# Publication: Galgano & Marrella, Diritto e Prassi del Commercio Internazionale

*Prof. Francesco Galgano* (emeritus in the University of Bologna Law School and founder of Galgano Law Firm) and *Prof. Fabrizio Marrella* ("Cà Foscari" University of Venice) have recently published "Diritto e Prassi del Commercio Internazionale" (CEDAM, 2010), vol. LIV of the "Trattato di Diritto Commerciale e di Diritto Pubblico dell'Economia", one of the most authoritative Italian legal series, directed by *Prof. Galgano*.

A presentation has been kindly provided by the authors (the complete TOC is available on the publisher's website):

> *The problems affecting cross-border transactions from a legal standpoint as well as arbitration have boomed in the last years. This book is the first systematic and accurate analysis of International Business Law updated to the most important reforms in the European Union such as: the Lisbon Treaty; Regulation Rome I on the law applicable to contractual obligations and Regulation Rome II on the law applicable to non contractual obligations. New competences for international trade negotiations have been attributed by Member States to the EU. Moreover, an entirely new choice of law regime has been introduced in the European Union affecting world international contracts and transnational arbitration. In addition,new instruments have been generated from the business side such as the new UCP 600 (the Uniform Customs and Practice for Documentary Credits, i.e. a set of rules on the issuance and use of letters of credit utilised by bankers and commercial parties in more than 175 countries in trade finance).*
>
> *Beautifully written by two world reputed Authors in the field, the purpose of this work is to closely examine actors and sources of International Commercial Law with particular reference to contracts for the sale of goods and other forms of exports; licensing of intellectual property; and foreign direct investment.*

Title: Diritto e Prassi del Commercio Internazionale, by *Francesco Galgano* and

*Fabrizio Marrella*, CEDAM (series: Trattato di Diritto Commerciale e di Diritto Pubblico dell'Economia, vol. LIV), Padova, 2010, XLVIII-956 pages.

ISBN: 978-88-13-28228-8. Price: EUR 98.

---

# Washington Declaration on Intl Family Relocation

Last week, the Hague Conference on Private International Law and the International Centre for Missing and Exploited Children organized an international judicial conference in Washington DC on cross-border family relocation. The opening remarks of the president of the Centre can be found here.

The following Declaration was then adopted:

> *On 23-25 March 2010, more than 50 judges and other experts from Argentina, Australia, Brazil, Canada, France, Egypt, Germany, India, Mexico, New Zealand, Pakistan, Spain, United Kingdom and the United States of America, including experts from the Hague Conference on Private International Law and the International Centre for Missing and Exploited Children, met in Washington, D.C. to discuss cross-border family relocation. They agreed on the following:*
>
> ***Availability of Legal Procedures Concerning International Relocation***
>
> *1. States should ensure that legal procedures are available to apply to the competent authority for the right to relocate with the child. Parties should be strongly encouraged to use the legal procedures and not to act unilaterally.*
>
> ***Reasonable Notice of International Relocation***
>
> *2. The person who intends to apply for international relocation with the child should, in the best interests of the child, provide reasonable notice of his or her*

*intention before commencing proceedings or, where proceedings are unnecessary, before relocation occurs.*

***Factors Relevant to Decisions on International Relocation***

*3. In all applications concerning international relocation the best interests of the child should be the paramount (primary) consideration. Therefore, determinations should be made without any presumptions for or against relocation.*

*4. In order to identify more clearly cases in which relocation should be granted or refused, and to promote a more uniform approach internationally, the exercise of judicial discretion should be guided in particular, but not exclusively, by the following factors listed in no order of priority. The weight to be given to any one factor will vary from case to case:*

*i) the right of the child separated from one parent to maintain personal relations and direct contact with both parents on a regular basis in a manner consistent with the child's development, except if the contact is contrary to the child's best interest;*

*ii) the views of the child having regard to the child's age and maturity;*

*iii) the parties' proposals for the practical arrangements for relocation, including accommodation, schooling and employment;*

*iv) where relevant to the determination of the outcome, the reasons for seeking or opposing the relocation;*

*v) any history of family violence or abuse, whether physical or psychological;*

*vi) the history of the family and particularly the continuity and quality of past and current care and contact arrangements;*

*vii) pre-existing custody and access determinations;*

*viii) the impact of grant or refusal on the child, in the context of his or her extended family, education and social life, and on the parties;*

*ix) the nature of the inter-parental relationship and the commitment of the applicant to support and facilitate the relationship between the child and the*

*respondent after the relocation;*

*x) whether the parties' proposals for contact after relocation are realistic, having particular regard to the cost to the family and the burden to the child;*

*xi) the enforceability of contact provisions ordered as a condition of relocation in the State of destination;*

*xii) issues of mobility for family members; and*

*xiii) any other circumstances deemed to be relevant by the judge.*

*5. While these factors may have application to domestic relocation they are primarily directed to international relocation and thus generally involve considerations of international family law.*

*6. The factors reflect research findings concerning children's needs and development in the context of relocation.*

***The Hague Conventions of 1980 on International Child Abduction and 1996 on International Child Protection***

*7. It is recognised that the Hague Conventions of 1980 and 1996 provide a global framework for international co-operation in respect of cross-border family relocations. The 1980 Convention provides the principal remedy (the order for the return of the child) for unlawful relocations. The 1996 Convention allows for the establishment and (advance) recognition and enforcement of relocation orders and the conditions attached to them. It facilitates direct co-operation between administrative and judicial authorities between the two States concerned, as well as the exchange of information relevant to the child's protection. With due regard to the domestic laws of the States, this framework should be seen as an integral part of the global system for the protection of children's rights. States that have not already done so are urged to join these Conventions.*

***Promoting Agreement***

*8. The voluntary settlement of relocation disputes between parents should be a major goal. Mediation and similar facilities to encourage agreement between the parents should be promoted and made available both outside and in the*

*context of court proceedings. The views of the child should be considered, having regard to the child's age and maturity, within the various processes.*

***Enforcement of Relocation Orders***

*9. Orders for relocation and the conditions attached to them should be able to be enforced in the State of destination. Accordingly States of destination should consider making orders that reflect those made in the State of origin. Where such authority does not exist, States should consider the desirability of introducing appropriate enabling provisions in their domestic law to allow for the making of orders that reflect those made in the State of origin.*

***Modification of Contact Provisions***

*10. Authorities in the State of destination should not terminate or reduce the left behind parent's contact unless substantial changes affecting the best interests of the child have occurred.*

***Direct Judicial Communications***

*11. Direct judicial communications between judges in the affected jurisdictions are encouraged to help establish, recognise and enforce, replicate and modify, where necessary, relocation orders.*

***Research***

*12. It is recognised that additional research in the area of relocation is necessary to analyse trends and outcomes in relocation cases.*

***Further Development and Promotion of Principles***

*13. The Hague Conference on Private International Law, in co-operation with the International Centre for Missing and Exploited Children, is encouraged to pursue the further development of the principles set out in this Declaration and to consider the feasibility of embodying all or some of these principles in an international instrument. To this end, they are encouraged to promote international awareness of these principles, for example through judicial training and other capacity building programmes.*

# Anti-suit injunctions, again and again

On Thursday, 18 March 2010, the weblog of the *Journal of Intellectual Property Law and Practice* published a piece of news under the title "Exclusive jurisdiction clauses and antisuit injunctions", on a new English case on anti-suit injunctions under the Brussels Regulation (the "other" State being a third State). I have been allowed to reproduce the facts of the case; an analyse by David Wilson and Joanna Silver is to be found here.

*Many thanks to the authors and to Professor Jeremy Phillips, blogmaster of the JIPLP weblog*

"Skype, domiciled in Luxembourg, offered free-to-download software that enabled users to communicate over the internet. Joltid, a BVI company, owned certain software that was integral to Skype's business. Skype and Joltid entered into a written agreement, by which Joltid granted Skype a worldwide licence to use a form of its software, the object code, but retained sole control of the source code. Clause 19.1 of the licence stated:

*Any claim arising under or relating to this Agreement shall be governed by the internal substantive laws of England and Wales and the parties submit to the exclusive jurisdiction of the English courts.*

In March 2009 Joltid, claiming that Skype had breached the licence by using and accessing the source code, purported to terminate it. In response, Skype commenced proceedings in England, claiming that the purported termination was invalid and the licence remained in force. Skype accepted that it had used the source code, but denied this was a breach. According to Skype, Joltid had supplied the source code rather than the object code. This amounted to a variation of the licence. If not, Joltid was estopped from alleging breach or had waived the right to demand strict compliance. In response, Joltid sought a declaration that the licence was validly terminated, as well as an injunction and financial remedies. Joltid subsequently registered its copyright in the source code

in the USA and commenced proceedings in the USA against Skype and its various investors (which were not parties to the licence) for copyright infringement.

Skype claimed that these US proceedings were in breach of clause 19.1 of the licence and sought an anti-suit injunction in the UK proceedings to restrain them. Since Skype was domiciled in Luxembourg, Article 23(1) applies in relation to clause 19.1 of the licence. Lewison J began by assessing whether the claims against Skype in the US proceedings fell within the scope of clause 19.1. Joltid argued that its claims in the US proceedings did not arise out of the licence since they were predicated on the assumption that the licence had been terminated. Lewison J rejected this interpretation as unduly narrow. Interpretation of a jurisdiction clause is a matter of national law (*Benincasa, Knorr-Bremse* (supra), and in *Fiona Trust*, Longmore LJ in the Court of Appeal, applauded by Lord Hoffmann in the House of Lords, stated that 'the words "arising out of" should cover "every dispute except a dispute as to whether there was ever a contract at all"'. Lord Hoffmann added that clause construction should start from the assumption that commercial parties are likely to have intended that all disputes are to be decided by the same tribunal. Accordingly, Lewison J concluded that the US proceedings initiated by Joltid did relate to a dispute covered by clause 19.1.

The court then considered whether Skype was entitled to an anti-suit injunction to prevent any further steps being taken in the US proceedings. Lewison J began by agreeing with Skype that, following Owusu, the UK court should not decline to exercise its exclusive jurisdiction under Article 23(1) on the basis of discretionary considerations such as forum non conveniens and that the UK proceedings should not therefore be stayed in favour of the US proceedings. Lewison J rejected Skype's argument that the tests for staying domestic proceedings and granting anti-suit injunctions were 'two sides of the same coin' and that it followed that, if the court could not stay its own proceedings, it must grant an anti-suit injunction. In *Turner and West Tankers*, the ECJ held that where proceedings are initiated in another Member State in breach of a jurisdiction or arbitration clause, a court should not grant an anti-suit injunction; it is for each court to rule on whether it has jurisdiction to resolve the dispute before it. Skype argued that this line of authority only applies where both jurisdictions are Member States, but Lewison J rejected this. He noted that Skype's argument that there was no discretion to stay the UK proceedings was founded on *Owusu,* where the ECJ drew no distinction between Member and non-Member States. Thus if Skype was right about this

issue, the ECJ's approach to anti-suit injunctions must also be equally applicable in the case of non-Member States. Nonetheless Lewison J concluded that, as a matter of discretion, an anti-suit injunction should be granted. Since there was no dispute that the licence was valid, even if terminated, there was a breach of clause 19.1 and the court would need a good reason before declining to enforce by injunction the parties' contractual bargain on jurisdiction. There was no such reason here. Lewison J considered that the standard *forum non conveniens* arguments prayed in aid by Joltid should be given little weight where, as here, the parties to an agreement of worldwide application deliberately agreed an exclusive jurisdiction clause appointing a neutral territory, and where such factors were eminently foreseeable when the parties entered into the licence. Otherwise, the clause would be deprived of its intended effect since, the more 'neutral' the forum chosen, the less importance the parties must have placed on its convenience for any particular dispute. Another important factor was whether the grant or refusal of the injunction would enable all disputes between the parties to take place in a single forum. In this case, the court's decision either way could not avoid the risk of parallel proceedings; following *Owusu*, the court could not stay the UK proceedings, but it had no jurisdiction to restrain the US proceedings in respect of the parties that did not have the benefit of the exclusive jurisdiction clause."

---

# Commission's Proposal on Applicable Law to Divorce

Yesterday, the European Commission announced that it was releasing its proposal for a Regulation laying down choice of law rules in divorce matters. For the time being, however, only a press release and a memo are available on the site of the Commission.

UPDATE: see comments for the links to the actual proposition

**Freedom of choice**

> *The proposal will allow international couples to choose the applicable law if*

*they were to separate, as long as it is the law of a country to which they have a close connection (such as long-term residence or nationality). For example, it would allow a Swedish-Finnish couple living in Spain to agree that Swedish or Finnish law applies if they were to divorce.*

*The proposal prevents forum shopping because the criteria for choosing the applicable law are strict. Couples must have a close connection to the country and its laws. The partners' choice of law, which must be in writing and signed by both spouses, is based on:*

1. *their common habitual residence;*
2. *their last common habitual residence if one of them still resides there;*
3. *the nationality of one of the spouses; or,*
4. *the law of the court before which the matter is brought.*

**Applicable law in absence of choice**

*If the spouses themselves cannot agree on the applicable law, it is determined on the basis of the following connecting factors:*

- *Divorce and legal separation are primarily subject to the law of the country where the spouses have their common habitual residence;*
- *Failing that, where they had their last recent common habitual residence if one of them still resides there;*
- *Failing that, to the law of the spouses' common nationality; and,*
- *Failing that, to the law of the court before which the matter is brought.*

*Under this formula, the law of the country where the divorce or legal separation was requested will apply in the vast majority of cases. For example, if an international couple living abroad in another EU country asks for a divorce there, the most important factor for the court would be their country of common habitual residence. That country's laws would therefore apply.*

**Foreign Law**

*Many courts currently apply the laws of other countries. The aim of today's proposal is to add more consistency in the way they decide which country's laws to apply.*

*The proposal could lead to the application of a foreign law in limited cases. This is a consequence of the free movement of citizens within the EU. Nevertheless, a court could choose not to apply a country's divorce law if it is manifestly contrary to the country's own public policy – if it is discriminatory, for example.*

*The proposal has been designed to avoid that the application of foreign law leads to delays and additional costs in divorce proceedings. If a court is called upon to apply the law of another Member State, the court can turn to the European Judicial Network in civil and commercial matters (EJN) to obtain further information on the foreign law. All Member States have designated contact points that are responsible for providing information to judges about national law.*

*Information about national divorce laws is already available on the EJN's website. The Commission is currently exploring other measures to facilitate the application of foreign law before the proposal enters into force.*

*The proposal does not in any way harmonise national divorce laws or practices, which remain very diverse for cultural and historical reasons.*

*These rules will apply only to international divorce – where both spouses are from different Member States or live in another Member State than that of their nationality or do not live in the same Member State. It will simply be a helpful set of rules for citizens involved in an international divorce.*

**Third States**

*The proposal may also benefit people from non-participating countries and non-EU countries whose divorce or legal separation is heard before a court of a participating Member State.*

*Take the example of a married American couple living in the south of France. If one spouse moves to an EU country that does not take part in the proposal, such as the Czech Republic, Poland or Slovakia, and the other stays in France, in many cases US divorce law would apply because both spouses have a common nationality, even if they had lived in France for most of their lives. However, if the husband moves to a Member State that is part of the proposal, French law would apply to the divorce because France is the last habitual*

*residence of the spouses.*

*On the other hand, a couple from a participating country may be deprived of the proposal's benefits if the court that is competent to hear the divorce is located in a non-participating country. That would be the case if two French people move to the U.K. and decide to separate.*

*In any case, this French couple would be no worse off after the proposal takes effect in the participating Member States compared to the current situation, which offers no benefits for international marriages.*

**Background**

The press release identified the current situation for cross-border couples as being:

5. *20 EU countries determine which country's law applies based on connecting factors such as nationality and long-term residence so that the spouses' divorce is governed by a law relevant to them.*
6. *7 EU Member States (Denmark, Latvia, Ireland, Cyprus, Finland, Sweden and the UK) apply their domestic law.*

*The Commission first proposed helping international couples in 2006, but the plan (so-called "Rome III" Regulation") did not get the required unanimous support of EU governments. Since then, 10 EU countries (Austria, Bulgaria, France, Greece, Hungary, Italy, Luxembourg, Romania, Slovenia and Spain) said they would like to use so-called enhanced cooperation to advance the measure. Under the EU Treaties, enhanced cooperation allows nine or more countries to move forward on a measure that is important, but blocked by a small minority of Member States. Other EU countries keep the right to join when they want.*

*The Regulation proposed today has no effect on Member States' ability to define marriage.*

**Way forward**

*EU Member States must now vote on whether the 10 countries may proceed*

*with enhanced cooperation. The European Parliament must also give its consent. "10 governments have asked for the Commission to propose a solution. Using the enhanced cooperation procedure is a good sign that the EU has the flexibility to help its citizens, even with difficult legal issues. My goal is to ensure that citizens can take full advantage of their right to live and work across European borders," said EU Justice Commissioner Viviane Reding.*

---

# Extraterritorial Application of U.S. Laws

See this post of Roger Alford on a recent case of the Eleventh Circuit regarding the U.S. Child Sex Trafficking Laws.

---

# Hess and Mourre on the Arbitration Exception

See the rejoinder of Alexis Mourre here.

---

# Conference ´Civil Litigation in a

# Globalizing World´

On 17 and 18 June 2010, the Schools of Law of Erasmus University Rotterdam and the University of Maastricht (the Netherlands) will jointly organize a conference devoted to the subject “Civil Litigation in a Globalizing World; a Multidisciplinary Perspective”.

Globalization of legal traffic and the inherent necessity of having to litigate in foreign courts or to enforce judgments in other countries considerably complicate civil proceedings and access to justice. This triggers the debate on the need for harmonization of civil procedure. In recent years, this debate has gained in importance because of new legislative and practical developments both at the European and the global level. These developments, amongst others the bringing about of the ALI/UNIDROIT Principles of Transnational Civil Procedure (2004) and some recent European Regulations introducing harmonized procedures, as well as problems encountered in the modernization of national civil procedure and in attempts for further harmonization, require deliberation.

Papers will be presented by renowned speakers from the perspectives of legal history, law and economics, policy, private international law and private law. European and global projects in the field of harmonization of civil procedure will be discussed by experts involved in those projects. Furthermore, national papers on specific developments, problems relating to or views on harmonization of civil procedure will be presented by experts from that jurisdiction.

For further information on the program, the speakers and to register, please click here.

# 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”.

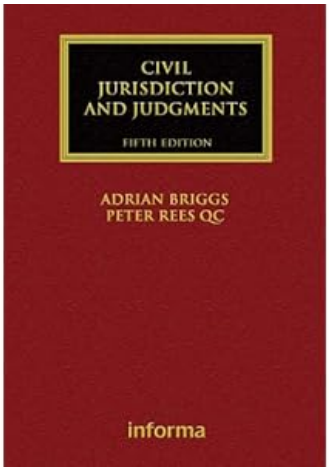
The truth is that art. 20 still raises many doubts. There is no definition of “provisional or protective *measures*“, and it is debatable that the jurisprudence of the ECJ on art. 24 Brussels Convention will be enough to solve this absence. Nor is clear what *provisional* means, although we must probably 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.*