ERA Conference on European Contract Law

Much debated issue of harmonisation of the European contract law by means of the Common Frame of Reference is topic of the ERA conference taking place on 18 and 19 March 2010 in Trier, Germany. More precisely, the conference titled "European Contract Law: EU Consumer Law Revision and the CFR. Towards an optional instrument?" will address different aspects of adapting the academic DCFR to fit the purpose of the "political" CFR, the possibility for linking the CFR and the proposed Consumer Rights Directive, as well as the prospects of the CFR serving as an optional instrument.

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

The conference web page is accessible here.

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

Singh v Singh (2009) 253 ALR 575; [2009] WASCA 53, in the Western Australian Court of Appeal, was a dispute between two brothers, both resident in Western Australia. One, the plaintiff, claimed that the alienation by the other, the defendant, of real estate in Malaysia was made with the intent to defraud creditors, within the meaning of s 89(1) of the *Property Law Act 1969* (WA). (That section is the modern equivalent in Western Australia of the Elizabethan statute 13 Eliz c 5, which has been reproduced in all Australian states and the Commonwealth.)

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

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

> *The case does not concern the Moçambique rule itself. The [plaintiff]'s claim falls within an exception to the rule. This is because in this case the [plaintiff]*

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

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

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

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

Pullin JA also rejected the defendant's submission that, for various reasons, the transfer of the Malaysian property did not fall within the terms of the Act. In particular, his Honour held that the Act was not confined to property in Western Australia, but extended to applications by persons resident in Western Australia to set aside alienations of foreign property by acts performed within the state by other persons resident in the state. This was not an extraterritorial operation of

the Act because (at [75]): ‘Parliament does not legislate extraterritorially if it legislates concerning fraudulent conduct (occurring in the state) by a person resident within the state.’

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

Australian article round-up

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

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

German Judgment on Rome II

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

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

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

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

interpretation, the BGH referred to Art.6 (1) Rome II according to which the law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the country where the collective interests of consumers are, or are likely to be, affected. In this respect, the BGH left the question open whether Art. 6 Rome II is directly applicable in the present context, since, according to the court, the underlying rationale – namely that consumers should be protected by the law of that country where their collective interests are affected – applied in the present context as well.

With regard to the **temporal scope of application** of Rome II – which is contentious in view of the not unambiguous provisions of Art. 31 and Art. 32 of the Regulation (see in this respect the abstracts of the articles by *Glöckner* and *Bücken* which can be found here) – the BGH seems to adopt, as it has been pointed out already by *Professor von Hein* in his recent comment, the point of view according to which the Regulation entered into force on 11 January 2009. The BGH, however, did not discuss the problems surrounding Artt. 31 und 32 Rome II.

Concerning the applicable law, the BGH emphasised that a distinction had to be drawn with regard to the law applicable to the claim for injunctive relief and the law applicable to the validity of the term in question (para. 15, 24 et seq.): In this respect, the BGH stated that according to § 1 UKlaG an injunction could be sought if general terms and conditions were used which are invalid under German law (§§ 307-309 Civil Code, BGB). Thus, injunctive relief under this provision presupposed that German law applied with regard to the validity of the terms in question. The court emphasised that the application of German law with regard to the claim for injunction did not imply that the validity of the standard term in question was governed by German law as well (para. 25). In this context, the court pointed out that this resulted from an interpretation of § 1 UKlaG and § 4a UKlaG: While an injunction under § 1 UKlaG required an infringement of German law, injunctive relief could be sought according to § 4a UKlaG in case of intra-Community infringements of laws that protect consumers' interests in terms of Art. 3 b) Regulation (EC) No. 2006/2004. Thus, according to § 4a UKlaG, claims for injunctive relief could be brought irrespective of whether German consumer protection laws had been infringed, but rather also in cases where any other consumer protection laws – which were encompassed by § 4a UKlaG – had been violated. As a consequence, the court stated that the applicable consumer

protection law had to be determined independently. The validity of general terms was governed by the law of the contract (para. 29). In this respect the court held that Latvian law had to be applied according to German PIL rules (Artt. 28 (1), 31 (1) EGBGB (German Introductory Act to the Civil Code)) with regard to the validity of the questioned standard terms since Latvia was the country the contract was most strongly connected with: According to Art. 28 (2) S. 1, 2 EGBGB – which was applicable in the absence of a special choice of law rule with regard to contracts for the carriage of passengers by air – it is presumed that the contract shows the closest connection to the country in which the party who is required to perform the duty characterising the contract has its principal establishment at the time of the conclusion of the contract. Since in case of contracts as the one in question the transport had to be regarded as the characteristic duty and the air line had its principal place of establishment in Latvia, Latvian law was applicable with regard to the validity of the standard term.

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

Further, the court held that also the aim of consumer protection did not result in a closer connection to German law: Even though Art. 29 (2) EGBGB reflected this aim by stating that "in the absence of a choice of law consumer contracts […] are governed by the law of the country where the consumer has his or her habitual residence", this provision was not applicable according to Art. 29 (4) EGBGB with regard to contracts of carriage (see para. 38). In this context the BGH referred to the Rome I Regulation and pointed out the difference between Art. 5 (2) Rome I

(which was not yet applicable in this case) and Art. 29 (4) No. 1 EGBGB (i.e. Art. 5 (4) Rome Convention): While Art. 5 (2) Rome I Regulation now states that – in the absence of a choice of law – the law applicable to a contract for the carriage of passengers shall be the law of the country where the passenger has his habitual residence, provided that either the place of departure or the place of destination is situated in this country, Art. 5 (4) (a) Rome Convention (Art. 29 (4) No. 1 EGBGB) did not attribute such a significance to consumer protection.

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

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

Wolfgang Hau, LMK 2009, 293079

Ansgar Staudinger/Paul Czaplinski, NJW 2009, 3375

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

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

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

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

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

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

preliminary ruling:

> *1. (a) Is the second indent of Article 5(1)(b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('Regulation No 44/2001') applicable in the case of a contract for the provision of services also where the services are, by agreement, provided in several Member States?*
>
> *If the answer to that question is in the affirmative,*
>
> *Should the provision referred to be interpreted as meaning that*
>
> *(b) the place of performance of the obligation that is characteristic of the contract must be determined by reference to the place where the service provider's centre of business is located, which is to be determined by reference to the amount of time spent and the importance of the activity;*
>
> *(c) in the event that it is not possible to determine a centre of business, an action in respect of all claims founded on the contract may be brought, at the applicant's choice, in any place of performance of the service within the Community?*
>
> *2. If the answer to the first question is in the negative: Is Article 5(1)(a) of Regulation No 44/2001 applicable in the case of a contract for the provision of services also where the services are, by agreement, provided in several Member States?*

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

In the present case it is questionable whether the referring court can be regarded as a court of last instance in terms of (the former) Art. 68 EC-Treaty since the question whether there are judicial remedies against the decision of the

Oberlandesgericht Wien depends – according to Austrian civil procedural law – on the decision of the referring court: As the AG points out, in case the referring court should confirm the decision of the first instance court, there would be be no remedy against its decision – and vice versa (para. 48 et seq.).

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

In the AG's opinion, the mere possibility that the referring court *might* be the court of last instance has to be regarded as sufficient for the purposes of admissibility. Thus, *in favorem* of admissibility, the AG regards the reference as admissible (para. 50).

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

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

regard to contracts for the provision of services also in cases where the services are provided in several Member States (para. 67)

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

Also in this respect, the AG refers to the ECJ's decision in *Rehder* where the ECJ has held that "the place with the closest linking factor between the contract in question and the court having jurisdiction [is] in particular the place where, pursuant to that contract, the main provision of services is to be carried out" (*Rehder*, para. 38).

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

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

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

Abbott v. Abbott Argument Round-Up

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

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

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

According to the SCOTUSBlog, another scenario itched at Justice Breyer so that he raised repeatedly during the argument: What if the custodial parent – presumably the one with whom the child would be better off – is the one who moves the child abroad and the non-custodial parent is the one requesting return? In particular, what if that non-custodial parent is akin to a "Frankenstein's

monster" whom the family-law judge denied any rights over the child? If the Convention grants such a parent custody rights, Breyer insisted he could not see the "humane purpose" behind it.

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

Perhaps prodding the court to issue another *Aerospatialle* -style decision, Karl Hays—the attorney for the Respondent—insisted that a parent left behind could resort to the legal system of the country where the child was taken, using laws such as the Uniform Child Custody Jurisdiction and Enforcement Act in the United States, to seek enforcement of their existing rights of access or custody. Justice Scalia dismissed that argument, scoffing, "If these local remedies were effective, we wouldn't have a treaty."

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

> *Justice Scalia: Most courts in countries signatory of the treaty have come out the other way and agree that a ne exeat right is a right of custody, and those courts include U.K., France, Germany, I believe Canada, very few come out the way you—how many come out your way?*
> *Mr. Hays: Actually, Your Honor, the United States and Canada do, and the analysis—*
> *Justice Scalia: Well, wait … You're writing our opinion for us, are you?*
> *Mr. Hays: … There have only been seven courts of last resort that have heard this issue. There are some 81 countries that belong—*
> *Justice Scalia: Yes, but, still, in all, I mean, they include some biggies, like the House of Lords, right? And … the purpose of a treaty is to have everybody doing the same thing, and … if it's a case of some ambiguity, we should try to go along with what seems to be the consensus in … other countries that are signatories to the treaty.*

> *Mr. Hays: If, in fact, there were a consensus, but … there is not a consensus in this instance….*

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

As Roger Alford at Opinion Juris has pointed out:

> *[T]his exchange raises a great question of country-splits in treaty interpretation. Several justices appeared willing to interpret an ambiguous treaty provision consistent with the general consensus of signatory nations. But respondent argues that there is no clear consensus and only a handful of countries out of 81 signatories have even addressed the issue. So even assuming the Court takes the approach suggested by Justice Scalia in Olympic Airways and looks for signatory consensus, what's the Court to do when there are few voices from abroad and those voices are not consistent? Is there still a role for comparative interpretive analysis in that context?*

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

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

AG Opinion in Wood Floor

The AG's Opinion in C-19/09 *Wood Floor Solutions* is available, but not (yet) in English. See Veronika's post on the original reference for the questions posed as to the interpretation of Art 5(1)(b) Brussels I where services are provided in multiple Member States.

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.

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