Antisuit Injunction Denied by French Court

Yesterday, the Paris first instance court (*Tribunal de grande instance*) has denied an antisuit injunction in the high profile *Vivendi* case.

In July 2002, shareholders of Vivendi Universal brought a securities fraud class action before a U.S. Court in New York against the company and two of its formers officers, Jean-Marie Messier and Guillaume Hannezo. Vivendi is a French company, and so are the two officers. But Messier and Hannezo moved to New York to direct corporate operations in the relevant period. It is alleged that they made financial misrepresentations while living and working in the US. Some of the shares were traded in Paris and held by French shareholders (the French press reports that they would amount to 60% of the shareholders). Some other shares were traded on the New York stock exchange and held by North-American shareholders.

The French action was initiated in October 2009 by Vivendi against two French shareholders and ADAM, a French entity specialized in the defence of minority shareholders which participates to the American proceedings. Vivendi sought compensation for the costs of the American proceedings and an injunction ordering the defendants to quit the American class action under the threat of a financial penalty (*astreinte*) of € 50,000 per day.

Vivendi argued that the American action was an abuse of process and that the French court should grant it a remedy. In a nutshell (the full text of Vivendi's complaint can be found here), the arguments of Vivendi were:

- that a French court was the "natural judge" of a case involving so many French parties (the figures put forward by Vivendi in the complaint were that 40% of the shareholders were French, and held 75% of the shares)
- that, although the defendants were entitled to sue both in the US and in France, they had abused their right by suing in the US for the sole purpose of preventing the natural judge of the dispute from deciding it
- that the defendants were abusing their right to initiate proceedings in the US because they would not bear the consequences of the procedure

should they lose. They would not have to pay the fees of the American lawyers, and they could initiate fresh proceedings in France since an American judgment on a class action was unlikely to be recognized in France.

In a judgment of January 13th, 2010, the French first instance court dismissed Vivendi's claims. The judgment did not address the issue of whether, as a matter of principle, French courts have the power to issue antisuit injunctions. The recent *In Zone Brands* case was not mentioned by the court (which, as a matter of French judicial style, is not surprising). The court only held that it could find no abuse of process on the facts. More specifically, the court defined the abuse of process (*abus du droit d'agir en justice*) as an action which is malicious, in bad faith, or grossly mistaken. On the facts, the court held that no such abuse could be found. First, the dispute was connected to the US, as the officers had acted in the US, and it followed that it was legitimate for the French shareholders to choose to sue in the US. Second, whether the US judgment could ever be recognized in France was irrelevant for the purpose of determining whether the French shareholders had abused the judicial process, as it was too early for the French court to rule on the recognition of the judgment, and as the US judgment could be enforced in the US.

Vivendi has announced that it intends to appeal the judgment.

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (1/2010)

Recently, the January issue of the German law journal "Praxis des Internationalen Privat- und Verfahrensrechts" (**IPRax)** was published.

It contains the following **articles/case notes (including the reviewed decisions)**:

- ***Heinz-Peter Mansel/Karsten Thorn/Rolf Wagner***: "Europäisches Kollisionsrecht 2009: Hoffnungen durch den Vertrag von Lissabon" – the English abstract reads as follows:

This article provides an overview on the developments in Brussels concerning the judicial cooperation in civil and commercial matters from November 2008 until November 2009. It summarizes the current projects in the EC legislation and presents some new instruments. Furthermore, it refers to the national German laws as a consequence of the new European instruments. This article also shows the areas of law where the EU has made use of its external competence. With regard to the ECJ, important decisions and some pending cases are presented. In addition, the article deals with important changes as to judicial cooperation resulting from the Treaty of Lisbon. It is widely criticised that the Hague Conference on Private International Law and the European Community should improve their cooperation. An important basis for the enhancement of this cooperation is the exchange of information among all parties involved. Therefore, the present article turns to the current projects of the Hague Conference as well.

- ***Ulrich Magnus***: "Die Rom I-Verordnung" – the English abstract reads as follows:

December 17, 2009 is a marked day for international contract law in Europe. From that day on, the court of the EU Member States (except Denmark) have to apply the conflicts rules of the Rome I Regulation to all transborder contracts concluded on or after that day. Fortunately, the Rome I Regulation builds very much on the fundaments of its predecessor, the Rome Convention of 1980, and amends that Convention only moderately. Though progress is limited, the amendments should not be underestimated. First, the communitarisation of international contract law will secure a stricter uniform interpretation of the Rome I Regulation through the European Court of Justice. Secondly, the changes strengthen legal certainty and reduce to some extent the courts' discretion, however without sacrificing the necessary flexibility. This is the case in particular with the requirements for an implicit chance of law, which now must be clearly demonstrated; with the escape clauses, which come into play when a manifestly closer connection points to another law or with the definition of overriding mandatory provisions, which apply irrespective of the law

otherwise applicable (Art. 9 par. 1). Legal certainty is also strengthened by a number of clarifying provisions, among them that the franchisee's and distributor's law governs their contracts, that set-off follows the law of the claim against which set-off is asserted or that the redress claim of one joint debtor against another is governed by the law that applies to the claiming debtor's obligation forwards the creditor. Thirdly, the protection of the weaker party through conflicts rules has been considerably extended and aligned to the Brussels I Regulation. Yet, some weaknesses have survived. These are the continuity of the confusing coexistence of the Rome I conflicts rules and further special conflicts rules in a number of EU Directives on consumer protection, the hardly convincing system of differing conflicts rules on insurance contracts and still open questions us to the rules applicable to assignments and their scope. It is to be welcomed that the Rome I Regulation itself (Art. 27) has already set these problems on the agenda for further amendment.

- ***Peter Kindler***: "Vom Staatsangehörigkeits- zum Domizilprinzip: das künftige internationale Erbrecht der Europäischen Union" – the English abstract reads as follows:

On October 14, 2009 the Commission of the European Communities has adopted a "Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Authentic Instruments in Matters of Succession and the Creation of a European Certificate of Succession" (COM [2009] 154 final 2009/0157 [COD] (SEC [2009] 410), (SEC [2009] 411). Its aim is to remove obstacles to the free movement of persons in the Union resulting from the diversity of both the rules under substantive law and the rules of international jurisdiction or of applicable law, the multitude of authorities to which international successions matters can be referred and the fragmentation of successions which can result from these divergent rules. According to the Proposal the competence lies with the Member state where the deceased had their last habitual residence, and this includes ruling on all elements of the succession, irrespective of whether adversarial or non-adversarial proceedings are involved (Article 4). The author welcomes this solution considering that the last habitual residence of the deceased will frequently coincide with the location of the deceased's property. As to the applicable law, the Proposal again uses the last habitual residence of the deceased as the principal connection factor (Article 16), but at the same

time allows the testators to opt for their national law as that applying to their successions (Article 17). In this respect, the author is critical on the universal nature of the proposed Regulation (Article 25) and, inter alia, advocates the admission of referral in case the last habitual residence of the deceased is located outside the European Union. Furthermore, the author is in favour of a wider range of choice-of-law-options for the testator as foreseen in the Hague Convention 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons.

- ***Wolfgang Hau***: "Doppelte Staatsangehörigkeit im europäischen Eheverfahrensrecht" – the English abstract reads as follows:

The question how multiple nationality is to be treated under the European rules on matrimonial matters was rather misleadingly answered by Alegría Borrás in her Official Report on the Brussels II Convention and it is still open in respect of the Regulation No 2201/2003. In the Hadadi case, the European Court of Justice has now pointed out that every nationality of a Member State held by both spouses is to be taken into account regardless of its effectivity. The Hadadi case directly concerns only the rather particular context of Article 64 (4) of the Regulation. In this case note it is argued that the considerations of the ECJ are convincing and also applicable to more common settings of the multiple-nationality problem within the Brussels II regime. On the occasion of the ongoing reform of the Regulation, it should however be carefully considered whether nationality of the spouses is an appropriate and indispensable basis of jurisdiction anyway.

- ***Jörg Dilger:*** "EuEheVO: Identische Doppelstaater und forum patriae (Art. 3 Abs. 1 lit. b)" – the English abstract reads as follows:

The essay reviews another judgment of the European Court of Justice relating to the Regulation (EC) No. 2201/2003 (Brussels IIA). Having to deal with spouses sharing the common nationality of two member states (Hungary and France), the ECJ – following the convincing AG's opinion – held that where the court of a member state addressed had to verify, pursuant to Article 64 (4), whether the court of a member state of origin of a judgment would have had jurisdiction under Article 3 (1) (b), the court had to take into account the fact

that the spouses also held the nationality of the member state of origin and that therefore the courts of the latter could also have had jurisdiction under that provision. Since the spouses might seize a court of the member state of their choice, the evolving conflict of jurisdictions had to be solved by means of the lis alibi pendens rule (Article 19 (1)). Given the special procedural situation, the author starts by analyzing the transitional rule in Article 64 (4) which empowers the courts of one member state to examine the jurisdiction of another member state's courts. He then examines the ECJ's reasoning and comes to the conclusion that de lege lata the ECJ's decision is correct. He finally shows that the ECJ's solution is not limited to transitional cases falling within the scope of Article 64, but applies to all the cases in which the court seized – which, not having jurisdiction pursuant Articles 3 to 5, considers having resort to jurisdiction according to its national law ("residual jurisdiction") – has to examine whether the courts of another member state have jurisdiction under the regulation (Article 17). Moreover, the solution elaborated by the ECJ also applies to spouses who share the common nationality of a member state and the common domicile pursuant to Article 3 (1) b, (2).

- ***Felipe Temming***: "Europäisches Arbeitsprozessrecht: Zum gewöhnlichen Arbeitsort bei grenzüberschreitend tätigen Außendienstmitarbeitern" – the English abstract reads as follows:

The Austrian High Court of Vienna has published a judgment on the topic of jurisdiction where an employee is relocated from Austria to Germany but the relocation never took effect. The employee was relocated pursuant to sections 99 and 95(3) Betriebsverfassungsgesetz, which raised the question of a change of jurisdiction according to Art. 19 No. 2 lit. a Regulation 44/2001/EC. The proceedings before the regional court of Innsbruck were brought by a sales representative against his Berlin-based employer in an action for payment. The employee was domiciled near Innsbruck from where he serviced customers in the area of Innsbruck and South-Germany and was transferred to Berlin however the employee became ill and the transfer never took effect. The case note first addresses issues regarding the personal scope of the Betriebsverfassungsgesetz in cross-border and external situations (part II.). It argues that the membership in an undertaking is the preferable criterion in order to establish the necessary link and only a consistent approach will lead to

coherent and fair results. The case note then briefly revisits the long-standing jurisprudence of the European Court of Justice on matters of the habitual – usual – work place according to Art. 5 No. 1 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, which was incorporated into Art. 19 of Regulation 44/2001/EC (part III.). The case note furthermore refers to section 48(1a) Arbeitsgerichtsgesetz which came into effect on 1 April 2008 and gives German labour courts jurisdiction at the habitual work place in matters solely internal to Germany. Art. 19 No. 2 lit. a of Regulation 44/2001/EC founds its counterpart in this new German law. The enactment of section 48(1a) Arbeitsgerichtsgesetz is consistent with Germany's Federal Labour Court which has set out in several cases the doctrine of the uniform place of performance of work as the criterion for jurisdiction in labour law cases and in so doing has followed the path laid down by the ECJ in the early Ivenel case. The legislation enacts the decisions which have been held by the Federal Labour Court and had not been supported by leading German scholars. The case note ends with concluding remarks (part IV.)

- ***Marianne Andrae/Steffen Schreiber***: "Zum Ausschluss der Restzuständigkeit nach Art. 7 EuEheVO über Art. 6 EuEheVO" – the English abstract reads as follows:

The article deals with a decision of the Austrian Supreme Court of Justice concerning the exclusion of residual jurisdiction according to art. 7 Brussels IIa Regulation in case there is no jurisdiction under art. 3–5 Brussels IIa Regulation but the defendant spouse is a national of a Member State. The authors agree with the decision. Only if no member state has jurisdiction on the lawsuit and if the rules of jurisdiction in art. 3–5 are not exclusive for any action against the defendant spouse, does art. 7 allow to determine the jurisdiction according to the law of the relative Member State. According to art. 6, the rules of jurisdiction in art. 3–5 are exclusive if the defendant spouse has his/her habitual residence in a Member State or if he/she is a national of a Member State. However, it is not necessary for the exclusion of residual jurisdiction under art. 6 that any member state actually has jurisdiction under art. 3–5. Even though the abatement of art. 6 and the introduction of new rules of residual jurisdiction may be desirable, this effect must not be achieved by simply interpreting the current art. 6 this way.

- ***Katharina Jank-Domdey/Anna-Dorothea Polzer:*** *"*Ausländische Eheverträge auf dem Prüfstand der Common Law Gerichte" – the English abstract reads as follows:

Courts in a number of important common law jurisdictions until recently gave little or no weight to prenuptial contracts entered into in civil law jurisdictions such as France or Germany. These contracts typically contain provisions as to the spouses' marital property regime or their maintenance after divorce. Recent decisions, however, show a clear trend towards the enforceability of such agreements. The paper discusses the judgments of the Court of Appeals of New York in Van Kipnis v. Van Kipnis (11 NY3d 573) involving a French separation of property agreement and of the Court of Appeal of England and Wales in Radmacher v. Granatino ([2009] EWCA Civ 649), involving a German contract providing for the separation of property and the exclusion of spousal maintenance in case of divorce, and looks at their precedents. While none of the courts concludes that the foreign law under which the contracts were made must be applied they in fact enforce the spouses' agreements as to the financial consequences of their divorce. According to the English court, however, giving due weight to a foreign prenuptial agreement is subject to the principle of fairness and must safeguard the interests of the couple's children.

- ***Sven Klaiber*** on the new Algerian international civil procedural law as well as arbitration law: "Neues internationales Zivilprozess- und Schiedsrecht in Algerien"
- ***Erik Jayme*** on the third Heidelberg conference on art law: "Kunst im Markt – Kunst im Streit Internationale Bezüge und weltweiter Kampf um Urheberrechte – III. Heidelberger Kunstrechtstag"

Dutch Articles on Rome I

(updated)

The last issue of the Dutch review of private international law (*NIPR Nederlands internationaal privaatrecht*) includes several articles on the Rome I Regulation, including four in English.

Michael Bogdan (Lund University): *The Rome I Regulation on the law applicable to contractual obligations and the choice of law by the parties*

> *The Rome Convention of 19 June 1980 on the Law Applicable to Contratual Obligations (in the following 'the Rome Convention') will be replaced on 17 December 2009, in all Member States of the European Union except Denmark, by the EC Regulation No 593/2008 on the Law Applicable to Contractual Obligations (the Rome I Regulation) although only in relation to contracts concluded after that date. The Commission's proposal of 2005 (in the following 'The Commission's proposal'), which led to the adoption of the Rome I Regulation after a number of amendments, stated that it did not set out to establish a new set of conflict rules but rather convert an existing convention into a Community law instrument. Nevertheless, the Regulation brings about several important changes in comparison with the Rome Convention.*

Luc Strikwerda (Advocate-General, Dutch Supreme Court): *Toepasselijk recht bij gebreke van rechtskeuze; Artikel 4 Rome I-Verordening*

> *If contractual parties have not availed themselves of the possibility to choose the law applicable to their contract (Art. 3, Rome I), the applicable law will be determined according to rules laid down in Article 4, Rome I. Similar to the equivalent provision of the 1980 Rome Convention, Article 4, Rome I is based upon the doctrine of the characteristic performance. Nonetheless, a new structure with respect to the concretization of this doctrine has been adopted, ensuring that the characteristic performance no longer functions as a presumption. Instead, Article 4 lays down the law applicable in a number of pre-determined categories (Art. 4(1)(a)-(h), Rome I). For the majority of these categories the law of the habitual residence of the party who performs the characteristic performance will be applied. These pre-determined categories form the basic structure and content of this contribution. The obvious disadvantage that this new structure leads to issues of characterisation will also*

be discussed.

Teun Struycken (Utrecht University and Nauta Dutilh, Amsterdam) and Bart Bierman (Nauta Dutilh, Amsterdam): *Rome I on contracts concluded in multilateral systems*.

One of the novelties of the Rome I Regulation is the special provision in Article 4(1)(h) on the law applicable to a contract entered into within a regulated market or a multilateral trading facility in the absence of a choice of a law by the contracting parties.

The authors analyse the practical significance of this provision and the relevant contracts which come into existence within a trading system. In the authors' view, the concept of contract used in Article 4(1)(h) of Rome I, encompasses transactions within a trading system that may not be true agreements under the substantive law of the Netherlands. Furthermore, many of the relevant contractual arrangements, in particular those relating to the clearing and the settlement of securities transactions on a regulated market or multilateral trading facility, fall within the scope of the special PIL provision for designated settlement finality systems pursuant to the Settlement Finality Directive.

According to the authors, legal certainty requires that all transactions on a particular trading system be subject to the same law, regardless of the nature of the parties involved. They take the view that there should be no room for a choice of a law other than the law governing the trading system. The rule in Article 4(1)(h) should in their view become applicable to each contract concluded within a multilateral trading system. The law designated by that provision should prevail over the law chosen by the parties to a transaction: such transactions should always be governed by the law governing the system.

Maarten Claringbould (Leiden University and Van Traa Advocaten, Rotterdam): *Artikel 5 Rome I en vervoerovereenkomsten*

Article 5, paragraph 1, Rome I covers contracts for the carriage of goods and paragraph 2 covers – and this is new – contracts for the carriage of passengers.

In most bills of lading, sea waybills and charter parties a choice of law clause has been inserted into the documents, although only a clause paramount in a

bill of lading might not be sufficient: the Hague (Visby) Rules that are incorporated into the contract only deal with the liability of the carrier and not with such items as payment for freight or the interpretation of the contract etc. and for such bills of lading Article 5(1) will determine the applicable national law. In CMR and CIM consignment notes, bills of lading for inland navigation as well as in air waybills a clear choice of national law clause is often lacking and then Article 5(1) also determines the applicable national law, sometimes with an unexpected outcome … But first of all we have to categorise the contracts that fall under the legal term 'a contract for the carriage of goods' as mentioned in Article 5(1). We know that recital 22 considers 'single charter parties and other contracts the main purpose of which is the carriage of goods' to be a contract for the carriage of goods. The Court of Justice in its recent judgment of 6 October 2009, ICF v. Balkenende (Case C-133/08), has interpreted this term. It concerned a contract for a shuttle train service between Amsterdam and Frankfurt for the carriage of containers. Under this contract ICF would make wagons available and it would also arrange for traction (locomotives). In my opinion this is a clear framework contract for the carriage of goods by rail as such a contract has been described in Article 8:1552 Dutch Civil Code since 2006. However, the Court of Justice (inspired by the Dutch Advocate-General Strikwerda as well as the questions formulated by the Dutch Supreme Court) started out on the wrong footing by stating in sub 2 that the contract at issue here was a charter party contract. A charter party contract means that the charterer has chartered a specifically named vessel or other means of transport (such as a truck or a complete train) including the crew. It is obvious that this was not the case for this train shuttle service: wagons were made available from time to time and ICF would arrange for traction (not mentioning specific locomotives with drivers). That is not a charter party with regard to a train; it is just a plain framework contract for the carriage of containers by rail. For that reason, the first answer by the Court of Justice should be read as merely referring to a 'contract of carriage' instead of a 'charter party'. Then the answer makes sense: 'The second sentence of Article 4(4) of the Rome Convention applies to a contract of carriage [emphasis added], other than a single voyage charter-party, only when the main purpose of the contract is not merely to make available a means of transport, but the actual carriage of goods.'

I am of the opinion that time charter parties, although under Dutch law they are

considered to be contracts of carriage and now – strictly speaking – fall under the first answer by the Court of Justice as contracts of carriage, are still excluded by recital 22 from the term 'contract for the carriage of goods' as mentioned in Article 5(1). If it were otherwise, the law which is applicable to such time charters might vary from port to port, such port being 'the place of delivery agreed by the parties', Article 5(1) last sentence. That would certainly be contrary to recital 16 ('the conflict-of-law rules should be highly foreseeable'). The fact that in its first answer the Court of Justice uses – in my opinion by mistake – the term 'charter party' does not alter this.

In my opinion (and unlike Boonk and Mankowski) the contractual side of bills of lading falls under Rome I and more specifically – if a choice of law clause is lacking – under Article 5(1). That concerns cargo claims, payment for freight and other obligations under the contract of carriage which is incorporated in the bill of lading. But the questions of who may claim under the bill of lading or who is the carrier under the bill of lading fall outside the scope of Rome I and Rome II and for that reason Article 5 of the Dutch Code on Private International Law with regard to the carriage of goods has to be retained.
Article 19(2) makes the place where the agency or branch of the carrier (the carrier always being a company) is located the habitual residence of the company. In practice, contracts of carriage are often concluded by agents of branch offices of the carrier and in such cases the place of the receipt of the goods will coincide with the 'habitual residence of the carrier' making – maybe quite unexpectedly – the law of the country where the goods are received for shipment the applicable law.

For that reason I advise air carriers carrying passengers, who seldom include a choice of national law in their tickets or general conditions, to choose as the applicable law the place where the carrier has its central administration (Art. 5(2c)) and not the place where the carrier has its 'habitual residence' which will often be the place where its agent who concluded the contract is located. I finish this article by expressing the hope and the expectation that the next time the Court of Justice has to interpret Article 5(1) Rome I, it will first properly categorise the contract of carriage at issue by starting from the correct body of facts.

Jonathan Hill (Bristol University): *Article 6 of the Rome I Regulation: Much Ado*

about nothing

> *Consumer contracts are typically standard-form contracts, the terms of which are drafted by (or on behalf of) suppliers. As the consumer has no influence over the substance of the contract, one of the perceived dangers is that a supplier may include in the contract a choice-of-law clause which selects a law which favours the interest of the supplier over those of theconsumer. This danger suggests that, in order to ensure that consumers are not deprived of the level of legal protection which they may legitimately expect, the choice-of-law rules applicable to consumer contracts should differ from those which apply to contracts in general (and which are founded on the principle of party autonomy).*

Christian Heinze (Max Planck Institute, Hamburg): *Insurance contracts under the Rome I Regulation*.

> *All government, indeed every human benefit and enjoyment, every viryue, and every prudent act, is founded on compromise and barter'. these words written by Edmund Burke more then 200 years ago still seem to be a fair description of the legislative process in the democracies today. They hold particularly true at the European level where compromise is notoriously difficult, in particular if the national backgrounds are as disparate as they are in insurance law. Article 7 of the European Regulation NOo 593/2008 on the law applicable to contractual obligations (hereafter abbreviated as 'Rome I'), the rule titled 'insurance contracts', is exactly that, a compromise.*

Articles of *NIPR* can be downloaded here by suscribers.

Recent ECJ Judgment and

References on Brussels I and Brussels II bis

I. Judgment on Brussels II *bis*

On 23 December 2009, the ECJ delivered its judgment in case C-403/09 PPU (Jasna Deticek v Maurizio Squeglia).

The case, which was decided under the urgent preliminary ruling procedure, concerns the interpretation of Art. 20 Brussels II *bis* Regulation.

The referring Slovenian court asked the ECJ whether a court of a Member State has jurisdiction under Art. 20 Brussels II *bis* to take protective measures if a court of another Member State having jurisdiction as to the substance on the basis of the Regulation has already taken a protective measure which has been declared enforceable in the first Member State.

Further, the referring court asked whether – in case of an affirmative answer regarding the first question – protective measures can be taken under Art. 20 Brussels II *bis* pursuant to national law amending or rendering inoperative a final and enforceable protective measure taken by a Member State court having jurisdiction as to the substance.

In its reasoning, the Court referred in particular to the three cumulative conditions which have to be satisfied to take provisional or protective measures under Art. 20 Brussels II *bis*: The measures concerned have to be urgent, must be taken in respect of persons or assests in the Member State where the courts are situated and must be provisional (para. 39 of the judgment).

According to the Court, already the first requirement, urgency, is not fulfilled since the change of circumstances resulted from the child's integration into a new environment. The Court held in this respect (para. 47): "If a change of circumstances resulting from a gradual process such as the child's integration into a new environment were enough, under Article 20 (1) of Regulation No 2201/2003, to entitle a court not having jurisdiction as to the substance to adopt a provisional measure amending the measures in matters of parental responsibility taken by the court with jurisdiction as to the substance, any delay in the

enforcement procedure in the requested Member State would contribute to creating the conditions that would allow the former court to block the enforcement of the judgment that had been declared enforceable. Such an interpretation would undermine the very principles on which that regulation is based."

As a further argument, the Court emphasised *inter alia* that the change in the child's circumstances resulted from a wrongful removal. According to the court, "the recognition of a situation of urgency in a case such as the present one would run counter to the aim of Regulation No. 2201/2003 to deter the wrongful removal or retention of children between Member States […]." (para. 49)

Thus, the Court held:

> *Article 20 [Brussels II bis] must be interpreted as not allowing, in circumstances such as those of the main proceedings, a court of a Member State to take a provisional measure in matters of parental responsibility granting custody of a child who is in the territory of that Member State to one parent, where a court of another Member State, which has jurisdiction under that regulation as to the substance of the dispute relating to custody of the child, has already delivered a judgment provisionally giving custody of the child to the other parent, and that judgment had been declared enforceable in the territory of the former Member State.*

II. References

1. Reference on Art. 1 Brussels I Regulation (C-406/09; *Realchemie Nederland BV v. Bayer CropScience AG*)

There is a new reference for a preliminary ruling on the interpretation of the term "civil and commercial matters" which has been referred to the ECJ by the Supreme Court of the Netherlands (Hoge Raad der Nederlanden) asking *inter alia* the following question:

> *Is the phrase 'civil and commercial matters' in Article 1 of Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters to be interpreted in such a way that this regulation applies also to the recognition and enforcement of an order for*

payment of 'Ordnungsgeld' (an administrative fine) pursuant to Paragraph 890 of the German Code of Civil Procedure (Zivilprozessordnung)?

"Ordnungsgeld"-decisions are contempt fines issued by German courts on the basis of § 890 ZPO. The State is responsible for enforcing these decisions: it collects the fine ex officio through its own public authorities, the fine is to be paid to the State ('Gerichtskasse'). Therefore the question whether these decisions can be enforced under the Brussels Convention/Regulation is controversial: The Higher Regional Court of Munich has refused to confirm a contempt fine as a European Enforcement Order in a recent decision based on the argument that the judgment creditor had no legitimate interest to apply for this confirmation since under German law the responsibility for the enforcement was attributed exclusively to the State (OLG München, 3 December 2008 – 6 W 1956/08 (the case is now pending before the Bundesgerichtshof (I ZB 116/08); see with regard to this case Giebel in IPRax 2009, p. 324 et seq.).

Many thanks to Sierd J. Schaafsma (The Hague).

2. Reference on Art. 5 No. 3 Brussels I and Art. 3 e-commerce-Directive

The German Federal Court of Justice (Bundesgerichtshof) referred with decision of 10 November (VI ZR 217/08) questions on the interpretation of Art. 5 No. 3 Brussels I Regulation as well as Art. 3 e-commerce-Directive to the ECJ for a preliminary ruling.

The case concerns an action for an injunction brought in Germany based on an impending threat of violation of personal rights due to publications on a website. The defendant, the operator of the website in question, is established in Austria. Thus, the question arose whether German courts are competent to hear the case under the Brussels I Regulation and therefore how the term "place where the harmful event may occur" in Art. 5 No. 3 Brussels I has to be interpreted.

Since the Bundesgerichtshof had doubts which requirements have to be satisfied for establishing jurisdiction on the basis of Art. 5 No. 3 Brussels I under the circumstances of the present case and – should German courts be competent to hear the case – whether German law is applicable, the Bundesgerichtshof referred the **following questions** to the ECJ for a preliminary ruling:

1. Is the phrase “place where the harmful event may occur” in Art. 5 No.3 Brussels I in case of (impending) violations of personal rights due to the content of an internet website to be interpreted as meaning

that the person concerned can bring an action for an injunction against the operator of the website before the courts of every Member State where the website can be accessed regardless of the Member State the operator is established

or

does the jurisdiction of the courts of a Member State where the operator of the website is not established require a particular connecting link either between the forum and the content in question or the website itself which goes beyond the mere technical accessibility of the website?

2. In case such a particular connecting link to the forum is required:

Which criteria are decisive for establishing this link?

Is it decisive whether the website is directed – according to the operator’s purpose – (also) at the internet users in the forum or is it sufficient if the accessible information shows a connection to the forum in this sense that, according to the circumstances of the specific case, a conflict of interests – namely the claimant’s interest in the respect of his personal rights and the operator’s interest in the design of his website as well as in reporting – could actually have arisen or may actually arise in the forum state?

Is it decisive for the determination of the connecting link to the forum how often the website has been accessed in this Member State?

3. In case a particular connecting link to the forum is not necessary for establishing jurisdiction or in case it is sufficient for establishing this link that the information in question shows a connection to the forum in this sense that a conflict of interests could actually have arisen or may arise in the forum state according to the circumstances of the specific case in particular due to the content of the website and the assumption of a link to the forum does not require the ascertainment that the website has been accessed in the forum in a minimum number of cases:

Are Art. 3 (1) and (2) Directive 2000/31/EC of the European Parliament and the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) to be interpreted as meaning

that these rules have the character of choice of law rules in this sense that they declare also with regard to civil law – by overriding national choice of law rules – the law of the country of origin to be exclusively applicable

or

do these rules constitute a corrective at the level of substantive law modifying the substantive result of the law applicable according to national choice of law rules and reducing this result to the requirements of the country of origin?

In case Art. 3 (1) and (2) Directive on electronic commerce have to be interpreted as choice of law rules:

Do the mentioned rules declare only the substantive law rules of the country of origin to be applicable or do they also refer to the private international law rules of the country of origin leading to the result that a renvoi to the law of the country of destination is possible?

(Own approximate translation from the German referring decision.)

The case is pending at the ECJ under C-509/09; the (German) text of the referring decision can be found at the website of the Bundesgerichtshof.

ERA conference on cross-border successions in the EU

The forthcoming ERA conference on cross-border successions is designed to cover the recent developments in the drafting and negotiating the Proposal for a Regulation on jurisdiction, applicable law, recognition and enforcement of

decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession. There are interesting topics which arise out of the differences between the national legal conceptions, such as the issues of clawback and the international competence of courts or non-judicial authorities, including notaries. The automatic recognition of the proposed European Certificate of Succession seems to be equally worthy of debate.

The speakers at the conference are:

> ***Ms Mari Aalto***, Legal Officer, DG Justice, Freedom and Security, European Commission, Brussels
> ***Professor Andrea Bonomi***, University of Lausanne
> ***Dr Anatol Dutta***, Max Planck Institute for Comparative and International Private Law, Hamburg
> ***Professor Sjef van Erp***, University of Maastricht
> ***Mr Rafael Gil Nievas***, Permanent Representation of Spain to the EU, Brussels
> ***Professor Jonathan Harris***, Barrister, Serle Court, London; University of Birmingham
> ***Mr Christian Hertel***, Notary, Weilheim
> ***Dr Marius Kohler***, Director, Federal Chamber of German Civil Notaries, Brussels
> ***Mr Kurt Lechner***, MEP, European Parliament, Brussels/Strasbourg
> ***Mr Hugues Letellier***, Managing Partner, Hohl & Associés, Paris
> ***Professor Paul Matthews***, Consultant, Withers LLP; King's College, London
> ***Ms Michaela Navrátilová***, JUDr Zden?k Hromádka Law Firm, Zlín
> ***Ms Salla Saastamoinen***, Head of Unit, Civil Justice, DG Justice, Freedom and Security, European Commission, Brussels.

The conference is scheduled for 18 and 19 February 2010 and will take place at the ERA Congress Centre in Trier, Germany. Detailed information on the conference is available here, and the registration details here.

18th International Congress of Comparative Law: Washington D.C.

On July 25 through August 1, 2010, the 18th International Congress of Comparative Law will be held at the Ritz-Carlton Hotel in Washington D.C. Sponsored by the International Academy of Comparative Law and the American Society of Comparative Law, it will be jointly hosted by American University Washington College of Law, George Washington University Law School and Georgetown Law Center. The topics of this year's Congress include:

I. A. Legal history and ethnology
Legal culture and legal transplants

I. B. General legal theory
Religion and the secular state

I. C. Comparative law and unification of laws
Complexity of transnational sources

I. D. Legal education
The role of practice in legal education

II. A. Civil law
Catastrophic damages-liability and insurance
Surrogate motherhood
Same-sex marriages

II. B. Private international law
Consumer protection in international transactions
Recent private international law codifications

II. C. Civil procedure
Cost and fee allocation rules
Collective actions

II. D. Agrarian and environmental law

Climate change and the law

III. A. Commercial law
The regulation of private equity, hedge funds and state funds
Harmonization of finance leases by UNIDROIT
Corporate governance
Insurance contract law between business law and consumer protection

III. B. Intellectual property law
The balance of copyright in comparative perspective
Jurisdiction and applicable law in intellectual property

III. C. Labour law
The prohibition of discrimination in labour relations (age discrimination)

III. D. Air and maritime law
The law applicable on the continental shelf and in the exclusive economic zone

IV. A. Public international law
The protection of foreign investment
International law in domestic systems: a comparative approach

IV. B. Constitutional law
Foreign voters
Constitutional courts as “Positive Legislators”

IV. C. Public freedoms and human rights
Plurality of political opinions and the concentration of media
Are human rights universal and binding? Limits of universalism

IV. D. Administrative law
Public-private partnerships

IV. E. Tax law
Regulation of corporate tax avoidance

V. A. Penal law
Corporate criminal liability

V. B. Criminal procedure

The exclusionary rule

VI. Computers
Internet crimes

There will also be Special Sessions dedicated to law and development, torture and cultural relativism, comparative perspectives on the role of transparency in administration of law, protection of privacy from the media, comparative family law, comparative constitutional law, and comparative and international government procurement law. Sessions dedicated to regional studies will include a "Panel on Africa: Comparative Private Law and Transitional Social Justice," a "Panel on Latin America: Comparative Legal Interpretation," and a "Panel on the Middle East: Islamic Finance and Banking in Comparative Perspective."

Registration information is available here, and a detailed agenda is available here. Note that early-bird registration ends on January 30. Updates to the agenda and schedule will follow on this site.

Publication – Electronic Consumer Contracts in the Conflict of Laws

Hart Publishing has kicked off its new Studies in Private International Law series with Zheng Sophia Tang's excellent *Electronic Consumer Contracts in the Conflict of Laws* (2009). It is based upon Sophia's PhD thesis, completed at the University of Birmingham in 2007. The blurb:

> *The application of private international law to electronic consumer contracts raises new, complex, and controversial questions. It is new because consumer protection was not a private international law concern until very recently and e-commerce only became an important commercial activity within the last ten years. E-consumer contracts generate original questions which have not been considered under traditional private international law theories. It is complex because it has to deal both with difficulties raised by consumer contracts and*

the challenges of e-commerce. Reasonable resolutions to consumer contracts may prove inappropriate in e-commerce, while effective approaches to resolving private international law problems in e-commerce may be improper for consumer contracts. It is controversial because it concerns the conflicting interests of consumers and businesses in a fast-moving commercial environment – a fair balance is therefore hard to achieve.

Without proper solutions provided by private international law, consumers will not be confident about purchasing online, and businesses will face unreasonable risk and participation costs in e-commerce. Updated and properly designed private international law rules are essential to the further development of e-commerce. This book aims to provide an answer to the urgent requirement for legal certainty, security and justice in e-consumer contracts. It is primarily concerned with existing approaches to jurisdiction and choice of law issues in e-consumer contracts in the European Community and England, but some typical approaches in other jurisdictions are also examined. Based on the analysis and the comparative study of the existing law, the book seeks to provide a proposal as to what the law should be in order to provide certainty to both parties, to provide reasonable protection to consumers, and to promote the development of e-commerce.

You can purchase it from Hart Publishing for £50.00, or from Amazon for £47.50.

Publication – Resolving International Conflicts

Peter Hay (Emory Univ. – Law), **Lajos Vékás** (ELTE – Law), **Yehuda Elkana** (Central European Univ.), & **Nenad Dimitrijevic** (Central European Univ. – Political Science) have published *Resolving International Conflicts: Liber Amicorum Tibor Várady* (Central European Univ. Press 2009). The contents:

- John J. Barceló III, Expanded judicial review of awards after Hall Street

and in comparative perspective
- David J. Bederman, Tibor Várady's advocacy before the international court of justice
- Peter Behrens, From "real seat" to "legal seat": Germany's private international company law revolution
- László Burián, The impact of community law on the determination of the personal law of companies
- Richard M. Buxbaum, Public law, Ordre public and arbitration: a procedural scenario and a suggestion
- Richard D. Freer, Forging American arbitration policy: judicial interpretation of the Federal Arbitration Act
- Guy Haarscher, The decline of free thinking
- Attila Harmathy, Questions of arbitration and the case law of the European court of justice
- Peter Hay, Recognition of a recognition judgment within the European Union: "double exequatur" and the public policy barrier
- László Kecskés, European Union legislation and private international law: a view from Hungary
- János Kis, Constitutional democracy: outline of a defense
- Ferenc Mádl, The European dream and its evolution in the architecture of the treaties of integration
- Vladimir Pavi?, 'Non-signatories' and the long arm of arbitral jurisdiction
- Hans-Eric Rasmussen-Bonne, The pendulum swings back: the cooperative approach of German courts to international service of process
- Kurt Siehr, Internationale schiedsgerichtsbarkeit über kulturgut-streitigkeiten
- Lajos Vékás, About the Rome II regulation: the European unification of the conflict rules to torts
- Johan D. van der Vyver, The United States and the jurisprudence of international tribunals

I cannot find the book on the CEU Press website, but here's a link to it on Amazon, where it is £30.35.

Publication: Intellectual Property and Private International Law

Happy New Year to everybody. I have not posted in a while, but am now freed from the shackles of teaching (well, mostly) for this year, and so can devote myself to conflictoflaws.net once again (not, I'm sure, that anyone noticed my absence, given the dedication of my co-editors).

In any event, a few new publications dropped into my pigeon-hole in late 2009, and here's the first: Intellectual Property and Private International Law, edited by Stefan Leible and Angsar Ohly (Mohr Siebeck, 2009). The blurb:

> *The relationship between intellectual property law and private international law has not always been an easy one. To many intellectual property lawyers, private international law seems like an esoteric and complicated field of law with many potential pitfalls. Hence there is a tendency to look for simple, straightforward rules such as the principle of territoriality and the lex loci protectionis rule and to solve more complex issues such as the collision of signs on the internet within substantive law. Private international lawyers, on the other hand, resent the territorial segmentation which results from the application of both principles. The fact that both fields of law are specialist matters, difficult to penetrate for outsiders, has complicated the discourse between both legal disciplines. Nevertheless there is a growing awareness that choice of law issues in this field really matter. The importance of intellectual property rights in a knowledge-based economy is increasing steadily. At the same time, the traditional principles governing the choice of law in intellectual property disputes have come under challenge in a globalized world dominated by internet communication. Eminent American und European scholars of both fields discussed different topics concerning the relationship between intellectual property law and private international law at the Bayreuth Conference "Intellectual Property and Private International Law" (4/5 April 2008). This volume comprises the papers which were presented.*

ISBN 978-3-16-150055-8. Price: € 59.00. Purchase it direct from the Mohr website.

French Conference on Breach of Jurisdiction Agreements

The Master of arbitration and international commercial law of the university of Versailles Saint-Quentin will organize a conference on January 19th on *Damages for Breach of Jurisdiction and Arbitration Agreement*.

The speaker will be professor Koji Takahashi, from Doshisha University (Kyoto, Japan). Prof. Takahashi has published several articles on the topic, both in Japanese and in English. In particular, he has published an article on Damages for Breach of Choice of Court Agreements at the 2008 Yearbook of Private Int'l Law.

The conference will begin at 5 pm and will be held in English. It is free of charge.

Details can be obtained from Ms Chantal Bionne, Tél. : 01 39 25 52 55 ou courriel: chantal.bionne@uvsq.fr