Maher v Groupama Grand Est: Law Applicable to Direct Action Against Insurer

This post was written by Mrs Jenny Papettas, a PhD Candidate and Postgraduate Teaching Assistant at the University of Birmingham.

The Court of Appeal delivered its judgment in the case of *Maher v. Groupama Grand Est*. on 12 November 2009, upholding both the decision and reasoning of Blair J. in the Queen's Bench Division. The case, concerning issues of applicable law in a direct action against an insurer, is noteworthy because it is illustrative of the type of case that will fall to be decided under Article 18 Rome II and serves as a reminder that individual Member State reasoning on these issues is obsolete under that Regulation.

The Claimants, an English couple, Mr. and Mrs. Maher, were involved in a collision in France with a van being driven negligently by French resident M Marc Krass. M Krass was sadly killed in the collision. The claim was brought directly against M Krass' third party liability insurer. Liability and the application of French law to the substantive issues in the case were not at issue. The outstanding issues to be determined by the court were; (1) Whether damages should be assessed in accordance with French law or English law, (2) Whether pre-judgment interest on damages should be determined in accordance with French law or English law.

The Assessment of Damages

Under English law the assessment of damages in tort claims falls to be decided as a procedural issue *(Harding v. Wealands* [2007] 2 AC 1). The issue in *Maher* was whether in a direct action against the tortfeasor's insurer the issue was to be characterised as tortious, with damages being dealt with as a procedural issue under the *lex fori* or as a claim founded in contract, where assessment of damages is dealt with as a substantive issue by the applicable (French) law as stipulated in both the Rome Convention (implemented in English law by Contracts (Applicable Law) Act 1990, s.2 and Sch.1, Art.10(1)(c)) and the Rome I Regulation. Despite

the Defendant's arguments that the claim only arose because it was contractually obliged to indemnify the insured and that therefore the claim was contractual in nature, the Court, citing *Macmillan Inc v. Bishopgate Investment Trust plc (No. 3) [1996]1 WLR 387,* held that it was not the claim that fell to be characterised but each individual issue. Further citing Law Com Report No. 193 (Private international Law: Choice of Law in Tort and Delict (1990)) where it was stated that direct actions against liability insurers are better seen as an extension of a tortious action (para 3.51) the Court held that since liability was admitted and the insurer therefore had to meet the tortfeasor's liability the claim was tortious with the consequence that assessment of damages was procedural and a matter for the *lex fori*.

Pre-judgment Interest

With regard to pre-judgment interest the Court found that the issue was split. The existence of a right to such interest was held to be a substantive issue whilst the calculation of any interest, being partially discretionary in nature under s 35A Supreme Court Act 1981, was procedural. However, although the quantification of interest would as a result be determined with reference to English law, s35A is flexible enough to allow the Court to apply French rates if it is necessary to achieve justice in the circumstances.

Anticipating Rome II

Article 15 of Rome II provides a lengthy list of issues which will be determined by the applicable law, largely disposing of any possibility of subjecting different issues to different laws. This extends to the assessment of damages thereby expanding the scope of Rome II into areas previously classified as procedural under the traditional English substance /procedure dichotomy. Indeed, it was acknowledged during *Maher* that the application of Rome II would have produced a different result in this regard.

However an intriguing question remains as to whether Article 18, which provides for direct actions against insurers, will be interpreted so that the injured party's choice of either the applicable law or the law of the insurance contract will govern the whole claim or simply the question of whether a direct action can be permitted. Furthermore it will be interesting to see how the issue of

characterisation plays out. For example, will the insurer be able to rely on the contractual limits of the policy where the applicable law to a direct action is determined by the law applicable under the Regulation. The only certainty is that such questions will have to be answered with reference to the autonomous definitions which are yet to develop and the methods currently employed by Member State courts will be obsolete for dealing with issues which fall within the remit of Rome II.

Haiti Earthquake and Intercountry Adoption

The Secretariat of the Hague Conference has posted an Information Note to States and Central Authorities on the *Haiti Earthquake and Intercountry Adoption of Children* on its website.

Are We Witnessing the Demise of Alien Tort Statute Litigation?

Over the past few months, various US federal courts have handed down opinions that may presage a more limited role for the Alien Tort Statute in US litigation. The Alien Tort Statute provides US district courts with original jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. In a series of cases starting with *Filartiga v. Pena-Irala*, US courts had been willing to give a robust reading to the statute, thus allowing recovery in cases that pushed the envelope for violations of customary international law. When the Supreme Court issued its most recent opinion on the statute in *Sosa v. Alvarez-Machain*, hope existed in

some quarters that the statute would be more narrowly construed by US lower courts. Decisions following that case, however, continued to follow caselaw allowing for robust recovery.

We may be witnessing a subtle sea change in ATS litigation, which is surprisingly being accomplished not by the US Supreme Court but by US lower courts. In the past six months, five decisions in particular have changed the litigating landscape substantially and will make it harder for plaintiffs to plead and prove ATS cases. These decisions span various subject areas, but each contributes to reining in ATS cases. A short summary of these cases follows.

In *Sarei v. Rio Tinto*, the Ninth Circuit has been willing to consider applying exhaustion of remedies requirements in ATS cases, thus allowing district court judges to dismiss ATS cases unless a plaintiff can show that all local legal remedies have been exhausted or that such remedies are unavailable, ineffective, or futile. In *Turedi v. Coca-Cola* and *Aldana v. Del Monte Fresh Produce*, the Second and Eleventh Circuits have been willing to affirm ATS dismissals on grounds on *forum non conveniens*. In *Sinaltrainal v. Coca-Cola*, the Eleventh Circuit relied on heightened pleading standards enunciated in the Supreme Court's *Iqbal* and *Twombly* decisions, discussed here, to impose a higher standard of pleading on ATS claimants. Finally, and perhaps most importantly, the Second Circuit in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, ruled that in order to find aiding and abetting liability under the ATS, a plaintiff must show "that a defendant purposefully aided and abetted a violation of international law." In changing the standard from mere knowledge to purpose, the Second Circuit has placed a heavier burden on plaintiffs bringing ATS claims.

The upshot of these decisions is that from pleading to proof to discretionary doctrines like *forum non conveniens* US federal courts are perhaps closing the door on many ATS cases. While this movement will be favorable to defendants, at the level of process it is a surprising outcome for several reasons. Congress has known since *Filartiga* that there was potential for ATS abuse and has done nothing about it. In the wake of congressional silence, US courts had been hesitant for 28 years to restrict the statute's use, and rather looked to the US Supreme Court to provide guidance. The Supreme Court's guidance in *Sosa* was opaque at best. Faced with such minimal direction, US lower courts have been forced to make a choice regarding the ATS. Momentum appears to be gathering in favor of choosing to limit ATS litigation. As such, US lower courts have been

forced to use discretionary judicial doctrines to cabin the reach of a congressional statute.

While it may be too soon to say that the death knell has sounded for ATS litigation, these developments show that we may be witnessing the demise of ATS litigation.

Choice of Law in American Courts 2009

Once again, Dean Symeon Symeonides has compiled his annual choice of law survey. Here is the abstract:

"This is the Twenty-Third Annual Survey of American Choice-of-Law Cases. It is written at the request of the Association of American Law Schools Section on Conflict of Laws and is intended as a service to fellow teachers and students of conflicts law, both within and outside the United States. Its purpose is to inform, rather than to advocate.

The Survey covers cases decided by American state and federal appellate courts from January 1 to December 31, 2009, and posted on Westlaw before the end of the year. Of the 1,490 conflicts cases meeting both of these parameters, the Survey focuses on those cases that may contribute something new to the development or understanding of conflicts law – and particularly choice of law.

For the conflicts afficionados, 2009 brought many noteworthy developments, including the enactment of the second choice-of-law codification for tort conflicts in the United States, and a plethora of interesting cases, such as the following:

– Several cases brought under the Alien Torts Statute (ATS) involving human rights abuses in foreign sites, including Iraq's Abu Ghraib prison, one case denying a Bivens remedy to a victim of "extraordinary rendition," and one case allowing an ATS action against an American pharmaceutical company for

nonconsensual medical experiments on children in Nigeria;

– Two cases holding that the Holy See was amenable to suit under the tortious activity exception of the Foreign Sovereign Immunity Act for sexual abuses allegedly committed by clergymen in the United States;

– Two cases declaring unconstitutional two California statutes (dealing with Nazi looted artwork and the Armenian Genocide, respectively) as infringing on the Federal Government's exclusive power over foreign affairs;

– Several cases dealing with the recognition of same-sex marriages and their implications on issues of parentage, adoption, and child custody; Several cases striking down (and a few enforcing) class-action or class-arbitration waivers in consumer contracts;

– A Minnesota case holding that Panama's blocking statute did not prevent dismissal on forum non conveniens grounds an action arising from events occurring in Panama; and

– A case of legal malpractice for mishandling a conflicts issue, a case involving alienation of affections and "criminal conversation," and the usual assortment of tort, product liability, and statute of limitation conflicts."

The full survey is available for free here.

Thanks to Dean Symeonides for providing this valuable resource on the state of American conflicts law.

ERA Conference on European Contract Law

Much debated issue of harmonisation of the European contract law by means of the Common Frame of Reference is topic of the ERA conference taking place on 18 and 19 March 2010 in Trier, Germany. More precisely, the conference titled

“European Contract Law: EU Consumer Law Revision and the CFR. Towards an optional instrument?” will address different aspects of adapting the academic DCFR to fit the purpose of the “political” CFR, the possibility for linking the CFR and the proposed Consumer Rights Directive, as well as the prospects of the CFR serving as an optional instrument.

The speakers at the conference include: **Mr Giuseppe Abbamonte**, DG Justice, Freedom and Security, European Commission, Brussels; **Professor Christian von Bar**, European Legal Studies Institute, University of Osnabrück; **Professor Hugh Beale**, University of Warwick; **Professor Eric Clive**, University of Edinburgh; **Professor Bénédicte Fauvarque-Cosson**, University Panthéon-Assas, Paris; **Mr Rafael Gil Nievas**, Permanent Representation of Spain to the EU, Brussels; **Professor Piotr Machnikowski**, University of Wroclaw; **Dr Chantal Mak**, University of Amsterdam; **Professor Guillermo Palao Moreno**, University of Valencia; **Mr Patrice Pellegrino**, Senior Adviser, EuroCommerce, Brussels; **Ms Nuria Rodríguez Murillo**, Senior Legal Officer, BEUC, Brussels; **Professor Hans Schulte-Nölke**, European Legal Studies Institute, University of Osnabrück; **Professor Matthias E. Storme**, KU Leuven and University of Antwerp; **Ms Diana Wallis**, Vice-President of the European Parliament, Brussels/Strasbourg.

The conference web page is accessible here.

Fraudulent alienation of foreign immovables and the Moçambique rule in the Western Australian Court of Appeal

Singh v Singh (2009) 253 ALR 575; [2009] WASCA 53, in the Western Australian Court of Appeal, was a dispute between two brothers, both resident in Western Australia. One, the plaintiff, claimed that the alienation by the other, the

defendant, of real estate in Malaysia was made with the intent to defraud creditors, within the meaning of s 89(1) of the *Property Law Act 1969* (WA). (That section is the modern equivalent in Western Australia of the Elizabethan statute 13 Eliz c 5, which has been reproduced in all Australian states and the Commonwealth.)

The defendant owed the plaintiff money arising from the purchase of a restaurant in Western Australia. After the plaintiff commenced an action in Western Australia to recover the debt, the defendant transferred his interests in real estate both in Western Australia and in Malaysia to relatives. He transferred the Malaysian property to his wife and daughter, also resident in Western Australia. The instruments of transfer were all executed in Western Australia. As to the Malaysian property, the plaintiff sought orders restraining the wife and daughter from dealing with the property and that they deliver up vacant possession for the property to be sold at auction. The defendant sought summary judgment on the basis that the Supreme Court of Western Australia had no jurisdiction under the *Moç*ambique rule or alternatively that the proceeding should be stayed on the grounds of *forum non conveniens*. A Master dismissed the defendant's application and the defendant appealed to the Court of Appeal.

Pullin JA (with whom the rest of the Court of Appeal agreed) dismissed the appeal. Pullin JA held that the plaintiff's claims fell within an exception to the *Moçambique* rule, saying (at [22]):

> *The case does not concern the Moçambique rule itself. The [plaintiff]'s claim falls within an exception to the rule. This is because in this case the [plaintiff] does not deny that the [defendant] is the legal owner of the Malaysian land, ie the registered proprietor and does not seek an in rem judgment. His complaint is that the [defendant] became the registered proprietor by reason of the train of events beginning in Perth, when the [defendant] signed a transfer of the Malaysian land, and ending with the registration of the transfer in Malaysia. It was contended that this was an alienation of property with the intent of the appellant to defraud his creditors. The [plaintiff] having become aware of the alienation of the Malaysian property elected to exercise his right to avoid the alienation based on his allegation that the [defendant] had the intent to defraud. In the Supreme Court, he asks for declarations concerning the conduct of the [defendant] and the [wife and daughter] and in personam relief against [them]. If the [plaintiff]'s claims are upheld then the court will 'act upon the*

> *conscience' of the [defendant] and his wife and daughter. The jurisdiction is not over the property but over the person of each of [them].*

His Honour referred to various cases in which claims in equity based on fraud provided an exception to the *Moçambique* rule and concluded (at [32]):

> *The Western Australian Parliament must be taken to have known of the equitable jurisdiction of its courts to make decrees to deal with fraudulent dealing of foreign immovable property by a person within the jurisdiction and it is therefore clearly arguable that it must have intended to legislate to confer the right on a person, prejudiced by an alienation of foreign immovable property with intent to defraud creditors, to avoid such a disposition.*

Pullin JA further considered that it was at least arguable that any judgment of the Supreme Court of Western Australia could be enforced in Malaysia. In any event, his Honour agreed with the plaintiff's submission that since the relief sought was *in personam* relief against the wife and daughter, this issue did not arise, because it could be enforced against them in Western Australia.

Pullin JA also rejected the defendant's submission that, for various reasons, the transfer of the Malaysian property did not fall within the terms of the Act. In particular, his Honour held that the Act was not confined to property in Western Australia, but extended to applications by persons resident in Western Australia to set aside alienations of foreign property by acts performed within the state by other persons resident in the state. This was not an extraterritorial operation of the Act because (at [75]): 'Parliament does not legislate extraterritorially if it legislates concerning fraudulent conduct (occurring in the state) by a person resident within the state.'

Finally, Pullin JA considered that the connections to Western Australia meant that the Supreme Court was not *forum non conveniens* (in the sense of a clearly inappropriate forum).

Australian article round-up

At the beginning of a new year, readers may be interested in the following Australian articles, which were published throughout last year and escaped a post at the time:

- Chief Justice Spigelman, 'The Hague Choice of Court Convention and International Commercial Litigation' (2009) 83(6) *Australian Law Journal* 386
- Chief Justice Spigelman, 'Cross-border insolvency: Co-operation or conflict?" (2009) 83 *Australian Law Journal* 44
- Amrit MacIntyre, 'Taxation of investments by foreign sovereigns' (2009) 83 *Australian Law Journal* 752
- Daril Gawith, 'Cost-effective redress for disputed/failed low-value international consumer transactions: Current status and potential directions' (2009) 37 *Australian Business Law Review* 83
- Daniel Clarry, 'Contemporary approaches to market definition: Taking account of international markets in Australian competition law' (2009) 37 *Australian Business Law Review* 143

German Judgment on Rome II

Even though the decision is not really new anymore and the case has been discussed already – at least with regard to certain aspects concerning the temporal scope of Rome II – it might still be worth mentioning since it is the first judgment of the German Federal Court of Justice (Bundesgerichtshof, BGH) applying the Rome II Regulation.

The case concerns an action brought by a registered association in terms of § 4 Unterlassungsklagengesetz, UKlaG (Injunctive Relief Act) seeking an injunction to prevent an airline established in Latvia from using a particular clause in its general terms and conditions towards consumers.

With regard to the question of **international jurisdiction**, the BGH held that German courts were competent to hear the case on the basis of Art. 5 No. 3 Brussels I Regulation since the use of unfair general terms of conditions constituted a "harmful event" in terms of Art. 5 No. 3 Brussels I Regulation. In this respect, the BGH referred to the ECJ's judgment in *Henkel* (C-167/00) where the ECJ had held that "[t]he concept of 'harmful event' within the meaning of Article 5 (3) of the Brussels Convention is broad in scope […] so that, with regard to consumer protection, it covers not only situations where an individual has personally sustained damage but also, in particular, the undermining of legal stability by the use of unfair terms which is the task of associations such as […] to prevent." (ECJ, C-167/00, para. 42).

With regard to the **applicable law** concerning the claim for injunctive relief against the use of unfair terms, the BGH referred to Regulation (EC) No. 864/2007 (Rome II) and held that German law – and therefore §§ 1, 2, 4a UKlaG – was applicable in this case: According to Art. 4 (1) Rome II the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country in which the indirect consequences of that event occur. In the present context, the country in which the damage occurs or is likely to occur (Art. 2 (3) b) Rome II) is, according to the court, the country where the unfair general terms were used or are likely to be used and therefore the country in which the consumers' protected collective interests were affected or are likely to be affected. In support of this interpretation, the BGH referred to Art.6 (1) Rome II according to which the law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the country where the collective interests of consumers are, or are likely to be, affected. In this respect, the BGH left the question open whether Art. 6 Rome II is directly applicable in the present context, since, according to the court, the underlying rationale – namely that consumers should be protected by the law of that country where their collective interests are affected – applied in the present context as well.

With regard to the **temporal scope of application** of Rome II – which is contentious in view of the not unambiguous provisions of Art. 31 and Art. 32 of the Regulation (see in this respect the abstracts of the articles by *Glöckner* and *Bücken* which can be found here) – the BGH seems to adopt, as it has been

pointed out already by *Professor von Hein* in his recent comment, the point of view according to which the Regulation entered into force on 11 January 2009. The BGH, however, did not discuss the problems surrounding Artt. 31 und 32 Rome II.

Concerning the applicable law, the BGH emphasised that a distinction had to be drawn with regard to the law applicable to the claim for injunctive relief and the law applicable to the validity of the term in question (para. 15, 24 et seq.): In this respect, the BGH stated that according to § 1 UKlaG an injunction could be sought if general terms and conditions were used which are invalid under German law (§§ 307-309 Civil Code, BGB). Thus, injunctive relief under this provision presupposed that German law applied with regard to the validity of the terms in question. The court emphasised that the application of German law with regard to the claim for injunction did not imply that the validity of the standard term in question was governed by German law as well (para. 25). In this context, the court pointed out that this resulted from an interpretation of § 1 UKlaG and § 4a UKlaG: While an injunction under § 1 UKlaG required an infringement of German law, injunctive relief could be sought according to § 4a UKlaG in case of intra-Community infringements of laws that protect consumers' interests in terms of Art. 3 b) Regulation (EC) No. 2006/2004. Thus, according to § 4a UKlaG, claims for injunctive relief could be brought irrespective of whether German consumer protection laws had been infringed, but rather also in cases where any other consumer protection laws – which were encompassed by § 4a UKlaG – had been violated. As a consequence, the court stated that the applicable consumer protection law had to be determined independently. The validity of general terms was governed by the law of the contract (para. 29). In this respect the court held that Latvian law had to be applied according to German PIL rules (Artt. 28 (1), 31 (1) EGBGB (German Introductory Act to the Civil Code)) with regard to the validity of the questioned standard terms since Latvia was the country the contract was most strongly connected with: According to Art. 28 (2) S. 1, 2 EGBGB – which was applicable in the absence of a special choice of law rule with regard to contracts for the carriage of passengers by air – it is presumed that the contract shows the closest connection to the country in which the party who is required to perform the duty characterising the contract has its principal establishment at the time of the conclusion of the contract. Since in case of contracts as the one in question the transport had to be regarded as the

characteristic duty and the air line had its principal place of establishment in Latvia, Latvian law was applicable with regard to the validity of the standard term.

The court's further considerations on the question whether the contract is more closely connected with another country – which would have rebutted the presumption provided by Art. 28 (2) EGBGB according to Art. 28 (5) EGBGB – are of particular interest with regard to Rome I and the Brussels I Regulation: According to the court, a closer connection to another country, in particular to Germany, could neither be assumed only due to the fact that the defendant's website was directed at customers in Germany (para. 36), nor could a more closer connection to Germany be assumed on the basis that Germany was the place where the services were provided (para. 37) since in case of cross-border flights it was not possible to determine exactly in which country the characteristic performance was actually provided. In this context, the BGH referred to the ECJ's judgment in C-204/08 (*Rehder*) on the interpretation of Art. 5 No. 1 b) Brussels I Regulation.

Further, the court held that also the aim of consumer protection did not result in a closer connection to German law: Even though Art. 29 (2) EGBGB reflected this aim by stating that "in the absence of a choice of law consumer contracts […] are governed by the law of the country where the consumer has his or her habitual residence", this provision was not applicable according to Art. 29 (4) EGBGB with regard to contracts of carriage (see para. 38). In this context the BGH referred to the Rome I Regulation and pointed out the difference between Art. 5 (2) Rome I (which was not yet applicable in this case) and Art. 29 (4) No. 1 EGBGB (i.e. Art. 5 (4) Rome Convention): While Art. 5 (2) Rome I Regulation now states that – in the absence of a choice of law – the law applicable to a contract for the carriage of passengers shall be the law of the country where the passenger has his habitual residence, provided that either the place of departure or the place of destination is situated in this country, Art. 5 (4) (a) Rome Convention (Art. 29 (4) No. 1 EGBGB) did not attribute such a significance to consumer protection.

The judgment of 9th July 2009 (Xa ZR 19/08) can be found (in German) at the website of the German Federal Court of Justice.

There are, as far as I could see, two case notes (in German) by now:

Wolfgang Hau, LMK 2009, 293079

Ansgar Staudinger/Paul Czaplinski, NJW 2009, 3375

Many thanks to Dr. Carl-Friedrich Nordmeier and Professor Jan von Hein.

AG Opinion on Art. 5 No. 1 (b) Brussels I

As pointed out already in the "asides category", on 12 January 2010 AG Trstenjak's opinion in case C-19/09 (*Wood Floor Solutions*) on Art. 5 No. 1 Brussel I has been published.

Since the opinion is not available in English (yet), here's a short summary:

The case concerns basically the questions, whether Art. 5 No. 1 (b) second indent Brussels I Regulation is applicable in case of a contract for the provision of services where the services are provided in several Member States and which criteria should be applied for determining the court having jurisdiction.

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

> *1. (a) Is the second indent of Article 5(1)(b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('Regulation No 44/2001') applicable in the case of a contract for the provision of services also where the services are, by agreement, provided in several Member States?*
>
> *If the answer to that question is in the affirmative,*
>
> *Should the provision referred to be interpreted as meaning that*
>
> *(b) the place of performance of the obligation that is characteristic of the contract must be determined by reference to the place where the service*

provider's centre of business is located, which is to be determined by reference to the amount of time spent and the importance of the activity;

(c) in the event that it is not possible to determine a centre of business, an action in respect of all claims founded on the contract may be brought, at the applicant's choice, in any place of performance of the service within the Community?

2. If the answer to the first question is in the negative: Is Article 5(1)(a) of Regulation No 44/2001 applicable in the case of a contract for the provision of services also where the services are, by agreement, provided in several Member States?

In her opinion, the AG turns first to the question whether the reference is admissible at all (para. 47 et seq.). The question of **admissibility** arises in the present case since under the former Art. 68 EC-Treaty only courts against whose decisions there is no judicial remedy under national law were competent to request the ECJ to give a preliminary ruling on the interpretation of Community law. (Thus, this question will not arise under the Lisbon Treaty since under Art. 267 of the Treaty on the Functioning of the European Union this restriction does not exist anymore).

In the present case it is questionable whether the referring court can be regarded as a court of last instance in terms of (the former) Art. 68 EC-Treaty since the question whether there are judicial remedies against the decision of the *Oberlandesgericht Wien* depends – according to Austrian civil procedural law – on the decision of the referring court: As the AG points out, in case the referring court should confirm the decision of the first instance court, there would be be no remedy against its decision – and vice versa (para. 48 et seq.).

According to the AG, the reference is admissible: She points out that otherwise the referring court would – as intended – confirm the first instance court's ruling which would result in the fact that – under Austrian law – there would be no remedy against this decision; i.e. the referring court would (then) be a court of last instance in terms of Art. 68 EC (para. 50).

In the AG's opinion, the mere possibility that the referring court *might* be the court of last instance has to be regarded as sufficient for the purposes of

admissibility. Thus, *in favorem* of admissibility, the AG regards the reference as admissible (para. 50).

With regard to the **first question (1 (a))** (para. 52 et seq.), i.e. the question of the applicability of Art. 5 (1) b second indent Brussels I with regard to contracts for the provision of services if the services are provided in different Member States, the AG refers to the judgments given by the ECJ in *Color Drack* and in particular *Rehder*: In *Color Drack*, the ECJ held with regard to the sale of goods that the first indent of Art. 5 (1) (b) Brussels I has to be interpreted as applying where there are several places of delivery *within a single* Member State. Further, the Court stated that the court of the principal place of delivery – which had to be determined on the basis of economic criteria – had jurisdiction. In the absence of determining factors for establishing the principal place of delivery, the plaintiff could sue the defendant in the court for the place of delivery of its choice.

In *Rehder* – which has been decided *after* the Austrian court had referred the present questions to the ECJ – the Court has already answered the question of whether Art.5 (1) (b) second indent Brussels I is applicable with regard to provisions of services where the provision is effected in *different* Member States. In this decision the Court held that "[t]he factors on which the Court based itself in order to arrive at the interpretation set out in *Color Drack* are also valid with regard to contracts for the provision of services, including the cases where such provision is not effected in one single Member State" (*Rehder*, para. 36). Thus, the AG concludes that Art. 5 No.1 (b) second indent Brussels I is applicable with regard to contracts for the provision of services also in cases where the services are provided in several Member States (para. 67)

With regard to the question whether the place of performance of the obligation that is characteristic of the contract must be determined by reference to the place where the service provider's centre of business is located (**question 1 (b)**), the AG emphasises the principle of predictability as well as the principle of the closest linking factor (para. 70 et seq.) which are crucial for the determination of jurisdiction.

Also in this respect, the AG refers to the ECJ's decision in *Rehder* where the ECJ has held that "the place with the closest linking factor between the contract in question and the court having jurisdiction [is] in particular the place where,

pursuant to that contract, the main provision of services is to be carried out" (*Rehder*, para. 38).

The AG argues that these considerations apply to this case as well, taking into account, however, that it has not been agreed upon in the present case where the main provision of services has to be carried out. Therefore, under these circumstances it is – according to the AG – decisive where the main provision of services was actually carried out, which has to be determined by the national court (para. 80).

With regard to **question 1 (c)** the AG argues that, in the event that it is not possible to determine the place where the main provision of services was carried out, with regard to commercial agency contracts, the place of establishment of the commercial agent is regarded as the place of the provision of services (para. 94).

See with regard to this case also our previous post on the reference which can be found here.

Abbott v. Abbott Argument Round-Up

The Supreme Court of the United States heard argument in *Abbott v. Abbott* this past week. *Abbott* is the rare family-law case before the Supreme Court involving an American child taken to Texas from his home in Chile by his mother, without his father's consent. Under the 1980 Hague Convention on the Civil Aspects of Child Abduction, children must be automatically returned to the country from which they are taken, so long as the removal was "in breach of rights of custody." The Supreme Court is asked to decide whether the father had a "right of custody" under the treaty, because at the time of the divorce the Chilean family court—and Chilean law as a matter of course—entered a "ne exeat" order prohibiting either parent from removing the child from the country without the consent of the other.

The transcript of the oral argument is available here, and Dahlia Lithwick has a great summary of the argument over at Slate. In her experienced view, "[l]istening to the justices argue over an international child-custody case is a bit like watching them ride the mechanical bull. They aren't experts, but they're ever so willing to go down trying." Justices Ginsburg, Breyer and Roberts were especially active in the argument, positing a wide array of pointed hypotheticals to test the limits of what constitutes a ne exeat right under foreign law. For example, Justice Breyer posited early in the argument:

> *[What if] the woman is 100 percent entitled to every possible bit of custody and the man can see the child . . . on Christmas day at 4:00 in the morning, that's it. Now there's a law like Chile's that says, you cant take the child out of the country without the permission of the of the father. . . . Are you saying that that's custody? . . [Wouldn't that] turn the treaty into a general: return the child, no matter what?*

According to the SCOTUSBlog, another scenario itched at Justice Breyer so that he raised repeatedly during the argument: What if the custodial parent – presumably the one with whom the child would be better off – is the one who moves the child abroad and the non-custodial parent is the one requesting return? In particular, what if that non-custodial parent is akin to a "Frankenstein's monster" whom the family-law judge denied any rights over the child? If the Convention grants such a parent custody rights, Breyer insisted he could not see the "humane purpose" behind it.

By the end of the petitioner's argument, Chief Justice Roberts and Justices Sotomayor and Ginsburg, at least, seemed satisfied that, in such exceptional circumstances, the Convention would allow a parent to escape abroad with their child. Article 13(b) of the Convention got a bit more attention than the case—or the parties' papers—would have envisioned.

Perhaps prodding the court to issue another *Aerospatialle* -style decision, Karl Hays—the attorney for the Respondent—insisted that a parent left behind could resort to the legal system of the country where the child was taken, using laws such as the Uniform Child Custody Jurisdiction and Enforcement Act in the United States, to seek enforcement of their existing rights of access or custody. Justice Scalia dismissed that argument, scoffing, "If these local remedies were effective,

we wouldn't have a treaty."

For his part, Justice Antonin Scalia, whom Lithwick describes as the "sentinel of international law" on the Court and in keeping within his views in Olympic Airways, pointed out that most of the 81 countries that have signed the Hague treaty have agreed that a ne exeat right is also a right of custody. Here is Scalia's exchange with counsel for respondent:

> *Justice Scalia: Most courts in countries signatory of the treaty have come out the other way and agree that a ne exeat right is a right of custody, and those courts include U.K., France, Germany, I believe Canada, very few come out the way you—how many come out your way?*
> *Mr. Hays: Actually, Your Honor, the United States and Canada do, and the analysis—*
> *Justice Scalia: Well, wait … You're writing our opinion for us, are you?*
> *Mr. Hays: … There have only been seven courts of last resort that have heard this issue. There are some 81 countries that belong—*
> *Justice Scalia: Yes, but, still, in all, I mean, they include some biggies, like the House of Lords, right? And … the purpose of a treaty is to have everybody doing the same thing, and … if it's a case of some ambiguity, we should try to go along with what seems to be the consensus in … other countries that are signatories to the treaty.*
> *Mr. Hays: If, in fact, there were a consensus, but … there is not a consensus in this instance….*

Justices Breyer and Ginsburg then entered the fray with Justice Scalia and the three start counting countries, to which Hays made "the point that . . . if you have one or two or even three countries that have gone one way and then you have other countries that have gone the other way, that there's not a clear-cut overwhelming majority of the other jurisdictions that have ruled in favor of establishing ne exeat orders…." To which Scalia responds, "We will have to parse them out, obviously."

As Roger Alford at Opinion Juris has pointed out:

> *[T]his exchange raises a great question of country-splits in treaty interpretation. Several justices appeared willing to interpret an ambiguous treaty provision consistent with the general consensus of signatory nations. But*

> *respondent argues that there is no clear consensus and only a handful of countries out of 81 signatories have even addressed the issue. So even assuming the Court takes the approach suggested by Justice Scalia in Olympic Airways and looks for signatory consensus, what's the Court to do when there are few voices from abroad and those voices are not consistent? Is there still a role for comparative interpretive analysis in that context?*

Lithwick concludes that "[t]he most interesting thing about [the] argument in Abbott v. Abbott is that it breaks down all the normal divisions on the court: left versus right, women versus men, pragmatists, internationalists, textualists, idealists … all of it flies out the big ornamental doors as the court grapples with this new problem of international child abduction at the grittiest, most practical level. It feels nice. Less an ideological smack down than a good, old-fashioned family argument. I wouldn't get too used to it. But I enjoy it while I can."

A decision is expected before the end of June. Previous coverage of this case on this site can be found here and here.