A.G. Opinion on Pammer and Hotel Alpenhof

The Opinion of Advocate General Ms Verica Trstenjak in Case C-585 / 08 (Pammer) and Case C-144 / 09 (Hotel Alpenhof) was presented on May 18, 2010. Both cases involve the interpretation of Regulation (EC) No 44/2001. The national court asks if, in order to imply that a business or professional activity is addressed to the Member State where the consumer is domiciled within the meaning of Article 15, paragraph 1,c) of Regulation No 44/2001, access to the website in the Member State of domicile of the consumer is enough. The essential question raised is therefore how to interpret Article 15 paragraph 1 c), and specifically how to interpret the notion that a person engaged in a commercial or professional activity "directs" this activity to the Member State of domicile of the consumer, or to several Member States including that Member State. This is the first time that the ECJ will interpret the concept of "directing" trade or business to the Member State of domicile of the consumer.

As noted by the AG, interpretation of this concept is particularly important when the direction of activity to the Member State of the consumer occurs through the Internet, since this activity has some specific characteristics which should taken into account in the interpretation of Article 15, paragraph 1 c) of Regulation nº 44/2001. The specificity of the Internet is that consumers can generally access the website of a dealer anywhere in the world; a very narrow interpretation of the concept of "direction of activity" would mean that the creation of a website could already mean that the trader directs its business to the state of domicile of the consumer. Therefore, in interpreting the concept of "directing activity", a balance must be sought between the protection of consumers entitled to special rules of jurisdiction under Regulation nº 44/2001, and the consequences for the professional, to whom these special rules of jurisdiction should only apply if he knowingly chose to direct its activity to the Member State of the consumer.

The A. G. interpretation relies initially on four pillars: the usual sense of the concept of "directing an activity"; the teleological interpretation; the historical interpretation; and the systematic interpretation of the concept. She concludes that the notion is not broad enough to cover the mere accessibility of a website. She also notes that -leaving aside the historical interpretation – in assessing the

meaning of the direction of business within art. 15, the fact that the website is interactive or passive can not be an important point. On the other hand, she argues that several criteria will be relevant in assessing whether a person who pursues commercial or professional activities directs them towards the Member State of domicile of the consumer – ie, whether he invites and encourages the consumer to pass a distance contract. Among these criteria we find:

.- The information published on the site: indication of the international code before the telephone or fax number, or indication of a special telephone number for help and information of consumers abroad; information indicating the route to get from other Member States to the place where the professional operates (eg international connections by train, the names of closest airports); information on the possibility to check the availability of the stock of a commodity, or on the possibility to provide a particular service. Conversely, the only indication of an email address on the website is not enough to conclude that the merchant "directs its activity" within the meaning of Article 15, paragraph 1 c) of Regulation No 44/2001.

.- The business done in the past with consumers of other Member States: if the professional concludes traditionally distance contracts with consumers of a given Member State, there is no doubt that he directs its activities towards that Member State. On the contrary, the conclusion of one contract with one consumer of a particular Member State will not suffice for the direction of the activity to that Member State.

.- The language used on the website – although in the twenty-fourth recital Rome I Regulation this criterion is considered not important, Ms Trstenjak nevertheless argues that the language may in some borderline cases be an index of the direction of activity towards a particular Member State or to several Member States: for example, if a website is presented in a given language, but this language can be changed. This is relevant because it is an indication that the merchant directs its activity also to other Member States. Through the possibility to change languages, the merchant shows knowingly his wish that consumers from other Member States also conclude contracts with him.

.- The using of a top level domain of a given country, primarily in cases where a trader based in a given Member State uses the domain of another Member State in which he has no seat.

– If the merchant, using the various technical possibilities offered by the Internet (eg, the email), has sought to ensure that consumers of concrete Member States are informed of the offer.

.- If a trader who has a website also directs its activities towards the Member State of domicile of the consumer through other means of publicity.

.- If the merchant explicitly includes/excludes the direction of his activity to some Member States (and actually behaves in accordance with this inclusion/exclusion).

Finally, the AG suggests the ECJ to answer that the "direction of an activity" requirement within the meaning of Article 15, paragraph 1 c) of Regulation No 44/2001, is not met merely because the website of the person who carries the activity is accessible in the State where the consumer is domiciled. The national court must, on the basis of all the circumstances of the case, judge whether the person who carries on business and professional conducts his activities to the Member State where the consumer is domiciled. The important factors for this assessment include the contents of the website, the former activity of the person conducting the trade or professional activity, the type of Internet domain used, and the using of the possibilities of advertising offered by Internet and other media.

(The Parmer case also raises the question whether a tourist trip on board of a cargo ship can be considered as part of a contract for a fixed price combining travel and accommodation within the meaning of section15, paragraph 3 of Regulation nº 44/2001. According to Ms Trstenjak, the ECJ must answer affirmatively. She adds that in her view, the concept of a "contract which, for an inclusive price, provides for a combination of travel and accommodation" in Article 15, paragraph 3 of Regulation nº 44/2001 must be interpreted in the same way as the concept of "package" of Article 2, paragraph 1 of Directive 90/314 of 13 June 1990 on package travel, package holidays and package tours).

Ph.D. Grant – International Max Planck Research School for Maritime Affairs

Also this year, the International Research School for Maritime Affairs at the University of Hamburg will award for the period commencing 1 August 2010 **one Ph.D. grant** for a term of two years (with a possible one year extension). The particular area of emphasis to be supported by this grant is **Maritime Law and Law of the Sea.**

The deadline for applications is 30 June 2010.

More information on the scholarship can be found here.

First Issue of 2010's ERA Forum

The first issue of *ERA Forum* for 2010 was released recently. It includes several articles dealing with various aspects of European private law, either in English, German or French.

Some discuss more specifically topics of private international law. Here is the relevant part of the editorial of the journal by Leyre Maiso Fontecha:

> ***1 European civil procedure***
>
> *The Brussels I Regulation lays down rules governing the jurisdiction of courts and the recognition and enforcement of judgments in civil and commercial matters in the Member States of the European Union. It supersedes the Brussels Convention of 1968, which was applicable between the Member States before the Regulation entered into force in 2002. The Brussels I Regulation is currently under review by the European Commission. Among the issues raised are those concerning the treatment of choice of court agreements. By an*

exclusive choice of court agreement, the parties designate which court will decide disputes in connection with a particular legal relationship, to the exclusion of the jurisdiction of any other courts. Two of the articles illustrate current issues dealing with choice of court agreements.

The first one concerns the admissibility of damages in case of breach of a choice of court agreement. Gilles Cuniberti and Marta Requejo explain how, in the last decade, English and Spanish Courts have awarded damages in case of a breach of this clause. Until recently, the most efficient remedy was to seek an antisuit injunction in England, an order restraining a party from commencing or continuing proceedings in a foreign jurisdiction. This was however considered incompatible with European Union law in several cases decided by the European Court of Justice. The European Commission has nevertheless suggested in the Green Paper on the review of the Brussels I Regulation that the efficiency of jurisdiction agreements could be strengthened by granting damages for breach of such agreements.

The second article by Marta Pertegás presents the Hague Convention of 30 June 2005 on Choice of Court Agreement. This instrument, not yet in force, establishes uniform rules on jurisdiction and on recognition and enforcement of foreign judgments in civil or commercial matters. The Convention would prevail over the Brussels I Regulation in cases where one party resides in an EU Member State and the other in a non-EU Member State that is a party to the Convention. The author argues that, in order to ensure that co-ordination is achieved between the Convention and the future revised European regulation, the Convention should serve as a source of inspiration as to possible amendments to the Brussels I Regulation with regard to choice of court clauses.

2 Private international law

The Rome Convention of 1980 on the law applicable to contractual obligations entered into force on 1 April 1991 to complement the Brussels Convention of 1968 by harmonising the rules of conflict of laws applicable to contracts. Like the Brussels Convention, the Rome Convention has been recently converted into a Community instrument. The Rome I Regulation,4 applicable since 17 December 2009, also modernises some of its rules. The article of Monika Pauknerová looks into the changes brought by the Rome I Regulation regarding mandatory rules and public policy. Mandatory rules are those which cannot be

derogated by contract and which are declared binding by a legal system. In international cases, these can be "overriding" mandatory rules, which cannot be contracted out by the parties by choosing the law of another country. These must be differentiated from the public policy exception, which occurs when the application of a rule of the law of any country specified by the conflict rules may be refused if such application is manifestly incompatible with the fundamental principles of national public policy of the forum State. The author assesses positively the regulation of mandatory rules in the Rome I Regulation, which clearly distinguishes between mandatory rules and overriding mandatory rules, but notes that many issues still remain unsolved, such as the scope and conditions of application of the overriding mandatory provisions.

The conflict of law rules for non-contractual obligations have also been harmonised at EU level to complement both the Brussels I Regulation (which relates to both contractual and non-contractual obligations) and the Rome I Convention (nowadays a Regulation). The Rome II Regulation5 creates a harmonised set of rules within the European Union to govern choice of law in civil and commercial matters concerning non-contractual obligations. One of the fields of tort law it regulates is product liability. The article of Guillermo Palao Moreno, which is of high practical importance, analyses the conflict of law rule for product liability cases contained in Article 5 of the Rome II Regulation. In his thorough analysis of Article 5 of the Rome II Regulation, read in conjunction with the other provisions of the Regulation, the author points out that its application could however lead to an undesirable result. Although the inclusion of a specific provision for product liability primarily aims at avoiding the application of the general conflict of law rule of the law of the country in which the damage occurs, Article 5 maintains those solutions present in paragraphs 2 and 3 of Article 4. Furthermore, the author calls for clarification as to the coordination of the Rome II Regulation with the Hague Convention of 2 October 1973 on the Law Applicable to Products Liability.

The last three articles are written in English. The first is written in French.

Forum on the electronic Apostille Pilot Program, Madrid 2010

The Hague Conference on Private International law has announced the holding of the 6th Forum on the electronic Apostille Pilot Program (e-APP) in Madrid on 29 & 30 June 2010.

The e-Apostille is a digital document communicated in electronic form; it allows a country to improve the issuance of reports of an administrative or notarial character, certifications of authority or of civil servants, in order to produce full effects in a foreign State.

Under the electronic Apostille Pilot Program (e-APP), the Hague Conference on Private International Law (HCCH) and the National Notary Association of the United States (NNA) are, together with any interested State (or any of its internal jurisdictions), developing, promoting and assisting in the implementation of low-cost, operational and secure software technology for the issuance of and use of electronic Apostilles (e-Apostilles), and the creation and operation of electronic Registers of Apostilles (e-Registers).

This is the current list of operational e-registres:

Andorra (since July 2009)
Belgium (since October 2007)
Bulgaria (since November 2009)
Colombia (since October 2007)
Georgia (since July 2009)
Mexico (since February 2010)
New Zealand (since April 2010)
Republic of Moldova (since January 2009)
USA – Rhode Island (since February 2007)
USA – Texas (since November 2008)

Recently, the European Union has accorded substantial financial support to the e-APP. This support will allow for the further development, implementation and operation of e-Registers of Apostilles and the promotion of the e-APP in the European Union and beyond. The e-APP for Europe is a transnational e-justice/e-

administration project designed to develop best practices in relation to the Apostille Convention by promoting the e-APP, in particular the use of e-Registers of Apostilles. The 18-month project comprises 3 interrelated elements:

1.The development and implementation of a central e-Register of Apostilles for all Competent Authorities in Spain*
2.The holding of 3 regional meetings across Europe to encourage all participating States to implement e-Registers
3.The holding of the 6th International Forum on the e-APP

The first highlight of the project will be the the above mentioned forum. It will be open to any interested State and targeted to government officials, Competent Authorities, IT experts, judges, practitioners and scholars who are interested in the most recent developments with the e-APP; an open dialogue on the best practices for the implementation of the e-APP; or learning from the experiences of those with first hand knowledge of the e-APP.

The programme of the Forum will also highlight the development of a central e-Register for all Competent Authorities issuing Apostilles in Spain. The successful roll-out of the Spanish e-Register of Apostilles will serve as a model for implementing this component of the e-APP in other European jurisdictions and indeed any other Contracting State.

There is no cost to attend the Madrid Forum, but registration will be required. Additional details, including information on registration, venue, and the draft programme, will soon be published at the Hague Conference site.

Source: Hague Conference on Private International Law

Local languages in the European

area of justice

The Ministry of Justice of France has warned the General Council of the Spanish Judiciary on the bad practices of some Catalonian judges and magistrates, who send their resolutions to their French colleagues written in Catalan. France has raised a complaint to the CGPJ, which in turn has sent a letter to the president of the Superior Court of Justice of Catalonia, reminding that France will only accept foreing judicial communications in French, English, Italian, German or Spanish, and “do not accept any other language.”

The CGPJ explains the case of a Court of Cassa de la Selva (Girona), which sent a letter of request to the neighboring country drafted exclusively in Catalan. In the CGPJ’s opinion, this attitude amounts to a violation of the rules of linguistic uses. The CGPJ also points out that European countries have the power to decide which foreign languages other than their own they accept for judicial documents to be referred to them. It also notes that the French Huissiers de Justice are annoyed by the frequent use of Catalan in the forms and letters sent by Catalan courts.

According to a journalist point of view (see El Mundo, 17.05.2010), this approach of the judiciary may be influenced by the fact that both Catalonian police and justice are instructed to prioritize the Catalan language in their writings. In case their documents have to be sent to another Spanish court outside Catalonia, they must be translated. This obligation can not be extrapolated to countries where the language of communication is not recognized as official.

The CGPJ has urged Catalonian judges not to send more documents written in Catalan to the neighboring country.

Abbott v. Abbott: A Ne Exeat Right

is a “Right of Custody” Under the Hague Abduction Convention

In a 6-3 decision announced yesterday morning, the United States Supreme Court reversed the decision of the United States Court of Appeals for the Fifth Circuit, and held that a ne exeat right—which typically allows a non-custodial parent to resist a child’s move out of his country of habitual residence—constitutes a right of custody under the Hague Abduction Convention, requiring a prompt return of the child. This settles a long-running split among the federal courts in the United States, and (though the parties and even the Court disagree on this to some extent) it also signals an emerging consensus among the courts of the various contracting states on this issue. You can get the decision here. Early commentary is also available from the SCOTUSBlog, Opinio Juris and the National Law Journal.

Aside from the holding, though, this decision was interesting for other reasons. As foreshadowed by the transcript of the oral argument, there was an interesting line-up of the justices, not at all following along the usual ideological lines. The exchange between the majority and the dissent sparred over big topics like the primacy of the Treaty’s text over its intent, the importance of the Executive’s view of a Treaty, and the effect of judicial decisions of foreign courts; they also sparred over some smaller things, too, like how to read Webster’s dictionary.

As we’ve discussed before on this site, this case concerns a custodial mother who removed a child from his habitual residence in Chile to the United States against the wishes of a non-custodial father. The mother clearly had a “right of custody” under the Hague Convention; the father clearly had a “right of access”—or visitation rights—under the same Convention. Chilean law, however, gives all parents with such visitation rights an automatic ne exeat right as well. The question is whether that statutory entitlement gives the father a “right of custody,” or whether he retains a mere “right of access,” under the Convention. This classification is important: under the text of the Convention, the child must be returned to Chile if he was taken in violation of the former, but not if he is taken in violation of the latter.

The Convention defines a “right of custody” as “rights relating to the care of the

person of the child and, in particular, the right to determine the child's place of residence." The majority concluded that Mr. Abbott had both. Citing Webster's dictionary, the Court held that he could "set bounds or limit" the child's country of residence by virtue of the right he was given under Chilean law, thus giving him right to "determine" that place of residence. He also had rights "relating to the care of the person of the child" because, in its view:

> *Few decisions are as significant as the language the child speaks, the identity he finds, or the culture and traditions she will come to absorb. These factors, so essential to self definition, are linked in an inextricable way to the child's country of residence. One need only consider the different childhoods an adolescent will experience if he or she grows up in the United States, Chile, Germany, or North Korea, to understand how choosing a child's country of residence is a right "relating to the care of the person of the child."*

The majority then moved quickly into supporting its textual holding with evidence of intent and broader, systemic concerns. Though notably avoiding much discussion of the travaux preparatoires, it held that:

> *Only this conclusion will "ensure[] international consistency [by] foreclose[ing] courts from relying on definitions of custody confined by local law usage, definitions that may undermine recognition of custodial arrangements in other countries or in different legal traditions."*

> *Only this conclusion will "accord[s] with the Treaty's object and purpose . . . of deterring child abductions by parents who attempt to find a friendlier forum for deciding custodial disputes"; and*

> *Only this conclusion "is supported . . . by the State Department's view on the issue" and "the views of other contracting states."*

Justice Stevens, joined by Justices Thomas and Breyer, stated their disagreement in a lengthy dissent. They contended that "the Court's analysis is atextual—at least as far as the Convention's text goes." In their view, the majority's conclusion that Mr. Abbott has rights "relating to the care" of his son depends on an overly-broad reading of the phrase "relating to." Under the Court's formulation of it,

“any decision on behalf of a child could be construed as a right ‘relating to’ the care of a child”—a position which is unhelpful to precisely defining the right at issue. The majority’s reading of the “right to determine the child’s place of residence,” too, “depends upon its substitution of the word ‘country’ for the word ‘place.’” This is especially troubling in the minds of the dissenting Justices because “[w]hen the drafters wanted to refer to country, they did; indeed, the phrase “State of habitual residence” appears no fewer than four other times elsewhere within the Convention’s text. Thus, the mere right to prevent foreign travel does not equate with the right to determine “where a child’s home will be.” That decision, like nearly all others that directly relate to the care of the child (like what he will eat and where he will go to school), is left to the custodial parent, with no input from a non-custodial parent who possess only visitation rights.

The majority’s “preoccupation with deterring parental misconduct,” the Justice Stevens wrote, “has caused it to minimize important distinction[s]” in the Convention’s text. The crux of the dissent is how this case “eviscerates the distinction” between rights of custody and rights of access in the Convention. “[A]s a result of this Court’s decision, all [Chilean] parents—so long as they have the barest of visitation rights—now also have joint custody within the meaning of the Convention and the right to utilize the return remedy.” The majority opinion, Justice Stevens found, allows a Chilean statute to “essentially void[] the Convention’s Article 21, which provides a separate remedy for breaches of rights of access.”

The dissent found no support for the majority’s “atextual” reading in the State Department’s views. For starters, the dissent saw no need to resort to “supplementary means of interpretation” when a clear answer lies in the text of the Convention. And, even it were to consider these sources, it would give the Executive’s position little weight because that position has been inconsistent and is here unsubstantiated by relevant conduct. “Instead, the Department offers us little more than its own reading of the treaty’s text. Its view is informed by no unique vantage it has, whether as the entity responsible for enforcing the Convention in this country or as a participating drafter.” The dissent also eschewed any reliance on foreign court decisions, stating that “we should not substitute the judgment of other courts for our own” (which is an interesting position for Justice Breyer to take).

As has already been noted by commentators, this decision will be cited more often—at least in the United States—for its Treaty-interpretation guidance than its precedent for custody cases. On this front, the dissent puts forward a very convincing case when the issue is strictly confined to the text of the Convention. But when you factor in secondary interpretive aids—like the treaty's object and purpose, state practice, the negotiating history, and the views of publicists—the majority approach tends to emerge as the right one. The winner of this case prevailed on how the Convention worked in practical operation—not on how it looked in black-and-white—which suggests that the Court may begin to take a more dynamic approach to treaty interpretation issues in the future.

Another interesting undercurrent is flowing here on the degree of deference to give foreign law and foreign courts. The dissent gives little deference to foreign court decisions defining the Convention, and would not allow a peculiar foreign law—like the one at issue here—to blur the categorical line between access and custody rights, expand the scope of the Convention's return remedy, and thus effectively mandate the abdication of U.S. jurisdiction over the matter. The majority purports to follow foreign court decisions defining the Convention, and gives short-shrift to this practical effect of this Chilean statute—barely mentioning it at all. The result is freely abdicating this custody decisions to the Chilean court, allowing the "best interests of the child" to be determined elsewhere. Interestingly though, and in nearly the same breathe as it's stated deference, the majority reminds those foreign courts that: "Judges must strive always to avoid a common tendency to prefer their own society and culture, a tendency that ought not interfere with objective consideration of all the factors that should be weighed in determining the best interests of the child. . . . Judicial neutrality is presumed from the mandate of the Convention, . . . [and] international law serves a high purpose when it underwrites the determination by nations to rely upon their domestic courts to enforce just laws by legitimate and fair proceedings."

Compensation for private copying in respect of storage media: A.G. Opinion on SGAE v. Panawan S.L., aff. C-467/08

On September the 8th 2008, the Audiencia Provincial de Barcelona referred a preliminary ruling under Article 234 EC. The Audiencia Provincial de Barcelona submitted a series of questions to the Court concerning the interpretation of Article 5(2)(b) of Directive 2001/29 of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society. The referring court wanted to know whether the rightholders of any copyright are entitled to fair compensation in the event of the reproduction of a work or other subject-matter for private use. These questions arose in the context of proceedings in which a Spanish intellectual property rights management society (the Sociedad General de Autores y Editores de España, SGAE), is bringing a claim against the company Padawan S. L., for payment of flat-rate compensation for private copying in respect of storage media, marketed by it during a precisely defined period. At first instance, the claim was upheld. The defendant appealed against that judgment.

In its order for reference, the referring court expresses uncertainty with regard to the correct interpretation of the concept of 'fair compensation' in Article 5(2)(b) of Directive 2001/29. It has doubts as to whether the provision which is applicable in the Kingdom of Spain, pursuant to which the private copying levy is charged indiscriminately on digital reproduction equipment, devices and media, can be regarded as compatible with the directive. It is of the opinion that the reply to its questions will affect the resolution of the main proceedings, because it will determine whether the claimant in the main proceedings is entitled to claim fair compensation for private copying in respect of all the CD-Rs, CD-RWs, DVD-Rs and MP3 players marketed by the defendant, or only in respect of those digital reproduction devices and media which it may be presumed have been used for private copying. The referring court has accordingly stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

(1) Does the concept of 'fair compensation' in Article 5(2)(b) of Directive 2001/29 entail harmonisation, irrespective of the Member States' right to choose the system of collection which they deem appropriate for the purposes of giving effect to the right to fair compensation of intellectual property rightholders affected by the adoption of the private copying exception or limitation?

(2) Regardless of the system used by each Member State to calculate fair compensation, must that system ensure a fair balance between the persons affected, the intellectual property rightholders affected by the private copying exception, to whom the compensation is owed, on the one hand, and the persons directly or indirectly liable to pay the compensation, on the other, and is that balance determined by the reason for the fair compensation, which is to mitigate the harm arising from the private copying exception?

(3) Where a Member State opts for a system of charging or levying in respect of digital reproduction equipment, devices and media, in accordance with the aim pursued by Article 5(2)(b) of Directive 2001/29 and the context of that provision, must that charge (the fair compensation for private copying) necessarily be linked to the presumed use of those equipment and media for making reproductions covered by the private copying exception, with the result that the application of the charge would be justified where it may be presumed that the digital reproduction equipment, devices and media are to be used for private copying, but not otherwise?

(4) If a Member State adopts a private copying 'levy' system, is the indiscriminate application of that 'levy' to undertakings and professional persons who clearly purchase digital reproduction devices and media for purposes other than private copying compatible with the concept of 'fair compensation'?

(5) Might the system adopted by the Spanish State of applying the private copying levy indiscriminately to all digital reproduction equipment, devices and media infringe Directive 2001/29, in so far as there is insufficient correlation between the fair compensation and the limitation of the private copying right justifying it, because to a large extent it is applied to different situations in which the limitation of rights justifying the compensation does not exist?

Article 2 of the Directive states as follows:

'Article 2

Reproduction right

Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

(a) for authors, of their works;

(b) for performers, of fixations of their performances;

(c) for phonogram producers, of their phonograms;

(d) for the producers of the first fixations of films, in respect of the original and copies of their films;

(e) for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.'
Article 5(2)(b) of the Directive provides as follows:

'Article 5

Exceptions and limitations
(2) Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:

(b) in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject?matter concerned.'

Article 2 of Directive 2001/29 was implemented under Spanish law by Article 17 of the (Texto Refundido de la Ley de Propiedad Intelectual, TRLPI) which was approved by the Real Decreto Legislativo (1/1996 of 12 April 1996), and by the following articles which extend that reproduction right to other holders of intellectual property rights. Art. 2 provides that '[t]he author has exclusive rights of exploitation of his works regardless of their form and, in particular, reproduction rights …which cannot be exercised without his permission except in circumstances laid down in this Law',

Article 18 TRLPI specifies that reproduction means: ‘the fixation of the work on a medium which enables communication of the work and copying of the whole or part of the work’.

In accordance with Article 5(2)(b) of Directive 2001/29, Article 31(1)(2) TRLPI provides that works which have already been circulated may be reproduced without the author’s permission for ‘private use by the copier without prejudice to Articles 25 and 99(a) of this Law, provided that usage of the copy is not collective or for profit’.

The version of Article 25 TRLPI which preceded Amending Law No 23/2006 of 7 July 2006 lays down highly detailed rules governing the compensation to which the holders of intellectual property rights are entitled in respect of reproductions made exclusively for private use, ‘by means of non typographical devices or technical instruments, of works circulated in the form of books or publications deemed by regulation to be equivalent, and phonograms, videograms and other sound, visual or audiovisual media’. That compensation, which must be fair and paid only once, consists of a levy applicable not only to equipment and devices for reproducing books but also to equipment and devices for reproducing phonograms and videograms, and to media for sound, visual and audiovisual reproduction (Article 25(5) TRLPI). The levy must be imposed on manufacturers and importers of the aforementioned equipment and media and on ‘wholesalers and retailers as subsequent purchasers of the products concerned’ (Article 25(4)(a) CTLIP), and it is to be paid to intellectual property rights management societies (Article 25(7) TRLPI). Amending Law No 23/2006 amended Article 25 TRLPI so as to extend the application of that levy specifically to digital reproduction equipment, devices and media. The amount of compensation must be approved jointly by the Ministry of Culture and the Ministry of Industry, Tourism and Trade in accordance with the following procedure: first of all, rights management societies and the industry associations, representing in the main persons liable for payment, are granted a period of four months to determine which equipment, devices and media attract fair compensation for private copying, together with the amount payable in each case; second, three months after notification of the agreement, or after expiry of the four-month period if no agreement has been reached, the Ministry of Culture and the Ministry of Industry, Tourism and Trade must approve the list of equipment, devices and media which attract the levy and the amount thereof (Article 25(6) of the CTLIP). In that

connection, the Law lays down a number of criteria to be taken into account: (a) the harm actually caused to the holders of the intellectual property rights as a result of the reproductions classified as private copying; (b) the degree to which the equipment, devices and media are used for the purpose of such private copying; (c) the storage capacity of the equipment, devices and media used for private copying; (d) the quality of the reproductions; (e) the availability, level of application and effectiveness of the technological measures; (f) how long the reproductions can be preserved and (g) the amount of compensation applicable to the equipment, devices and media concerned should be economically proportionate to the final retail price of those products (Article 25(6) of the CTLIP).

In order to implement the abovementioned provisions, the Orden Ministerial (Ministerial Decree) No 1743/2008 of 18 June 2008 laid down which digital reproduction equipment, devices and media must attract payment of the private copying compensation, and the amount of compensation payable in respect of each product by every person liable.

In its Opinion of May, 11th, A.G.Trstenjak proposes that the Court should answer the questions referred by the Audiencia Provincial de Barcelona as follows:

1. The concept of 'fair compensation' in Article 5(2)(b) of Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society is an autonomous Community law concept which must be interpreted uniformly in all the Member States and transposed by each Member State; it is however for each Member State to determine, for its own territory, the most appropriate criteria for assuring, within the limits imposed by Community law and by the directive in particular, compliance with that Community concept.

2. The concept of 'fair compensation' must be understood as a payment to the rightholder which, taking into account all the circumstances of the permitted private copying, constitutes an appropriate reward for the use of his protected work or other subject-matter. Regardless of the system used by each Member State to calculate fair compensation, the Member States are obliged to ensure a fair balance between the persons affected – the intellectual property rightholders affected by the private copying exception, to whom the compensation is owed, on the one hand, and the persons directly or indirectly liable to pay the compensation, on the other.

3. Where a Member State opts for a levy system in respect of compensation for private copies on digital reproduction equipment, devices and media, that levy must, in accordance with the aim pursued by Article 5(2)(b) of Directive 2001/29 and the context of that provision, necessarily be linked to the presumed use of those equipment and media for making reproductions covered by the private copying exception, meaning that the application of the charge is justified only where it may be presumed that the digital reproduction equipment, devices and media are to be used for private copying.

4. The indiscriminate application of a levy, on the basis of a private copying rule, to undertakings and professional persons who clearly acquire digital reproduction devices and media for purposes other than private copying, is not compatible with the concept of 'fair compensation' within the meaning of Article 5(2)(b) of Directive 2001/29.

5. A national system which indiscriminately provides for a levy for compensation for private copying on all equipment, devices and media, infringes Article 5(2)(b) of Directive 2001/29, in so far as there is insufficient correlation between the fair compensation and the limitation of the private copying right justifying it, because it cannot be assumed that those equipment, devices and media will be used for private copying.

ILA Conference 2010

De Iure Humanitas. Peace Justice and International Law.

The 74th Conference of the International Law Association, hosted by the Netherlands Society of International Law to celebrate its 100th anniversary, will take place in The Hague from 15 to 20 August 2010. The programme includes topics intesting for PIL lawyers, e.g. sessions on international commercial arbitration, international family law, international securities regulation, international trade law and international civil litigation.

For more information on the programme and registration, please click here.

Second Issue of 2010's Journal du Droit International

The second issue of French *Journal du droit international* (*Clunet*) for 2010 was just released.

It includes four articles and several casenotes.

Remarkably, one of the articles is actually written in English. It discusses Company mobility through cross-border transfers of registered offices within the European Union – A new challenge for French law. The authors are Didier Martin, who practices at Bredin Prat, and Didier Poracchia, a professor of law at Aix-Marseilles University. Here is the abstract:

> *Freedom of establishment is recognised by the Treaty on the Fuctioning of the European Union not only for private individuals, but also for companies which are formed in accordance with the laws of a Member State and which have their registered office, central administration or principal place of business within the European Community. This freedom relates to taking up and pursuing activities as self-employed persons and to setting up and managing undertakings, and in particular companies within the meaning of the second paragraph of article 54 of the Treaty of the Functioning of the European Union (former article 48 of the EC Treaty), subject to the conditions laid down by the law of the country of establishment for its own nationals.*

The second article (in French) is authored by Caroline Kleiner, who teaches at Geneva university. Its title is the Transfer of the Seat of Companies in PIL (*Le transfert de siège social en droit international privé*). The English abstract reads:

> *The international transfer of seat is confronted to a lack of regulation at the national, communautary and international levels. Far from being a benign operation, the migration of seat entails important and burdensome consequences. In some cases, it subjects a company to the rules of another*

legal order, implying its transformation or the attribution of a new nationality to the said company ; in other cases, by transferring its seat, a company runs the risk of disappearing. These effects – transformation and naturalisation – should however be distinguished according to the connecting factors chosen by the State of origin and the host State in order to determine the law applicable to a corporation. The effects should also be distinguished on the basis of the type of migration, since the duality of the notions of « seat » is necessarily linked to the notion of transfer. In the present state of the law, and given the incoherent position of the Court of justice of the European Union, the lack of predictability and legal security obstructs international transfers and prevents companies from using a useful tool for their restructuration.

Hélène Péroz, who lectures at Caen University, is the author of the third article, which discusses the Law Governing Registered Partnerships (*La loi applicable aux partenariats enregistrés*).

The law of may, 12th 2009 (n° 2009/526), created a conflicts rule for registered partnerships (now codified in article 515-7-1 of the Code civil). Those are governed by the law of registration authorities. Nonetheless, the scope of the applicable law remains to be defined.

Finally, David Sindres, who lectures at Paris I University, has authored an article on Third Party Claims Based upon the Breach of Contracts in PIL (*La violation du contrat au préjudice des tiers en droit international privé*).

The reasonings followed by the European Court of Justice and the French Cour de cassation in private international law regarding third party claims based upon the breach of a contract concluded by the defendant remain influenced by solutions of substantive law. The underlying assumption is that insofar as these claims are characterized as tort ones in substantive law -in France, the Cour de cassation adopted this solution in its famous Bootshop decision- they must be analyzed the same way in private international law. Although neglected in the classification process, the stakes of private international law reappear when it comes to implementing the applicable rules of conflict of juridictions and of conflict of laws. Some of the difficulties entailed by the implementation of the chosen rules are thereby avoided, at the risk of ascribing these rules the role of mere formal references.

Guest Editorial: Fentiman on “Private International Law and the Downturn”



Richard Fentiman is Reader in Private International Law at the University of Cambridge, where he teaches the postgraduate course on International Commercial Litigation. His book on *International Commercial Litigation* was published by Oxford University Press in February 2010. He is the author of *Foreign Law in English Courts* (OUP, 1998), and he gave a course at the Hague Academy of International Law on *The Appropriate Forum in International Litigation* in 2002. His recent publications include ‘The Significance of Close Connection’ in Ahern and Binchy*, The Rome II Regulation on the Law Applicable to Non-Contractual Obligations* (Nijhoff, 2009) *,* and ‘Choice of Law in Europe: Uniformity and Integration’ (2008) 82 Tulane LR 2021. He recently gave evidence to the House of Lords European Union Committee on the reform of the Brussels I Regulation.

Abstract

An increase in litigation in the wake of the economic downturn was widely anticipated, and with it a rise in cross-border disputes with conflicts elements. Yet the expected flood of cases has not materialised, despite a rise in claims in commercial centres such as London. There are reasons why disputes increase in any slump. But the current downturn has special features. These suggest what kind of disputes may arise, including conflicts disputes, and they explain why the number of claims is less than expected. A surge in litigation may yet occur, as initial attempts at compromise fail. But, whatever the number of disputes, private international law may have a central role in regulating the downturn’s legal effects.

Private International Law and the Downturn

1. Facts and figures

Is private international law affected by the current downturn? An intuitive answer is that commercial disputes proliferate with economic contraction. Conflicts disputes increase correspondingly because so much commercial activity is transnational. This is apparently verified by recent developments in London, venue for so many commercial disputes. With the world's leading economies in recession, 2009 saw an increase of 20% on the previous year in claims initiated in the London Commercial Court. ((Financial Times, 8 April 2010.)) 1,225 claim forms were issued, close to the average in the early years of the last decade, and the highest number since 2002. ((When 1,213 claims were initiated: Admiralty and Commercial Court Report 2002-2003, [11].)) More striking still, cases submitted to the London Court of International Arbitration reached a record high in 2009, an annual increase of almost 30%. ((Financial Times, 8 April 2010.)) Many of these claims are likely to have foreign elements. Most commercial disputes in London involve foreign parties, or foreign laws, or foreign assets, or parallel foreign proceedings, or acts or omissions abroad – often in combination. ((The Commercial and Admiralty Court Report 2005-2006 records that approximately 80% of claims in that year involved at least one non-UK party.))

Such figures need cautious handling. Of course some recent cases originate in the downturn, some with conflicts implications. ((As, for example, *Jefferies International Ltd v Landsbanki Islands HF* [2009] EWHC 894 (Comm).)) But only proper investigation will reveal the true cause (or causes) of the rise in claims in London. Nor can it be a complete explanation to attribute the increase to the recession. The risk of default may have heightened, but the number of transactions from which litigation might arise increased in the preceding years of plenty, enhancing the risk of litigation, downturn or not. Nor does the increase in claims mean that conflicts issues are at stake. How many recent actions in the Commercial Court involve contested issues of private international law remains a matter of speculation until they go to trial, as many will not, given the tendency of

commercial disputes to settle. ((Commercial and Admiralty Court Report 2004-2005, 3.)) The nature of arbitrated disputes is even harder to discern, given the privacy of the process. ((Unless ancillary proceedings arise in court.))

Such caveats aside, the rise in pending disputes in London gives pause for thought, and begs intriguing questions. Has the downturn generated more disputes? Does this mean more conflicts disputes? What kind of conflicts disputes? How will they be resolved – in court, by arbitration, or by negotiation? And what of the biggest puzzle? Why has the slump not triggered still more claims? A proper response to these questions demands an empirical study, traversing the economics and sociology of litigation. The following brief remarks are no such thing, but attempt at least to capture some impressions, and suggest some possibilities.

2. Disputes and the economy

Litigation can be generated by economic growth as well as by retrenchment. Transactions multiply with economic expansion, increasing the potential for disputes. Some litigants may also be more aggressive in pursuing or defending proceedings if cushioned by prosperity from the risk of losing. But the risk of default is surely less when times are good, when credit is cheaper, and transaction costs stable. Experience confirms that economic crises spawn litigation. This is reflected in microcosm by the spike in claims in the London Commercial Court in the late 1990s. 1,808 claims were initiated in 1999, explained in large part by the implosion of the Lloyd's insurance market. ((Admiralty and Commercial Court Report 2005-2006, 5.))

Creditors become impatient in times of diminished liquidity. They are more likely to seek recovery through litigation rather than forgive a debt or reschedule. There is also an increased risk in a downturn that counterparties will default, or seek to escape performance, as transaction costs rise with the increased price of services and materials, and the scarcity of credit. But default is not always forced on obligors by pressures beyond their control. Some may calculate that deliberate repudiation of their obligations, with the risk of litigation, is preferable to adhering to a newly onerous bargain. With credit and liquidity reduced many litigants may have a heightened sensitivity to the cost of funding litigation, and to

the risk of losing in court. But economic adversity may also alter the balance of risk, making the cost of litigation seem more attractive than the cost of performance.

Excuses for non-performance, such as incapacity, mistake, fraud, duress or illegality, thus become important, with inevitable conflicts implications in cross-border transactions. Disputes about the identity of the applicable law are the consequence. But this will often be contractually agreed, forcing a defaulting party to argue that the contract is unenforceable by reference to another law. As cross-border litigation increases, so does reliance on overriding rules and public policy. A consequence may be more reliance on overriding prohibitions against onerous interest provisions or exemption clauses, coupled perhaps with pre-emptive litigation in courts where such prohibitions exist. ((A pre-downturn example of pre-emptive reliance on mandatory rules and public policy to invalidate provisions for the payment of interest is *JP Morgan Europe Ltd v Primacom AG* [2005] EWHC 508 (Comm).))

Just as economic adversity encourages default, so it precipitates collateral litigation against commercial partners, such as guarantors, insurers, and reinsurers, offering further potential for cross-border litigation. Such collateral disputes often concern whether the terms of a secondary contract incorporate those of a primary contract, not least terms affecting jurisdiction, arbitration and choice of law. ((Fentiman, International Commercial Litigation (Oxford: OUP, 2010), [4.71] – [4.86].))

It is also more likely in straightened times that parties to a bad bargain will allege mis-selling, or blame their advisers, perhaps suing for misrepresentation, or alleging negligence against a third party such as a broker or auditor. ((A pre-downturn example, subject to English law, but involving the alleged mis-selling of investments in complex financial instruments, is *JP Morgan Chase Bank v Springwell Navigation Corporation* [2008] EWHC 1186 (Comm).)) It becomes important to establish whether the creditworthiness of a counterparty, or the value of an asset, or the risk of a transaction, was misstated – and to address any related conflicts issues. Nor are lawyers immune from such collateral litigation ((See *Haugesund Kommune v Depfa ACS Bank* [2010] EWHC 227 (Comm) (advice as to capacity to contract).)) – not least those who gave insufficiently qualified opinions as to governing law and jurisdiction.

Allegations of fraud also increase with economic stringency – as indeed does fraud – as trading conditions worsen and liquidity deteriorates. ((Mitchell and Taylor, 'The Fraud Litigation Spiral' NLJ 6 February 2010, 175.)) Sellers misrepresent their products, straightened borrowers conceal their circumstances to obtain finance, traders lacking liquidity charge their assets (often receivables) to different lenders to obtain funds. In cross-border disputes this highlights the treatment of pre-contractual fault, and the vexed question of priority between competing assignments of the same debt. Because fraud is often associated with attempts to conceal assets, applications for transnational freezing and disclosure orders also become more frequent.

Governments also tend to respond to economic crises with protective legislation, increasing the legal regulation of businesses and markets, and restricting economically sensitive transactions. The effect is to highlight the importance of conflicts rules governing discharge and illegality, and in particular the treatment of supervening illegality in the place of performance. Old questions may also arise concerning the effect of moratorium legislation, and the expropriation of assets. ((As in *Jefferies International Ltd v Landsbanki Islands HF* [2009] EWHC 894 (Comm).))

So reasons to litigate abound in troubled times. But so does the readiness to sue. Some potential litigants may be deterred from doing so because the liquidity necessary to pursue litigation may be more limited, and the risk of failure more serious, in adverse economic conditions. But not those whose last chance to avoid closure or insolvency is a successful claim – colloquially, 'bet-all' claimants. And not liquidators, whose task is to maximize a company's assets by recovering its losses, or pursuing its debtors, or disputing disposals of its property. Liquidators are especially prone to challenge purported transfers of a company's accounts receivable – raising (again) vexed questions about the effectiveness of cross-border assignments. ((An older example is *Raiffeisen Zentralbank Osterreich AG v An Feng Steel Co Ltd.* [2001] EWCA Civ 68; [2001] QB 825.))

Such considerations explain why and how litigation follows in the wake of economic crisis. But this may not occasion more trials on the merits, still less more final judgments. Nor for that reason may choice of law disputes increase. Commercial disputes are almost always settled, often when the identity of the forum becomes clear. ((Commercial and Admiralty Court Guide 2004-2005, 3.)) True to form, any additional disputes in the London Commercial Court are likely

to be interlocutory, concerning jurisdiction and interim relief, the key components in cross-border litigation. The staying of actions, the restraint of foreign proceedings, and the disclosure and freezing of foreign assets, are likely to loom large. Given the likely complexity of any disputes, orders for case-management may assume special importance – with potential cross-border implications if proceedings in different countries are involved. Moreover, at least in the European Union, where the Brussels I Regulation emphasises the importance of pre-emptive forum shopping, many disputes are likely to involve first-strike actions, often no doubt for declaratory relief. ((Fentiman, 'Parallel Proceedings and Jurisdiction Agreements in Europe', in de Vareilles-Sommières, ed, Forum Shopping in the European Judicial Area (Oxford: Hart, 2007).))

3. A different landscape

The landscape of litigation in the present downturn has novel features unconnected with the economy, which may affect the incidence and nature of disputes. Two are special to Europe but have particular significance for conflicts lawyers.

First, there are now enhanced techniques for reducing the financial risk of litigation, making it more attractive – or less unattractive. The cost of litigation determines whether to initiate or defend proceedings, and (importantly) where to do so. But the financing of litigation has been transformed in recent years by the possibility of third party funding. (('Litigation finance follows credit crunch', Financial Times 27 January 2010; Litigation and Business: Transatlantic Trends (Lloyds, 2008), 9.)) Evidence of the practice in London is scant. But a growing number of third party investors are prepared to finance claims, conditional on a share of the proceeds if the claim succeeds. In theory at least this possibility is especially appealing in a downturn, both to claimants, whose ability to finance proceedings may otherwise be compromised, and by investors, for whom the value of more conventional asset classes may seem uncertain.

Secondly, the popularity of arbitration has increased. Claims before the London Court of International Arbitration rose significantly by 131% between 2005 and 2009, a trend matched by other arbitral institutions. ((Financial Times, 16 April 2010, 11, citing figures sourced from the Singapore International Arbitration Centre. In the period 2005-2009 the international disputes administered by the

other leading centres increased as follows: ICC, Paris 57%; American Arbitration Association 44%; the Singapore International Arbitration Centre 153%; the China International Economics and Trade Arbitration Commission 31%.)) At least some of those disputes would once almost certainly have been tried in court. One explanation is the perennial concern (not always justified) that commercial litigation is excessively lengthy, complex, and costly by comparison with arbitration. ((Concerns about the efficiency of lengthy cases before the London Commercial Court prompted a review of its procedures culminating in the Admiralty and Commercial Courts Guide 2009.)) Another is the increasing tendency to include arbitration clauses in species of contract which previously would have contained jurisdiction agreements. This is especially so in financial transactions. Financial institutions are less reluctant to arbitrate than convention once dictated. This partly reflects a desire to escape the inflexibility of the Brussels jurisdiction regime, preoccupied as it is with avoiding parallel proceedings even to the detriment of jurisdiction agreements. ((Sandy and O'Shea, 'Europe, Enforcement and the English'.)) The consequence has been an increase in hybrid clauses providing in the alternative for litigation or arbitration. ((See, for example, the clause at issue in *Law Debenture Trust Corporation Plc v Elektrim Finance BV* [2005] EWHC 1412 (Ch).)) Given the prevalence of disputes between financial institutions in the downturn, the sensitivity of the transactions involved, and concerns about media scrutiny, parties faced with that choice may well favour arbitration. The effect is not, however, to rule out litigation entirely. Arbitration often generates ancillary judicial proceedings, not least concerning the restraint of foreign proceedings commenced in defiance of an arbitration clause.

Thirdly, the downturn coincides with important changes in the European conflicts regime, with the coming into force of both the Rome I and Rome II Regulations. It is perhaps unfortunate that many of the conflicts issues which are likely to arise in the near future are governed by novel provisions, causing uncertainty, and itself generating more litigation. Foremost among these are Article 9 of Rome I (likely to become contentious as obligors plead illegality to escape performance), and Articles 4 and 12 of Rome II (regulating the likely crop of claims for mis-selling and negligent advice). It is especially regrettable that Article 14 of Rome I remains unreconstructed and ambiguous, given that the assignment of debts underlies so many contentious transactions.

Finally, any increase in litigation poses a challenge for the Brussels I Regulation, as interpreted in such recent cases as *Owusu*, ((Case C-281/02 *Owusu v Jackson* [2005] ECR I-553.)) *Gasser*, ((Case C-116/02 *Erich Gasser GmbH v MISAT Srl* [2003] ECR I-14693.)) *Turner* ((Case C-159/02 *Turner v Grovit* [2004] ECR I-3565.)) and *West Tankers*. ((C-185/07 *Allianz Spa v West Tankers Inc* [2009] 3 WLR 696.)) The inappropriateness of the Regulation for handling high-value, multi-jurisdictional disputes has often been noted, and needs no elaboration here. ((Fentiman, International Commercial Litigation (Oxford, OUP, 2010), [1.40] – [1.47].)) But a proliferation of such disputes can only impose further stress on a regime which destabilises jurisdiction and arbitration agreements, and militates against the allocation of cases to the most appropriate forum. The Brussels regime may indeed have its own role in encouraging litigation, by inciting the prudent to seise their preferred forum early so as to win the all-important battle of the courts. ((See, Fentiman, 'Parallel Proceedings and Jurisdiction Agreements in Europe', above.))

4. A different downturn

Not all slumps are the same, and the present crisis has distinctive features of particular interest to conflicts lawyers. Most obviously, this is the first downturn to affect truly global markets. The last two decades have seen an increase in cross-border transactions, encouraged by the globalization of finance, enhanced communications, and the growth of emerging markets for trade and investment. The present crisis also follows a period of unprecedented economic expansion. The downturn was preceded by an economic boom, fuelled by plentiful credit, in which the volume of global business increased – and with it the risk of cross-border litigation even in the best of times.

Again, the first effect of the crisis was an unprecedented credit drought, triggered by paralysis in the wholesale lending markets. The effect may be disputes in which the obligor's default was triggered by the denial or withdrawal of the credit necessary to fund a project, or a purchase, or an investment. There is evidence that many recent disputes in the London Court of International Arbitration concern default prompted by a lack of credit. ((Financial Times, 8 April 2010, quoting James Clanchy, LCIA deputy director-general.)) Another effect has been remarkable volatility in the financial markets, with the value of securities,

currencies and commodities not simply falling (as might be expected), but rising and falling unpredictably. ((‘Global Markets Turn Volatile’.)) Disputes about the assessment of loss may result. Market fluctuations also make it hard for potential litigants to predict whether their losses might evaporate with a market upswing, raising strategic problems for both obligors and obligees. Is it time to default; is it time to sue? ((This may further explain why less litigation has followed the downturn than expected.))

The dearth of credit has also prompted numerous business failures, leading to an increase in insolvency and associated disputes – often disputes with a foreign element, involving the collapse of multi-national businesses, and those with foreign creditors. At its simplest liquidators are likely to pursue unpaid debts and recover losses incurred by failed transactions. But they are equally likely to attack any disposals of the company’s assets. This might involve denying the effectiveness of any assignments of a business’s receivables or loan book, perhaps by challenging the proprietary effect of such disposals. Or it may involve recharacterising a transaction, by alleging perhaps that it creates a security interest, and so fails for want of form or registration. ((Fentiman, International Commercial Litigation (Oxford: OUP, 2010), [3.177] – [3.181].)) Both attacks beg choice of law questions. What law governs the effectiveness of the assignment of a debt, and the characterisation of a transaction?

The decade before the downturn also saw an increase in the use of complex financing techniques, and increased investment in novel investment vehicles and emerging markets. The legal structure of such techniques is largely untested, and the risk associated with such investments was often unclear. ((See eg the high-risk swap transactions involved in *Haugesund Kommune v DEPFA ACS Bank* [2009] EWHC 2227 (Comm).)) Cases probing the effectiveness of such transactions might be expected, as are claims for mis-selling, in which investors allege that the risks were either concealed or unexplained. ((A precursor is the dispute in *JP Morgan Chase Bank v Springwell Navigation Corporation* [2008] EWHC 1186 (Comm), in which the claim failed.))

Of special importance has been the use of derivatives, principally as a means to mitigate the risk of fluctuating markets, and the development of products linked to the securitization of debt. That one type of derivative, the credit default swap, functions (in effect) as insurance against default under a loan or bond, suggests that such transactions are increasingly likely to be litigated. But the potential for

disputes arising from securitization is especially instructive. Traditional 'vanilla' lending – finance in return for repayment and interest – depends on familiar contractual principles, against a tolerably stable conflicts background. So too does the straightforward issue of securities involving investment in the issuer's business. But the predominant financing technique of recent years has been securitization. This embraces a variety of structures with at their core the issue of securities in the form of bonds, backed by the bulk assignment of debt to the issuer, by legal vehicles whose only purpose is to hold the assigned assets and issue the securities. It has also spawned a parallel market in devices such as credit derivatives, effectively a means of betting on the value of securitized assets. Such structures provide finance to the owner of the underlying assets, profits for the issuer, and investment vehicles for those purchasing the securities and wagering on their value. But the legal implications have yet to be fully tested, certainly in a cross-border context. ((Numerous domestic disputes have arisen in the United States.))

Any litigation arising from such structures may seem familiar. Investors facing significant losses are likely to sue issuers for breach of warranty and misrepresentation, or claim from an issue's underwriters, or even pursue the debt's original owner (perhaps for fraud or negligence). So too the asset's original owner may face claims from an issuer. But securitization may be an especially fertile source of litigation for several reasons. ((For an account of the inter-party 'frictions' underlying securitization, each a potential source of litigation, see Ashcraft and Schuermann, *Understanding the Securitization of Subprime Mortgage Credit*, Federal Reserve Bank of New York Staff Reports, no 318 (March 2008).)) First, a typical securitization involves several contracts between different parties, creating a web of potential claims and counterclaims, involving the borrowers whose debts are securitized, the asset pool's original owner, the issuer of the securities, and the disappointed investors. Secondly, each of the relationships between the several key parties is asymmetric, in so far as one party is likely to have better information than the other concerning value and risk. ((As insightfully explained by Ashcraft and Schuermann, above.)) When one party's position sours such asymmetry leads inevitably to accusations of misrepresentation and non-disclosure. Thirdly, particular difficulty arises where the effectiveness of such arrangements is questioned, and in particular the assignment of the underlying assets to the issuer. These difficulties are magnified where those assignments involve parties from different jurisdictions, creating

intensely difficult (if all-too familiar) questions about the cross-border assignment of debts. ((It also lends particular urgency to the debate surrounding the future of the Article 14 of the Rome I Regulation.))

The present downturn also follows a period in which normal business prudence was to some extent ignored. Anecdotal evidence suggests that a combination of market pressure and easy profits meant that transactions were completed in haste, or with a degree of complacency about the legal implications. Of particular interest to conflicts lawyers, there is evidence of unthinking reliance on standardised documentation, of surprising inattention to the language of jurisdiction agreements, and a tendency to ignore qualified legal opinions as to the effectiveness of transactions.

5. To sue or not to sue?

Given the severity of the downturn, and the scale of the losses incurred, a substantial increase in commercial litigation was widely anticipated. ((‘Credit crisis could lead to surge in litigation’, Timesonline, 10 August 2007.)) True, the number of claims has risen in London. But the expected deluge of litigation has not – or has not yet – materialised. As the judge responsible for the London Commercial Court has said, ‘no one has encountered what I call a tidal wave of litigation’. ((Gross J, Judge in Charge of the Commercial Court, quoted in the Financial Times, 8 April 2010.)) Why is this so?

Legal obstacles may be one reason. A spate of claims related to the mis-selling of financial products has long been expected, cast as actions for fraudulent or negligent misrepresentation. But such claims are inherently problematic, and one judge recently described a sophisticated investor’s case as a ‘fantasy’ and ‘commercially unreal’. ((*JP Morgan Chase Bank v Springwell Navigation Corporation* [2008] EWHC 1186 (Comm). It has been suggested that the US fraud proceedings recently brought by the SEC against Goldman Sachs may become a template for litigation by private claimants: ‘Wall Street beware: the lawyers are coming’, ‘Regulator’s move risks opening lawsuit floodgates’, Financial Times 18 April 2010.)) Certainly, corporate investors may have difficulty in establishing the reliance necessary to found liability, ((See Bankers Trust International Plc v PT Dharmala Sakti Sejahtera (No 2) [1996] CLC 518.)) just as fraud or negligence

may be hard to make out against financial institutions with robust practices. ((See *Luminent Mortgage Capital Inc v Merrill Lynch & Co* (20 August 2009), USDC ED Pennsylvania (Philadelphia).)) In the context of an endemic market collapse claimants may also face difficult questions of causation and remoteness in proving loss. ((A feature of recent US litigation, illustrated by *Luminent Mortgage Capital Inc v Merrill Lynch & Co*, above.)) Moreover, and of particular importance, the parties' dealings are likely to be subject to contractual disclaimers and exemption clauses designed to forestall litigation. ((JP Morgan Chase Bank v Springwell Navigation Corporation [2008] EWHC 1186 (Comm); see further, Peekay Intermark Ltd v ANZ Banking Group Ltd [2006] EWCA Civ 386; [2006] 2 Lloyd's Rep 511.))

Nor are contractual claims for breach as likely as might be supposed. Commercial contracts are not meant to be litigated, but to regulate matters of performance and discharge autonomously. Potential claimants may be stopped short by robust exemption or force majeure clauses. Or their rights may be put beyond doubt by events of default clauses and warranties, or reinforced by indemnities, making any defence unsustainable. Such drafting obstacles may not always prevent litigation, given the creativity of lawyers, and what may be at stake. But they make it harder, more costly, and more risky, so deterring claimants and persuading defendants to capitulate.

There are also special incentives to resolve disputes arising from the downturn commercially, by negotiation. Where this cannot be achieved there may be incentives to resolve the dispute without the full panoply of litigation, by arbitration (perhaps post-dispute arbitration) or other alternative means. One reason is that one or both parties may be financial institutions reluctant to see their differences aired in public in court. The sensitivity of the commercial information involved, and the likelihood of media attention, may incline such litigants to resolve their differences by negotiation. Especially in the financial markets, the inter-connectedness of business provides two further reasons for preferring the amicable settlement of disputes. The need to preserve commercial relations for the sake of future business may incline the parties towards compromise, without the hostility engendered by litigation. The inter-relatedness of the markets also suggests that the roles of the same two parties may be reversed in different disputes, the potential claimant in one being the potential defendant in another. Where cases involve claims and counter-claims between

financial institutions there is a natural tendency to seek an accounting solution by means of a negotiated set-off.

A negotiated solution is especially attractive because of the degree to which litigation in the present climate may itself impair the parties' commercial effectiveness. A feature of the downturn is the pervasiveness of its effects. The scale of the crisis, and the number of transactions affected, makes its impact systemic, or at least ubiquitous. This has particular consequences. A party faced with default by numerous counterparties is more likely to resolve its problems by negotiation. It is one thing to pursue a single claim, quite another to embark on multiple actions involving different parties, which may come to dominate a company's business. The widespread nature of the crisis also means that the claimant in one dispute may be the defendant in another. Many potential claimants may themselves have defaulted in other transactions. To pursue and defend both actions would be to fight on two fronts. The cost and complexity of such litigation, consuming a company's business, is deeply unattractive. Companies may be willing to litigate one or even several matters where this represents a sound investment, and the benefit outweighs the cost, but not to amend their business plan by devoting their resources largely to pursuing and defending claims.

This is not to ignore the recent increase in proceedings in London. But the rise in claims is compatible with suggesting that most will be resolved by negotiation. Whatever the incentives to achieve a commercial solution a claimant may initiate proceedings to preserve its position. To commence proceedings was once regarded as a hostile act, as a last resort as likely to impair compromise as encourage it. But, at least in Europe, Articles 27 and 28 of the Brussels Regulation compel the parties to initiate proceedings early – indeed, prematurely – by giving priority in parallel proceedings to the court first seised. Many of the claims recently initiated in the London Commercial Court (as in other Member States) may have just this pre-emptive purpose. Whether the presence of such holding claims will impair the chances of reaching a commercial solution in particular cases remains to be seen. But to sue is not at odds with a desire for compromise.

To say that fewer disputes have gone to law than many expected requires, however, three important qualifications. First, pre-dispute legal business is booming. It is apparent that many commercial parties have sought legal advice to

establish their rights and liabilities in the wake of the downturn. Secondly, many companies, both sellers and investors, have set aside funds to cover the costs of potential litigation. In that sense, the legal impact of the downturn is already significant. Thirdly, what will happen next is unclear. There will be cases in which any hope of a commercial solution will evaporate as positions harden. There will be others in which such a solution is impossible because the legal position is uncertain. There may even be some where the parties' differences turn on questions of private international law. Such cases may yet become contested actions before courts or arbitrators. As this suggests, it is too early to tell what the true consequences of the downturn will be, for cross-border litigation, and for the conflict of laws. But there is growing awareness amongst practitioners that a new phase is about to begin, as it becomes clearer which disputes can be resolved amicably and which cannot – a phase of adjudication not compromise. In that sense, the story of the downturn's impact on cross-border disputes cannot yet be written.

6. Private international law and the downturn

It is important to ask whether cross-border disputes will increase with the downturn. Any rise in litigation or arbitration matters to the parties, and to the arbitrators, courts and lawyers whose business is adjudication. It has a public policy dimension, concerning the use of judicial resources. It also has economic effects. The cost of litigation and the ability of parties to recover their commercial losses are financial consequences of the downturn as much as those more commonly reported. The legal impact of any rise in cross-border cases may also be significant, not least for private international law. Litigation creates law. The more issues there are before the courts, the more the law evolves at the hands of the judges. It is perverse to wish for more cases. But when they arise old questions are answered, and new ones posed.

In the end, however, the importance of the downturn for private international law does not depend entirely on the volume of cross-border disputes. It does not turn alone on the work load of courts and arbitrators, or any increase in contentious conflicts questions, or even on whether the parties disagree at all. Which court has jurisdiction, which law governs, whether a judgment is enforceable, whether

an injunction is available, are matters which may frame the parties' negotiations, or underpin the advice of lawyers to their clients. The rules of private international law have a special importance in cross-border relations in establishing both the procedural position of the parties and their rights and obligations – matters of importance whether or not they are contested, and whether or not they go to court or arbitration. One way or another, private international law has a role in managing the effects of the downturn. One way or another, that role may be central.

I am grateful to Sarah Garvey of Allen & Overy, who kindly shared her views on these issues, but is absolved from responsibility for the opinions here expressed. *The following remarks are concerned only with private litigation, not with proceedings initiated by regulators.*