### 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

#### 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.

#### 2007 Lugano Convention in Force

The 2007 Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters entered into force between the Member States of the European Union (including Danemark) and Norway on January 1st, 2010.

Article 69(4) of the new Lugano Convention provides:

The Convention shall enter into force on the first day of the sixth month following the date on which the European Community and a Member of the European Free Trade Association deposit their instruments of ratification.

The report of the Council of the European Union can be found here.

The Convention still does not apply with respect to other contracting states of EFTA, namely Switzerland and Island. It will on the first day of the third month following the deposit of their instrument of ratification (art. 69(5)), and eventually replace the 1988 Lugano Convention.

Thanks to Rafaël Jafferali for the tipp-off

# ECJ: Distinction between "Sale of Goods" and "Provision of Services" in Terms of Art. 5 (1) (b) Brussels

#### I (Car Trim)

On 25 February, the ECJ delivered its judgment in case C-381/08 (Car Trim).

The *Bundesgerichtshof* had referred the following questions to the ECJ for a preliminary ruling:

- (1) Is Article 5(1)(b) of Council Regulation No 44/2001 to be interpreted as meaning that contracts for the supply of goods to be produced or manufactured are, notwithstanding specific requirements on the part of the customer with regard to the provision, fabrication and delivery of the components to be produced, including a guarantee of the quality of production, reliability of delivery and smooth administrative handling of the order, to be classified as a sale of goods (first indent), and not as provision of services (second indent)? What criteria are decisive for the distinction?
- (2) If a sale of goods is to be presumed: in the case of sales contracts involving carriage of goods, is the place where under the contract the goods sold were delivered or should have been delivered to be determined according to the place of physical transfer to the purchaser, or according to the place at which the goods were handed over to the first carrier for transmission to the purchaser?

Thus, the case concerns at a first level the distinction of contracts for the sale of goods and contracts for the provision of services within the meaning of Art. 5 (1) (b) Brussels I in the case of contracts for the supply of goods to be produced where the customer has specified certain requirements. On a second level the case raises the question whether, in case of a sales contract involving carriage of goods, the place where the goods sold were delivered or should have been delivered, is to be determined by reference to the place of physical transfer to the purchaser.

With regard to the **first question**, the ECJ starts from the presumption that it is necessary with regard to the classification of a contract, to determine its characteristic obligation (para. 32 et seq.). In this respect the Court refers to several provisions of European Union law and international law giving some indication that the fact that the goods to be delivered are to be manufactured

does not alter the classification of the contract as a sales contract (para. 34 et seq.).

Further, in favour of a classification of the contract as a contract for the sale of goods, the Court takes into consideration that the raw materials were not supplied by the purchaser (para. 40 et seq.).

Consequently, the Court held that

Article 5(1)(b) [Brussels I] must be interpreted as meaning that where the purpose of contracts is the supply of goods to be manufactured or produced and, even though the purchaser has specified certain requirements with regard to the provision, fabrication and delivery of the components to be produced, the purchaser has not supplied the materials and the supplier is responsible for the quality of the goods and their compliance with the contract, those contracts must be classified as a 'sale of goods' within the meaning of the first indent of Article 5(1)(b) of that regulation.

With regard to the **second question**, i.e. the question whether in case of a sales contract involving carriage of goods, the place where the goods were delivered or should have been delivered is to be determined by reference to the place of physical transfer to the purchaser, the Court held that

the first indent of Article 5(1)(b) [Brussels I] must be interpreted as meaning that, in the case of a sale involving carriage of goods, the place where, under the contract, the goods sold were delivered or should have been delivered must be determined on the basis of the provisions of that contract. Where it is impossible to determine the place of delivery on that basis, without reference to the substantive law applicable to the contract, that place is the place where the physical transfer of the goods took place, as a result of which the purchaser obtained, or should have obtained, actual power of disposal over those goods at the final destination of the sales transaction.

In its reasoning, the Court referred in particular to the aims and objectives of the Brussels I Regulation and held that the place where the goods were physically

transferred (or should have been physically transferred) to the purchaser at their final destination was the most consistent with the Regulation since it met the criterion of predictability as well as proximity (para. 60 et seq.).

See with regard to the referring decision also our previous post which can be found here.

Many thanks to Dr. Martin Illmer and Jens Karsten for the tip-off.