# Non-Domiciled Parties and the Brussels I Regulation: A Phantom Menace

> *The Judges and Advocates General adjourned for lunch to discuss matters of common concern. Just before service of coffee, a pallid apparition entered the room, silently but menacingly. It wore a full bottomed wig, respecting its former custom, but appeared to have changed for the occasion into more modern, red and black Betty Jackson robes. All eyes in the room gazed upon the spectre. It rose, rattling its gavel angrily, before expelling a single word into the air. It was one unfamiliar to some of the assembled crowd, but which others knew only too well. 'Owuuuusuuuu …'*

The Court of Appeal's decision, delivered on 11 November 2009, in *Choudhary v Bhatter* [2009] EWCA Civ. 1176 will come as a surprise not only to some residents of Luxembourg but also to others familiar with the text of the Brussels I Regulation and recent jurisprudence of the Court of Justice. The Court decided that Art. 22 of the Regulation (specifically, Art. 22(2) concerning company disputes) does not apply to proceedings against persons not domiciled in a Member State, even if the relevant connection to a Member State is established. The Court also left open the question whether, even if Art. 22 were to apply, a Member State would retain the power to stay proceedings in favour of the courts of a non-Member State which it considered to be a more appropriate forum for the resolution of the parties' dispute.

The case concerned a dispute between rival factions within a company, of a kind that is fairly commonplace in England. One group was alleged to have attempted a coup, and the other brought proceedings against the company and selected members of the rival group in England, having first secured an interim injunction against one of the company's Indian directors, Mr Bhatter. What made the case unusual was that the company, although incorporated in 1872 in England, carried on its business exclusively in India and had been subject to (suspended) winding-up proceedings there. As Lord Justice Burnton noted:

> *The assets of the Company are in India; its affairs are subject to the jurisdiction of the courts in India; the events that gave rise to this litigation took place in India; and the individual parties, the witnesses and evidence are in India. It is obvious that the issues in these proceedings should be tried in India.*

Obvious it may have been to the Court, but not obvious according to the scheme of the Brussels I Regulation. Under Art. 22(2), exclusive jurisdiction is given to the courts of the Member State in which a company has its seat "in proceedings which have as their object … the validity of the decisions" of the company's organs. In *Choudhary*, it could not be doubted that (applying English private international law rules, in the form of Sch. 1, para. 10 of the Civil Jurisdiction and Judgments Order 1991) the company had its seat in the United Kingdom (specifically, England). Moreover, the claims set out in the Claim Form and Particulars of Claim appeared to fall (at least in substantial part) squarely within Art. 22(2). The relief sought included (a) declaratory relief concerning (i) the purported forfeiture of certain shares in the company by a shareholders resolution, (ii) a purported allotment of shares in the company by a board resolution, and (iii) the purported resignation of two of the claimants and the appointment of new directors and a company secretary by board resolutions, (b) statutory compensation from Mr Bhatter for allotment in breach of pre-emption rights, and (c) rectification of the company's register of members.

The appeal in *Choudhary*, however, concerned only the interim injunction granted against Mr Bhatter preventing him from taking certain steps with respect to the company's affairs. No similar relief had been sought or granted against the company or the other defendant, one of its shareholders, and neither was a party to the appeal. Indeed, the claimants' approach to the litigation may have been influential in their ultimate defeat. As another Court of Appeal judge noted at an earlier stage in the proceedings, in requiring that the claimants provide security for costs:

> *[T]here is a certain element of luxuriousness in the invocation of this jurisdiction by the claimants in this case. They may well be entitled to invoke it, but one asks oneself why it would not be sufficient for the injunctive relief that has so far been obtained to have been obtained in India, and indeed why the case as a whole could not more conveniently proceed in India. That is not of course an answer to the jurisdiction point because convenience, it is said by*

> *[Counsel], and no doubt rightly, is irrelevant to any question of invocation of jurisdiction under the Regulation, but as I say it does seem to me that, if the claimants wish to have the luxury of litigating these matters in England, that there is a certain injustice in requiring Mr Bhatter, who has a legitimate appeal, to put money up front to secure the costs of the appeal.*

This led the Court to question whether Art. 22(2) applied to a claim against a person not domiciled in a Member State. Again, the Regulation appears unambiguous on this point, as (1) Art. 22 is expressed to apply "regardless of domicile", and (2) Art. 4 (the general rule regulating jurisdiction over persons not domiciled in a Member State) is expressed to be "subject to Articles 22 and 23".

The Court begged to differ. It concluded, referring to references in the Recitals and in other Articles to domicile *in a Member State*, that:

- "the direction in the opening words of Art. 22 as to the courts which are to have 'exclusive jurisdiction' is a direction which was intended to apply only as between the courts of those Member States which are bound by the Regulation" (para. 34);
- the words "shall have exclusive jurisdiction" in Art. 22(2) displace Art. 2 and other rules in Sections 2 to 5 of the Regulation based upon domicile in a Member State (para. 35);
- the words "subject to Articles 22 and 23" in Art. 4(1) also prevent the exercise of jurisdiction over a person not domiciled in a Member State in cases where another Member State has exclusive jurisdiction under one of those Articles (para. 36);
- the words "regardless of domicile" in Art. 22 have no purpose, in the context of promoting the sound operation of the internal market, in a case where the person sued is not domiciled in a Member State (para. 37); and
- it is unnecessary – and wrong – to construe the words "regardless of domicile" in Art. 22 as having any application to a case where the person is not domiciled in a Member State (para. 38).

The Court suggested (para. 38) that no authority compelled a different conclusion. It did not, therefore, refer to the ECJ's observation in para. 28 of its

judgment in *Owusu v Jackson* (Case C-281/02) that:

> *[T]he rules of the Brussels Convention on exclusive jurisdiction or express prorogation of jurisdiction are also likely to be applicable to legal relationships involving only one Contracting State and one or more non-Contracting States. That is so, under Article 16 of the Brussels Convention* ***[the predecessor to Art. 22 of the Regulation]****, in the case of proceedings which have as their object rights in rem in immovable property or tenancies of immovable property between persons domiciled in a non-Contracting State and relating to an asset in a Contracting State.*

Nor did the Court refer to the ECJ's statement in para. 14 of its judgment in *Klein v Rhodos Management* (Case C-73/04) (a claim against a company not domiciled in a Member State) that:

> *As a preliminary point, it must be observed that Article 16(1) of the Convention provides for the exclusive jurisdiction of the courts of the Contracting State where the property is situated, in proceedings which have as their object rights in rem in, or tenancies of, immovable property, by way of derogation from the general principle laid down by the first paragraph of Article 4 of the Convention, which is that if the defendant is not domiciled in a Contracting State, each Contracting State is to apply its own rules of international jurisdiction.*

Nor did the Court refer to the ECJ's statement in para. 21 of its judgment in *Land Oberösterreich v CEZ* (Case C-343/04) (a claim against a company not domiciled in a Member State where Art. 16 of the Brussels Convention was relied on to establish jurisdiction) that:

> *It must be observed, as a preliminary point, that, although the Czech Republic was not a party to the Brussels Convention at the date on which the Province of Upper Austria brought the action before the Austrian courts, and the defendant in the main proceedings was not therefore domiciled in a Contracting State at that date, such a circumstance does not prevent the application of Article 16 of the Brussels Convention, as is expressly stated in the first subparagraph of Article 4.*

Finally, the Court did not refer to the ECJ's statement in para. 149 of its Opinion 1/03 on the Lugano Convention that:

> *As regards that reference to the national legislation in question, even if it could provide the basis for competence on the part of the Member States to conclude an international agreement, it is clear that, on the basis of the wording of Article 4(1), the only criterion which may be used is that of the domicile of the defendant, provided that there is no basis for applying Articles 22 and 23 of the Regulation.*

Further, the Court's view (para. 36) that the words "subject to Articles 22 and 23" in Art. 4(1) prevent the exercise of jurisdiction by a Member State court applying local rules of jurisdiction against a non-domiciled person when the courts of *another* Member State have exclusive jurisdiction, but do not enable Arts. 22 and 23 to be relied on as a positive basis for establishing jurisdiction against such a person and (apparently) do not prevent reliance on Art. 4(1) by a court in the Member State designated under Art. 22 and 23 as having "exclusive jurisdiction" is baffling. Art. 22(2) either applies to claims against non-domiciled parties or it does not. The half-way house reached by the Court is unattractive and, it is submitted, indefensible.

In light of the wording of Art. 22 and earlier ECJ authority, the Court of Appeal's interpretation of the Brussels I Regulation appears untenable, and unlikely to survive a further appeal should the matter proceed. The Court, however, gave two other reasons for allowing the appeal of the Indian director, and discharging the order.

First, in the Court's view, the only claim against Mr Bhatter was the claim for statutory compensation, which as a personal claim which did not depend on a finding of validity fell outside Art. 22(2) (paras. 46-47). The claims for declaratory relief (see above) were, in the Court's view, brought only against the company and the defendant shareholder (paras. 31-32). Although that conclusion may have reflected the presentation of the claimants' written case, the separation of one defendant from the others seems questionable, as the issues concerning the validity of decisions relating to the identity of the shareholders and directors of the company were equally pertinent to relations between two of the claimants, claiming to be directors in the company, and Mr Bhatter, who (on any view)

continued to act as a director. The claimants, therefore, had a legitimate interest in claiming a declaratory relief against Mr Bhatter, at least with respect to the board decisions.

Moreover, even if the Court of Appeal's view of the limited nature of the claims advanced against Mr Bhatter is correct, it may be questioned whether Art. 22 should to be applied on a fragmented basis to individual claims in complex proceedings based on company law, where all claims are closely linked to a series of contested decisions of the company's organs. Although a claim by claim approach has been supported by the ECJ in relation to the *lis alibi pendens* rules (Case C-406/92, *The Tatry*), it does not follow that the same approach is appropriate in the context of Art. 22. The ECJ's decision in *GAT v Lamellen* (Case C-4/03) might suggest a more rounded approach, looking at the proceedings as a whole.

Secondly, the Court (paras. 56-64) thought that the interim order should not have been granted, as it served no proper purpose in view of the strong connection to India and the existing arrangements there for management of the company's affairs. On this point, the Court appears to have been on stronger ground, but the grant or refusal of injunctive relief should have no impact on the Court's jurisdiction to determine the substance of the case. Unless, however, the decision on the Art. 22 issue is reversed by the Supreme Court or the Court of Justice, it appears unlikely that the claim will progress any further. To add to the claimants' woes, the Court (paras. 66-70) refused permission to serve the claim form on the defendants other than the company in India (the company appeared powerless to act in its defence – see para. 21), and refused to make any interim order against the company directly.

Finally, the Court considered (but, in light of its interpretation of Art. 22(2), did not resolve), the question whether a court having jurisdiction under Art. 22 could decline it on *forum conveniens* grounds.

From an EU law perspective, the answer to this question may appear obvious – Art. 22 ranks, in the hierarchy of rules in the Brussels I Regulation, above (and operates as a limited exception to) Art. 2. Like the former provision, Art. 22 is expressed in mandatory terms ("shall have exclusive jurisdiction") and serves the purpose of conferring jurisdiction on the courts of the Member State which is best placed to determine specific disputes (see, e.g., Case C-372/07, *Hassett v South*

*Eastern Health Board*). Art. 2, famously, has mandatory effect, excluding the power to decline jurisdiction on *forum conveniens* grounds. If the same conclusion were not reached with respect to Art. 22, then a claimant may (in a case such as *Choudhary*) find himself in a more precarious position in terms of establishing and maintaining jurisdiction under the Regulation if his claim fell within Art. 22 (exclusive jurisdiction) than if he sued in the defendant's Member State of domicile under Art. 2.

The Court, however, declined to express a view either way, suggesting that the Court of Justice might take the opportunity to resolve that question on the reference made to it by the Supreme Court of Ireland in *Goshawk Dedicated v Life Receivables* [2009] IESC 7. As that reference has not yet made it out of Dublin, and does not in any event concern the issue raised in *Choudhary*, we should not perhaps hold our collective breath.

*Choudhary v Bhatter* is undoubtedly an unusual case, and one which may not easily be replicated for the other grounds of jurisdiction in Art. 22. Nevertheless, the Court of Appeal's conclusion that Art. 22 of the Brussels I Regulation does not apply to claims against persons not domiciled in a Member State could be seen as a defiant stance against the tide of EU regulation of matters of private international law. Unfortunately, the fight that it chose to pick seems unwinnable, for the reasons given. Further, the Court's approach to Art. 4(1) and its relationship to Arts. 22 and 23 (choice of court agreements, creates uncertainty in practice as to whether those Articles are capable of conferring jurisdiction against non-domiciliaries or whether a jurisdictional basis must be found in local rules (imposing on claimants the requirement to serve proceedings out of the jurisdiction). It is to be hoped that the Supreme Court will be given the opportunity to clear up.

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# US Supreme Court Grants Review

# in Case Involving Whether US Securities Laws Apply to Transnational Dealings

On Monday, the US Supreme Court granted certiorari in the case of *Morrison, et al., v. National Australia Bank, et al.* (08-1191), even though the US Solicitor General had urged it to bypass the case. The case presents the following issue: Whether the judicially implied private right of action under Section 10(b) of the Securities and Exchange Act of 1934 should, in the absence of any expression of congressional intent, be extended to permit fraud-on-the-market claims by a class of foreign investors who purchased, on a foreign securities exchange, foreign stock issued by a foreign company. More information on the case and petition-stage briefing is available here.

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# Prize Established for Best Essay on Conflict of Laws

The following announcement will be of interest to many of our readers.

The Private International Law Interest Group of the American Society of International Law has established a prize for the best essay on any topic of conflict of laws. The terms and conditions for the call of papers for the prize are as follows:

"Private International Law Prize

Terms and conditions

A prize has been established by the Private International Law Interest Group of the American Society of International Law for the best essay submitted on any topic in the field of private international law.

Competitors may be citizens of any nation but must be 35 years old or younger on December 31, 2009. They need not be members of the American Society of International Law.

The prize consists of $500 and a certificate of recognition. The prize will be awarded by the Private International Law Interest Group on the recommendation of a Prize Committee. Decisions of the Prize Committee on the winning essay and on any conditions relating to this prize are final.

The winner of the Private International Law Prize will be announced at the American Society of International Law's Annual Meeting in March 2010.

Submission: Submissions must be received by January 15, 2010. Entries must be written in English and should not exceed 8,000 words, including footnotes.

Entries must be submitted by email in Word or Pdf format with a cover sheet containing the title of the entry, name and contact details. The essay itself must contain no identifying information other than the title.

Submissions and any queries should be addressed by email to: Alejandro Carballo, alex.carballo@cuatrecasas.com

All submissions will be acknowledged by e-mail."

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# Security for claim and costs in action of incola against peregrinus

In a recently published judgment of the High Court of South Africa, Cape Provincial Division (Silvercraft Helicopters (Switzerland) v Zonnekus Mansions 2009 (5) SA 602)), the Court had to deal with the question whether, in terms of the common law, an order for security for the claim, or only for costs, was to be made when an action (either in convention or in reconvention) is brought by an incola against a peregrinus. Citing a long passage in an article by Prof. Christian Schulze "Should a peregrine plaintiff furnish security for costs for the

counterclaim of an incola defendant" , (2007) 19 South African Mercantile Law Journal 393-399, the Court adopted Schulze's view and held "that there is indeed a practice operating in this division that would permit the court to grant an order directing the plaintiffs to give security for the potential value, and costs, of the second defendant's claim in reconvention, but that all the circumstances should be considered before a plaintiff is compelled to provide security in full for a claim in reconvention".

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# Jurisdiction to Take Control over, and Liquidate, Foreign Companies

Is it permissible for a court to appoint a receiver whose powers will include taking control of a foreign company, holding in his possession all its assets, and liquidate it? Would that, at the very least, require recognition of the court order in the jurisdiction where the company has its seat?

These are some of the very many interesting issues raised by the proceedings initiated by the American Securities and Exchange Commission (SEC) against an American businessman living in France, Richard Blech, and companies of his group, Credit Bancorp. Blech has been accused of running a ponzi scheme in the United States. The SEC initiated proceedings against him before the U.S. District Court for the Southern District of New York for violation of U.S. securities laws. Pending the determination of the merits of its claims, the SEC sought interim orders aiming at preserving the assets of the defendants. In November 1999, the U.S. Court issued a first temporary restraining order and asset freeze and then a second one. These orders not only purported to freeze the assets of the defendants world wide but also appointed a Fiscal Agent for both Blech and some of his companies.

The authority of the Fiscal Agent included asserting control over foreign companies by being appointed by Blech as their sole officer and director. The companies were incorporated in various jurisdictions in the world, but what really

mattered to the Fiscal Agent was Credit Bancorp N.V., the holding of the group which was incorporated in the Netherlands Antilles. The Fiscal Agent (who had been appointed in the meantime as a Receiver by the U.S. Court by an order of January 2000 which had now empowered him to liquidate Credit Bancorp N.V.) demanded that Blech designate him as the signatory of all accounts of the company, and that he appoint him as the sole director and officer of Credit Bancorp N.V., and indeed of all other companies. As Blech would not, he was declared in contempt of court by Court Order of April 2000 and ordered to pay US$ 100 per day of non-compliance. The financial penalty eventually reached US$ 13 million (I have already reported on the enforcement proceedings that the Receiver has initiated in France).

In August 2008, the Netherlands Antilles lawyer of Credit Bancorp N.V. wrote to the Receiver in his personal capacity to inform him that he had been instructed to seek compensation for his improper interferences with the company, arguing in particular that the receiver had no lawful jurisdiction over Credit Bancorp N.V. The Receiver answered that he was properly constituted by the U.S. Court. He also demanded that Blech instruct the Netherlands Antilles lawyer to discontinue its activities. On December 17, 2008, Credit Bancorp N.V. initiated proceedings in Curacao, Netherlands Antilles, against the Receiver (still in his personal capacity) and his American lawyers, claiming US$ 150 million in damages for unlawful interference. Arguments put forward by Credit Bancorp N.V. include that U.S. Court never had jurisdiction over Credit Bancorp N.V., that the Receiver never sought recognition of any of the U.S. orders abroad (and that he consequently has no authority in Curacao), and that he has never served properly the foreign company.

In October 2009, the Receiver sought an antisuit injunction in New York. On the jurisdictional points, he argued that Credit Bancorp N.V. was the very same company as its American subsidiaries, and indeed that all Credit Bancorp companies wherever incorporated are just different names used by Blech to operate his scheme. On October 14, 2009, the U.S. District Court issued another contempt order against Blech. The order finds that Blech is in contempt for interfering with the Receiver’s duties, and issues an arrest warrant which will remain in effect as long as the Netherlands Antilles action will not be dismissed.

Is the assertion of jurisdiction of the U.S. Court admissible? The court appointed receiver certainly carries state authority. May a Court freely empower

him to act abroad? Is it relevant whether he will physically travel to the foreign jurisdiction or whether he will instead merely act from the country where he was granted authority?

Is the situation different when his actions include taking control over a foreign company, and might result in its liquidation? In this case, the Receiver argued that the "foreign" company could not be distinguished from a local company. But I understand that the companies each had offices in the jurisdiction where they were incorporated, with salaried resident directors. And the Receiver still demanded Blech to relinquish control over the foreign company. If there had really been no difference, maybe he would not have insisted so much and sought two contempt orders. Does the existence of a company fall within the exclusive jurisdiction of the state where it was incorporated?

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# Case note on Gambazzi

I have posted a draft case note in English on the *Gambazzi* case on SSRN.

It discusses a variety of the issues raised by the judgment of the ECJ, including the characterization of English default judgments as judgments within the meaning of article 25 of the Brussels Convention (as it was then) and the compatibility of the English proceedings with public policy.

With respect to public policy, the central argument is that the ECJ's conclusion that the English proceedings ought to be scrutinized globally is unhelpful and confusing. It should have been conceptually much clearer and should have identified the particular aspects of the proceedings which could be found as infringing Gambazzi's fundamental rights.

The note can be freely downloaded here. It is a draft, so I very much welcome comments!

# Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (6/2009)

Recently, the November/December issue of the German law journal "Praxis des Internationalen Privat- und Verfahrensrechts" (**IPRax)** was released.

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

- ***Klaus Bitterich:*** "Vergaberechtswidrig geschlossene Verträge und internationales Vertragsrecht" – the English abstract reads as follows:

*This article is concerned with the law applicable to international (works or supplies) contracts concluded by a German public authority on the basis of an unlawful award procedure or decision. In many, but not all cases there will be an express or implied choice of law agreement in favor of German law by way of reference to the German Standard Building Contract Terms "VOB/B" or, in case of a supplies contract, the "VOL/B" respectively. In the absence of choice, a contract concluded as a result of a tender procedure governed by public procurement legislation is, as the author intends to show, according to the escape clause of article 4 para. 3 of the new Rome I-Regulation No. 593/2008 governed by the law of the country where the tender procedure took place, because such a contract is more closely connected to this place than to the place where the party who is to effect the characteristic performance has his habitual residence. Thus, where German authorities are involved German law will apply to the question whether a breach of a public procurement rule is capable of affecting the validity of the contract. The relevant German provisions of substantive law state that such breach may only be invoked by means of a specific review process according to §§ 102 et seq. of the "Gesetz gegen Wettbewerbsbeschränkungen" (GWB) and, as this remedy is no longer available after the contract has been concluded, as a principle hold errors in the*

*procurement procedure which where not subject to such review irrelevant. The only exception is § 101b GWB (replacing the former § 13 of the "Vergabeverordnung" – public procurement regulation –) declaring void contracts concluded without prior information of tenderers whose offers will not be accepted and, on the other hand, contracts concluded without a regular tender procedure. Whether this provision is an overriding mandatory provision within the meaning of article 9 para. 1 of the Rome I-Regulation and thus applicable irrespective of the law otherwise applicable to the contract is the second subject of the article at hand. The author argues that this is not the case due to its inability to effectively enforce the public procurement regime even on a national level after the contract has been concluded. It must be noted, though, that the Oberlandesgericht (OLG) Düsseldorf has taken the opposite view.*

- ***Felix Dörfelt***: "Gerichtsstand sowie Anerkennung und Vollstreckung nach dem Bunkeröl-Übereinkommen" – the English abstract reads as follows:

*The International Convention on Civil Liability for Bunker Oil Pollution Damage designates international jurisdiction to the country where the damage occurred. The author discusses the various available local fori under the Brussels I-Regulation and the German ZPO, emphasizing on the forum actoris under Art. 9 para. 1 lit. b in connection with Art. 11 para. 2 Brussels I-Regulation. The gap in German local jurisdiction for damages in the exclusive economic zone can be bridged by an analogy to § 40 AtomG. Concerning the recognition and enforcement of Judgments under the convention the author criticises the possibility of "recognition-tourism" due to the global effect of recognition under Art. 10 para. 1 Bunker Oil Convention. The convention allows subsequent enforcement of judgements recognized without the possibility of a public policy exception due to the specialties of the German law on recognition and enforcement. This problem can be overcome by an extensive interpretation of "formalities" in Art. 10 para. 2 Bunker Oil Convention allowing for courts to invoke the public order exception.*

- ***Peter Mankowski***: "Die Darlegungs- und Beweislast für die Tatbestände des Internationalen Verbraucherprozess- und Verbrauchervertragsrechts"

– the English abstract reads as follows:

*The burden of proof and the onus for the underlying facts in the concrete application of both conflict rules and rules on jurisdiction is one of the dark areas. The present article examines it in the field of international consumer law. The fundamental maxim is that the party who alleges that a certain rule is applicable bears the burden of stating and proving that the facts required are fulfilled. Hence, generally it is for the consumer to show that the facts required to bring the protective regime of international consumer law in operation, are present since ordinarily the consumer will allege its applicability. He who invokes an exception is liable to present the facts supporting such contention. If a choice of law or choice of court agreement is at stake the party invoking it must show that such agreement has been concluded in accordance with the chosen law.*

- ***Carsten Müller***: "Die Anwendung des Art. 34 Nr. 4 EuGVVO auf Entscheidungen aus ein- und demselben Mitgliedstaat" – the English abstract reads as follows:

*The Council Regulation (EC) No 44/2001 provides in Article 34 (3) and (4) that a judgment, under certain conditions, shall not be recognised if this judgment is irreconcilable with a judgment given in the Member State in which recognition is sought (Article 34 (3)) or with an earlier judgment given in another Member State or in a third State (Article 34 (4)). The following article deals with the question whether "another Member State" in the sense of Article 34 (4) is also the Member State from which the judgment to which the earlier judgment might be opposed originates. The author comes to the conclusion that Article 34 (4) also applies to two judgments originating from the same Member State other than the Member State in which recognition is sought.*

- ***Moritz Brinkmann***: "Der Vertragsgerichtsstand bei Klagen aus Lizenzverträgen unter der EuGVVO" – the English abstract reads as follows:

*In Falco Privatstiftung and Rabitsch the ECJ has excluded license agreements from the application of Article 5 (1) (b) Brussels I Regulation. The author argues that the Court's narrow understanding of the term "contract for the*

*provision of services" is persuasive particularly in light of Article 4 (1) (b) Rome I Regulation. Regarding Article 5 (1) (a) Brussels I Regulation, the ECJ has held, that the principles which the Court previously developed in Tessili and De Bloos with respect to Article 5 (1) of the Brussels Convention are still pertinent with respect to the construction of Article 5 (1) (a) of the Brussels I Regulation. This position is not surprising as the legislative history of Article 5 (1) gives clear indications that for contracts falling under (a) the legislator wanted to retain the Tessili and De Bloos approach. In the author's view, however, the case gives evidence for the proposition that the solution in Article 5 (1) of the Brussels I Regulation is an unsatisfying compromise as it requires for contracts other than contracts for the sale of goods or for the provision of services a determination of the applicable law. Hence, the ascertainment of jurisdiction is burdened with the potentially difficult determination of the lex causae. The author postulates that the European legislator should de lege ferenda extend the approach taken in Article 5 (1) (b) to other kinds of contracts where the place of performance of the characteristic obligation can be autonomously ascertained. With respect to license agreements this could be the jurisdiction for which the right to use the intellectual property right is granted.*

- ***Markus Fehrenbach***: "Die Zuständigkeit für insolvenzrechtliche Annexverfahren" – the English abstract reads as follows:

*Even though the EC Regulation No 1346/2000 on Insolvency Proceedings contains provisions about recognition and enforcement of judgments deriving directly from insolvency proceedings and which are closely linked with them it lacks explicit rules about international jurisdiction for these types of actions. On 12 February 2009 the ECJ ruled on the international jurisdiction on an action to set aside which was brought by the liquidator of a German main insolvency proceeding. The ECJ declared the international jurisdiction to open a main proceeding covered these actions as well. While the ECJ established an international jurisdiction for German courts, German law does not contain explicit rules about local jurisdiction. In its judgment of 19 May 2009 the German Federal Court of Justice decided that local jurisdiction is determined by the seat of the Court of Insolvency. The author analyses both judgments and agrees with the ECJ insofar as international jurisdiction for actions deriving directly from insolvency proceedings and which are closely linked with them,*

*belong to the courts of the member state where the main proceeding was opened. He disagrees insofar as a German action to set aside is regarded as such an action. Once the international jurisdiction of the German courts is established there has to be a local jurisdiction, too. In contrast to the judgment of the German Federal Court of Justice, the local jurisdiction follows by analogy with article 102 sec. 1 para. 3 of the German Act Introducing the Insolvency Code.*

- ***Diego P. Fernández Arroyo/Jan Peter Schmidt***: "Das Spiegelbildprinzip und der internationale Gerichtsstand des Erfüllungsortes" – the English abstract reads as follows:

*The article comments on a decision by the Oberlandesgericht Düsseldorf on the recognition and enforcement of an Argentine judgment. The Argentine claimant had obtained an award for payment of a broker's commission against a company domiciled in Germany. Recognition and enforcement of the judgment was denied because, according to the German rules of international jurisdiction, the Argentinean court had not been competent to decide the matter. The case perfectly illustrates Argentine courts' tendency to claim a much wider scope of jurisdiction than their German counterparts in litigation arising out of contractual relations. The authors draw the conclusion that while the decision by the Oberlandesgericht Düsseldorf not to grant recognition and enforcement is fully in accordance with German law, it also highlights the defects of the so called "mirror principle", i. e. the mechanism of reviewing the jurisdiction of foreign courts strictly according to the German rules. In times of ever increasing international legal traffic, more flexible and liberal approaches, which can be found in other legal systems, are clearly preferable.*

- ***Rolf A. Schütze***: "No hay materia más confusa …" – In this article, the author discusses a decision of the German Federal Court of Justice dealing with the question which standard has to be applied with regard to the (in)consistency of national arbitral awards with public policy (BGH, 30.10.2008 – III ZB 17/08).
- ***Dirk Looschelders***: "Anwendbarkeit des § 1371 Abs. 1 BGB nach Korrektur einer ausländischen Erbquote wegen Unvereinbarkeit mit dem

ordre public" – the English abstract reads as follows:

*Under the German statutory marital property regime a person who outlives his or her spouse and becomes legal heir is generally granted an additional quarter of the inheritance pursuant to § 1371 para. 1 BGB. Scholars disagree whether this provision also applies in cases where the legal succession to the deceased is governed by foreign law. The present case involved an unusual situation: the applicable Iranian law of succession discriminates against the surviving wife and therefore violates the German ordre public. The Higher Regional Court of Düsseldorf refused the application of § 1371 para. 1 BGB, since the wife's inheritance pursuant to the Iranian law of succession had already been increased to avoid the ordre public violation. This argument, however, does not convince: There needs to be a clear distinction between the correction of the Iranian law of succession to conform to the German ordre public and the question of whether the provisions of § 1371 para. 1 BGB apply.*

- ***Andreas Spickhoff***: "Die Zufügung von „Trauerschmerz" als Borddelikt" – The article analyses a decision of the Austrian Supreme Court of Justice (OGH, 09.09.2008 – 10 Ob 81/08x). The decision concerns – at a PIL-level – the question of the applicable law with regard to a claim for grief compensation in a case of a deadly accident aboard a yacht. At the level of substantive law, the case illustrates the differences between German and Austrian law: While under German law, the compensation of relatives of accident victims requires an impairment of health exceeding the "normal" reaction caused by the death of a close relative, Austrian courts award grief compensation also in cases where the relatives themselves have not suffered an impairment of health – as long as there exists a strong emotional bond which is presumed in case of close relatives living in a joint household.
- ***Santiago Álvarez González***: "The Spanish Tribunal Supremo Grants Damages for Breach of a Choice-of-Court Agreement"- the introduction reads as follows:

*On January 12th 2009, the Spanish Tribunal Supremo (TS henceforth) granted compensation for damages caused by the breach of a choice-of-court agreement favoring Spanish jurisdiction. This is the first, or at least one of the first judgments in Europe (leaving aside the UK), which has dealt with the issue at*

*the highest level of the courts of justice. The TS revoked the two prior rulings (those of the courts of first instance and appeal), in which the claim of the plaintiff had been rejected alleging that, due to the essentially procedural nature of the choice-of-court agreement, its violation could not lead to compensation. For both courts of justice, the natural consequence of the breach of a choice-of-court agreement was the rejection of the claim and (depending on the case) an order for costs. It is not the first time that the Spanish TS decides about a claim for damages due to the breach of a choice-of-court – but it is, indeed, the first time it shows its awareness of the specific problems present in this type of lawsuit. Good proof is that, in an unusual move, the judgment reproduces in extenso the legal arguments advanced by the parties both in first instance and in appeal. It also reproduces the arguments of the first and second instance courts of justice in detail. Nevertheless, the resolution is simple, convincing, and does not take into account (and in my opinion this is correct) the great number of useless details the parties added to their otherwise quite clear pretensions. In this commentary, I will pay attention just to the contents of the judgment in the light of the elements and issues that are usually relevant in this kind of process, attending to the singularity of the current case – where the non-contractual court is placed on the US, this is, out of the scope of action of Brussels I; it must be noted that Spain has no agreement on enforcement of judgments in civil and commercial matters with the US. After going through the general idea of the case, I will study the rulings of both first and second instance, as well as some non-discussed issues. I will analyze the solution of the TS, and I will finish by giving my own view on the decision and its relevance for the future. The legal discussion was heterogeneous and messy; most of the topics, except that of the procedural or substantive nature of non-fulfillment and its consequences, were not given the importance they indeed have and, at some points, they were not articulated at the right procedural moment through the proper, procedural mechanisms envisaged by the lex fori. This paper tries to reorganize and synthesize this heterogeneity, even at the price of losing some nuances.*

- **Viktória Harsági/Miklós Kengyel***:* "Anwendungsprobleme des Europäischen Zivilverfahrensrechts in Mittel- und Osteuropa" – the English abstract reads as follows:

*The study is the summary of an international conference organized at the*

*Andrássy Gyula German Speaking University. It deals with the effect of the community law on the legal systems of eight new Central and Eastern European Member States, (Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland and Slovenia) on the field of civil procedure. Apart from this, former member states like Austria and potential member states like Croatia and Turkey are also analyzed. The article examines the specific problems of applying the law in cross-border litigation, such as questions of jurisdiction, recognition, enforcement, service of documents and taking of evidence.*

- ***Hilmar Krüger*** presents selected PIL decisions of the Jordanian Court of Cassation: "Jordanische Rechtsprechung zum Kollisionsrecht"
- ***Carl Friedrich Nordmeier***: "Timor-Leste (Osttimor): Neues Internationales Zivilprozessrecht" – the English abstract reads as follows:

*The Democratic Republic of Timor-Leste (East Timor) enacted a new Civil Procedure Code (Código de Processo Civil) by decree-law n. 1/2006 of 21st of December, 2006. This article reports on the new rules of international jurisdiction and enforcement of foreign judgments in Timor-Leste. The wording of the new provisions is very similar to the corresponding rules of the Portuguese Civil Procedure Code.*

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# Eldon Foote's Domicile on May 17, 2004

Those interested in lengthy discussions of the law of domicile might enjoy the Alberta Court of Queen's Bench's odyssey undertaken to determine where the late Eldon Foote died domiciled (available here). The decision is over 100 pages long. Spoiler alert – the answer is Norfolk Island, an external territory of Australia located in the south Pacific Ocean. Other options considered but rejected were Alberta and British Columbia. The court sets out the applicable legal principles

over some 23 pages, providing a useful summary of the law of domicile in common law Canada. The reasons then contain extended discussion of whether, at various points in his life, Mr. Foote had changed his domicile.

One point of note on the law is that the court rejects the old notion that a domicile of origin should be considered particularly difficult to change. Instead, the ordinary standard of proof on the balance of probabilities is all that is required (paras. 71-74).

Another interesting point is the court's view that if a revival of the domicile of origin would produce an "absurd" result, the court has "residual authority to instead conclude that a person has retained their last domicile of choice" (para. 97). Thre is little authority to support this view, and if it is correct it represents an important development in the Canadian law of domicile.

At the time of his death Mr. Foote was worth over US$130 million. He was a civil litigation lawyer who made his money after leaving the law, ultimately having his business bought out by the Dutch conglomerate Sara Lee. He was apparently drawn to Norfolk Island because it was a tax haven.

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# French Conference on Parallel Litigation

The Master of arbitration and international commercial law of the university of Versailles Saint-Quentin will organize a conference on Thursday November 26th on parallel litigation.

There will be two speakers, who will speak in French. First, Gilberto Boutin, from the university of Panama, will present recent developments in the doctrines of forum non conveniens and lis pendens in South America. Then, Gilles Cuniberti, from the university of Luxembourg, will discuss parallel proceedings between courts and arbitral tribunals, with a special focus on recent European developments.

The conference will begin at 5 pm. It is free of charge.

More details can be found here.

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# The Written Observations Submitted in the Gambazzi Case

*Many thanks to Prof. Koji Takahashi for sending the following text and the files with the written observations submitted in the Gambazzi case.*

The written observations submitted to the European Court of Justice are normally unpublished. Earlier this year, I obtained the observations submitted in Case C-394/07 Gambazzi by the United Kingdom, the Republic of Italy and the Commission of the European Communities as well as the French translation of the observation of Italy supplied by the Court of Justice. The request was made under the United Kingdom Freedom of Information Act 2000 (My thanks are due to the United Kingdom Ministry of Justice and those helped me in the process). Since I was told that those observations were now regarded as being in the public domain, I think I should make them available to all rather than keeping them to myself. Please note that the United Kingdom is withholding the written observations submitted on behalf of the Hellenic Republic, Mr Gambazzi, Daimler Chrysler Canada Inc. and CIBC Mellon Trust Company since they did not consent to disclosure by the United Kingdom.

Commission observations

UK observations

Italy observations (in italian)

Italy observations (in french)

*Note:* On October the 1st Advocate General Poiares Maduro delivered his opinion in the joined Cases C?514/07 P, C?528/07 P and C?532/07 P.  The Opinion is

connected with the information provided by Prof. Takahashi in as much as the central issue submitted to the ECJ is “to what extent do the principles of transparency of judicial proceedings and publicity of trial require members of the public to be allowed access to the written submissions filed with the Court by the parties to a case”.

Many thanks to Daniel Sarmiento Ramirez-Escudero for the hint.