the purpose of applying French law. It seems indeed that the carrier had not argued that the embargo law governed the issue of the validity of the contract, but rather that it should be taken into consideration for the purpose of applying French law to that issue.

Finally, it does not seem that the argument that foreign law might have been taken into consideration for the purpose of assessing whether the *performance* of the contract was possible was made before any of the courts.

Many thanks to Horatia Muir Watt for the tip-off.

Publication: Fentiman on International Commercial Litigation

Richard Fentiman's treatise on *International Commercial Litigation* (OUP, 2010) is now out. The blurb:

> *The legal framework of cross-border commercial disputes is important and complex in practice, but it is increasingly difficult to discern the subject's structure and assumptions. This book is a definitive account of the law and practice of international commercial disputes in the English courts, which summarises the present state of the law, and articulates its underlying principles. It is intended to be accessible to non-specialist practitioners.*
>
> *The book offers an account of the subject which is comprehensive, yet also concise and highly focused, designed to reflect the perceptions and concerns of*

> *practitioners. A feature of the book is its emphasis on evolving areas of practice, and issues of difficulty. Such topics as the developing law of cross-border injunctions, and the relationship between national and community law are extensively explored. Where the law is uncertain or controversial, the rival arguments are examined and assessed. The emphasis is on the solution of current (or future) problems, in addition to explaining contested issues. It is as much concerned with the impact of litigation on cross-border transactions – including prospective planning and risk-avoidance – as it is with dispute resolution. It examines the scope of party choice, and the legal risks associated with cross-border business. Consideration is given as to how these risks might be avoided or reduced by planning or agreement, by adopting particular business structures, or by opting for alternative forms of dispute resolution.*

We hope to publish a short review of the book in the next few weeks but, in the meantime, here are the necessary purchase details: £175 from OUP, or you can buy it for **£124.99** from Amazon.

Design Tweaks

In an effort to speed up the blog, I have tweaked the design. Most notably, the 'asides' category in the second menu column has disappeared (all those posts can now be found in the main post area with all the others), as indeed has the second menu column itself. All other content from that column has moved into the first column, which you can see to your left. ((Yes, yes, I *know* it's now on the right; the posts are our focus, and so it makes perfect sense for those to be the first thing you see when you arrive, hence the switch.)) The *Journal of Private International Law* logo has (temporarily) been removed; it's a fairly big graphic, which slows down the website. On the basis that 1) you would rather see what you want to see *quickly*, and 2) have probably already subscribed to the Journal (if not, you should), it will not come back until I am sure that it will not impact upon performance.

So, please excuse my dust whist I am 'optimising.' As usual, by all means get in

touch if you have any questions/issues.

French Conference on the Lisbon Treaty

The Seminar of European Law of the University of Urbino will host a conference on the Impact of the Lisbon Treaty on Private International Law (*L'entrée en vigueur du Traité de Lisbonne et le droit international privé*) on March 27th in Paris.

The main speaker will be Didier Boden, who lectures at Paris I University. The speech will be followed by a debate chaired by Professors Marie-Elodie Ancel (Paris Est University) and Dany Cohen (Sciences Po).

The graduation ceremony of the attendees to the 2009 Urbino Seminar will follow.

When: March 27th, 2010, at 4 pm

Where: Hôtel de Galliffet, Istituto Italiano di Cultura di Parigi, 50 rue de Varennes, 75007 Paris

Admission is free, but registration is compulsory at ceje.urbino@gmail.com

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Hess' Response to Mourre

Burkhard Hess has posted at the Kluwer Arbitration Blog a response to *Alexis Mourre's* post which had been a reaction to *Burkhard Hess'* Guest Editorial on the question whether arbitration and European procedural law should be separated or coordinated.

Brussels I Review: Responses to the Commission's Green Paper

The contributions received by the European Commission in response to the Green Paper on the review of the Brussels I reg. (published in April 2009 together with the Commission's report on its application: see our post here) have been recently published on the DG FSJ website.

Over 120 contributions have been collected, from Member States' governments, parliaments and other public authorities, third States (Switzerland), commercial, financial and civil society organisations, NGOs, and the legal and academic sector.

Readers of this blog had the opportunity to read in draft the excellent contribution prepared by Andrew Dickinson, and some comments and responses to his analysis (see this post by Prof. Jonathan Hill and this one by Martin Illmer and Ben Steinbrück).

Among the recent academic initiatives on the review of reg. 44/2001, see also our post on the latest issue of IPRax (2/2010), where some of the papers presented at the conference held in Heidelberg in December 2009 have been published. A two-day conference, organized by the Spanish Presidency of the EU, will be held in Madrid on 15 and 16 March 2010: "Bruselas I: La reforma de la litigación internacional en Europa".

(Many thanks to Federico Garau – Conflictus Legum – and Rafael Arenas – Àrea de Dret Internacional Privat)

Wood Floor Solutions at the ECJ: Art 5(1)(b) Brussels I

Today, the ECJ delivered its judgment in case C-19/09 (*Wood Floor Solutions*): Art. 5 (1) (b) second indent Brussels I is applicable in the case where services are provided in several Member States. *See also our previous posts on the AG opinion and the reference.*

Fourth Issue of 2009's Revue Critique de Droit International Privé

The last issue of the *Revue critique de droit international privé* was just released. It contains two articles and several casenotes.

The first article is authored by Caroline Kleiner, who teaches at the Faculty of Law of Geneva University. It is a study of Interest in Private International Law (*Les intérêts de somme d'argent en droit international privé, ou l'imbroglio entre la procédure et le fond*). The English abstract reads:

> *Private international law has considerable difficulty with the way in which the French Civil Code deals with interests generated by debts which are*

> *enforceable by way of payment of a sum of money. It requires distinguishing between moratory and judicial interests. Moratory interests attach to the substantive relationship between creditor and debtor and are designed to compensate the loss resulting from the temporary unavailability of the sum owed, when payment is late; the existence and period of such interests are governed by the law applicable to the obligation whose performance has been delayed; on the other hand, since its rate depends on a decision of monetary authorities, it must be fixed by the law of the currency in which it is so determined. Judicially created interests are part of procedure and represent the pretium temporis which justifies the recourse to a court in view of the assessment and enforcement of a debt of damages. Hence, in proceedings before a given court, it will be the law of that court governing its functioning which will also govern judicial interests, whatever uncertainty there may be on this point in scholarly writings and in the case-law. In proceedings for recognition and enforcement of foreign judgments, when such interests have been imposed by the foreign court, whatever he applicable law, they remained intangible in the recognizing state at least until enforcement has been ordered, after which they may be relayed by any judicial interest, which the recognizing court may attach to its own judgment. When the foreign court has not provided for any judicial interests, this does not prevent the recognizing court from imposing interests as from the time of its own judgment, on the debt it has declared enforceable.*

I am the author of the second article, which discusses the Recognition in France of English Default Judgments (*La reconnaissance en France des jugements par défaut anglais – A propos de l'affaire* Gambazzi-Stolzenberg). The article is divided in two parts. The first presents the *Gambazzi-Stolzenberg* case. It begins by discussing the various decisions rendered by the supreme courts of New York, France and Switzerland. It then offers comments of the decision of the European Court of Justice. The second parts focuses more specifically on the issue of the recognition in France of English default judgments, and discusses in particular the public policy issue that such judgments raise because they do not give reasons.

Articles of the *Revue Critique* can be downloaded here.