

Publication: International Jurisdiction and Commercial Litigation.

International Jurisdiction and Commercial Litigation. Uniform Rules for Contract Disputes, by Hélène van Lith, T.M.C. Asser Press (distributed by Cambridge University Press), 2009.

This interesting book includes a comprehensive analysis of the basic approaches to international jurisdiction in commercial contracts, and compares the jurisdictional systems of major continental European countries, the UK, the US and the Brussels Regulation. The author explores whether any common grounds exist in international jurisdiction rules, and assesses the feasibility of a uniform global system for international contract disputes, also in relation to the previous work of the Hague Conference on a worldwide jurisdiction convention.

This book is the commercial edition of a Ph.D., defended at Erasmus University Rotterdam in 2009.

Annual Conference of the American Association of Private International Law (ASADIP)

The American Association of Private International Law (Asociación americana de derecho internacional privado ASADIP) will hold its third annual conference “International Business Law in a time of change” on 12 and 13 November in Venezuela, Isla de Margarita). A special tribute will be given to Tatiana Maekelt, who was one of the most outstanding conflicts scholars of Latin America.

Among the topics that will be addressed and which might interest members of this list are:

- Bernard Audit (Paris II Panthéon-Assas University) on “Problemas actuales del convenio arbitral: efecto negativo, extensión a otros contratos y a otros miembros del grupo societario”
- Georges Bermann (ColumbiaUniversityl) on “Recent Trends in Parallel Litigation”
- Herbert Kronke (Heidelberg University) on “Transnational Certainty and the Convention on Intermediated Securities -Reflections on Key Issues”
- David P. Stewart (Georgetown University) on “Companies and Human Rights: Litigation in the United States Under the “Alien Tort Statute”
- Juan M. Velázquez Gardeta (Basque Country University) on “Challenges of E-Commerce: North American Case Law and the Future of Latin America”
- Didier Opertti Badán (Catholic University of Uruguay) on “The Situation of Private International Law in a Context of Globalization”

For more information, please consult the website of the conference:
<http://www.negociosinternacionales.com.ve/>

and here to ask for your membership to the asociacion.

Time to Update the Rome I Regulation

The Council has adopted a corrigendum to all versions of the Rome I Regulation to correct what appears to be an “obvious error”. Art. 28, which had previously provided that the Regulation would apply to contracts concluded “after” (French: “après”; German: “nach”) 17 December 2009, will now refer to contracts concluded “as from” (French: “à compter du”; German “ab”) 17 December 2009, bringing it in line with Art. 29 which requires that the Regulation be applied “from” 17 December 2009. The corrigendum was first published on 8 October and itself revised on 19 October. Under the procedures for corrigenda (set out in

a Council Statement of 1975), the amendment will apply unless the European Parliament took objection within 8-days (and there is no reason to believe that this is the case). It is understood that the text of the corrigendum will appear in the Official Journal later this month.

The change would appear satisfactorily to put to bed the lacuna which had troubled the German delegation to the Council's Civil Law Committee, with the result that lawyers concluding agreements on 17 December 2009 can now rest more easily. Any legal opinions relating to such contracts can now, with confidence, be based on the Rome I Regulation (as opposed to the Rome Convention).

Unfortunately, those grappling with the Rome II Regulation do not have the same comfort. As has been highlighted on these pages, there remains a controversy as to whether the Regulation applies to events giving rise to damage "which occur after" 20 August 2007 (the Regulation's apparent entry into force date under Art. 254 EC) or those occurring "from"/"after" 11 January 2009 (the Regulation's application date) (see Arts. 31-32). The problem here is not so much the use of the word "after" in Art. 31 in contrast to the word "from" in Art. 32 (a mere trifle by comparison), but the fact that the Regulation uses different terminology ("entry into force"; "application") in these two provisions dealing with its temporal effect and does not (explicitly, at least) stipulate an entry into force date in either of them. Commentators disagree as to the correct solution, and a division of opinion has emerged (for example) in England (where the majority favour 20 August 2007 as the relevant date) and Germany (where opinion is divided, but is understood numerically to favour 11 January 2009). Member State courts will, no doubt, need to grapple with this soon. The question is: who will get there first, and which solution will they prefer?

Bonanza at the British Institute

There's plenty for private international law aficionados to devour in programme of forthcoming events at the British Institute of International and Comparative Law.

First, on Friday 6 November, Jonathan Faull, Director General of the Commission Justice, Freedom and Security (JLS) Directorate is giving the Chalfen Memorial Lecture on “Law-making in Brussels”, giving perhaps an insight as to the likely future direction on civil justice policy in light of the forthcoming Stockholm Programme.

Secondly, on Tuesday 10 November, the Institute offers a first reaction to the Commission Proposal on Cross-Border Succession and Wills. Chaired by Professor Jonathan Harris (University of Birmingham), the speakers include Professor Paul Matthews (King’s College, London), Richard Frimston (solicitor, London) and Oliver Parker (Ministry of Justice).

Thirdly, on 18 November 2009, in what promises to be a lively event, Professor Christian von Bar (Universität Osnabrück) will be entering the lion’s den to speak on the controversial topic of “A Model Civil Code for Europe?”. Believers, agnostics and conflicts lawyers are equally welcome to register. Lord Justice Rix chairs.

Last (but by no means least), the Herbert Smith Private International Law Seminar Series continues on 9 December 2009 with a session entitled “Jurisdiction Agreements on Trial: Current Problems – Future Solutions”. Chaired by Filip De Ly (Erasmus University, Rotterdam), the speakers include Barbara Dohmann QC, Professor Harris and Professor Trevor Hartley (joint reporter for the Convention on Choice of Court Agreements).

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Unfair arbitration clause before the ECJ

In a recent decision of October 6, 2009 (C 40/08 – Asturcom Telecomunicaciones SL v. Maria Cristina Rodríguez Nogueira) the European Court of Justice held that

a national court or tribunal hearing an action for enforcement of an arbitration award which has become final and was made in the absence of the consumer is required to assess *of its own motion* whether an arbitration clause in a contract concluded between a seller or supplier and a consumer is unfair.

As in the *Elisa María Mostaza Claro v. Centro Móvil Milenium SL* (C-168-05) case, the dispute arose from a subscription contract for a mobile telephone concluded between Asturcom and Mrs Rodríguez Nogueira. The contract contained an arbitration clause under which any dispute concerning the performance of the contract was to be referred for arbitration to the Asociación Europea de Arbitraje de Derecho y Equidad (European Association of Arbitration in Law and Equity) ('AEADE'). The seat of that arbitration tribunal, which was not indicated in the contract, was located in Bilbao.

An arbitral award condemned Mrs Rodríguez Nogueira to pay EUR 669,60 to Asturcom. The consumer neither participated in the arbitral proceedings nor did she intend to get the annulment of the award, as permitted by the Spanish Arbitration Law.

Asturcom brought an action before the Juzgado de Primera Instancia No 4 de Bilbao for enforcement of the award.

First, the Spanish Court of First Instance rules that the arbitration clause contained in the subscription contract is unfair. However, the Spanish Law on Arbitration does not allow the arbitrators to examine of their own motion whether unfair arbitration clauses are void and secondly, the Spanish Code of Civil Procedure (Ley 1/2000 de Enjuiciamiento Civil) does not contain any provision dealing with the assessment to be carried by the court or tribunal having jurisdiction as to whether arbitration clauses are unfair when adjudicating on an action for enforcement of an arbitration award that has become final.

In those circumstances, the Juzgado de Primera Instancia decided to stay the proceedings and to refer to the Court the following question for a preliminary ruling:

"In order that the protection given to consumers by [Directive 93/13] should be guaranteed, is it necessary for the court hearing an action for enforcement of a final arbitration award, made in the absence of the consumer, to determine of its own motion whether the arbitration agreement is void and, accordingly, to annul

the award if it finds that the arbitration agreement contains an unfair arbitration clause that is to the detriment of the consumer?"

The ECJ held that national courts having jurisdiction for the enforcement of arbitral awards made in the absence of the consumer are "required to assess of their own motion whether an arbitration clause in a contract concluded between a seller or supplier and a consumer is unfair, *in so far as, under national rules of procedure, they can carry out such an assessment in similar actions of a domestic nature*."

If that is the case, it is for that court or tribunal to establish all the consequences thereby arising under national law, in order to ensure that the consumer is not bound by that clause".

In my opinion, the decision is written in a misleading way.

In the first place, it seems to mean that national courts having jurisdiction over the enforcement of arbitral awards should on their own motion raise the nullity of the arbitration clause on the basis of Directive 93/13.

However, they should do so only where their national procedural laws ("*in similar actions of a domestic nature*") authorize them to do so. Which means that in this case (if I understand well), as the provisions on the enforcement of domestic awards of the Spanish Code of Civil Procedure are silent on this matter, Spanish judges are not required to raise on their own motion the unfair arbitration clause... But what should we understand by "*in similar actions of a domestic nature*"? It is quite clear that the ECJ excludes the procedure of the enforcement of international awards from its ambit. But what are these provisions that national judges should look at???

If anyone has a clue on this...

New Journal of International Dispute Settlement

Oxford University Press will publish a new *Journal of International Dispute Settlement* from 2010 onwards. The General Editors will be Geneva based scholars Gabrielle Kaufman-Köhler and Joost Pauwelyn, with Thomas Schultz being the Managing Editor. 

Since the 1980s, a radical development has taken place in international dispute settlement. The number of international courts, tribunals and other international dispute resolution mechanisms has increased dramatically. The number of international disputes resolved by such means has risen in even greater proportions. These disputes more and more frequently raise issues that combine private and public international law, effectively bringing back to light the deep-seated interactions that have always existed between these two traditional fields of academic study. The regulatory impact of certain branches of international dispute settlement – such as international arbitration – further create the need to take a step back and think about where we are going. The growth of the field of international dispute settlement in practice, the novelty and significance of the issues posed, and the originality of the academic angle from which such issues need to be addressed are the factors that triggered the launch of the Journal of International Dispute Settlement.

JIDS defines its mission according to these developments. It is primarily designed to encourage interest in issues of enduring importance and to highlight significant trends in the field of international dispute settlement. Heavyweight and reflective articles will find preference over news-driven works. In addition to strictly legal approaches, the journal's purview encompasses studies inspired by legal sociology, legal philosophy, the history of law, law and political science, and law and economics. It covers all forms of international dispute settlement and focuses particularly on developments in private and public international law that carry commercial, economic and financial implications. The main subjects that will be dealt with are international commercial and investment arbitration, WTO dispute resolution, diplomatic dispute settlement, the settlement of international political disputes over economic matters in the UN, as well as international negotiation and

mediation. Particular attention will be paid to questions that involve a combination of private and public international law.

JIDS will address procedural issues that arise in international dispute resolution procedures, such as provisional measures; the consensual character of jurisdiction; evidence; amicus curiae interventions; res judicata, lis pendens and double fora; the procedural influence of human rights; experts and witnesses; interpretation, revision and challenge of awards and decisions; recognition and enforcement, etc. Comparative approaches, which are attentive to the different ways that these issues are dealt with in different types of dispute resolution procedures, are of particular interest.

The journal will also include substantive aspects pertaining to those fields of the law that are shaped by international courts and tribunals, be they of an interstate, private or mixed character. Hence, substantive issues in international economic law and international investment law will be considered, so long as the link to international dispute settlement is clearly established. This will include questions of substantive law properly speaking, but also more general aspects of the substantive evolution of international law, covering issues such as the proliferation of international dispute settlement mechanisms and the ensuing fragmentation of international law.

JIDS is intended not only for academics with an interest in international dispute settlement, international arbitration, private or public international law. It is also intended for practitioners who are looking for a single source that captures the fundamental trends with the field, allowing them to anticipate new issues and new ways to resolve them. Graduate and post-graduate students, government officials, in-house lawyers dealing with international disputes, and people working for international courts and tribunals and for international arbitration institutions should also find interest in this journal.

The contents of the first two issues of the Journal can be found [here](#).

Krombach: an Update on the Efficacy of Private Enforcement in Criminal Law

As I promised readers to keep them updated on the recent developments in the Bamberski - Krombach case, and as it seems that there is not as much media coverage of the case outside of France as there is in France, here are the latest news.

First and most importantly, the French media has reported that Krombach will be tried again in France in a bit less than a year. My recollection of French criminal law is that it is standard procedure when a person sentenced in absentia is eventually caught. What this means, of course, is that the strategy elaborated by Bamberski has worked. In a report broadcasted yesterday night on France main TV channel, he said that he organized the abduction because he did not want to see Krombach die without serving his time in prison.

It seems, therefore, that private enforcement can work pretty well in criminal law. I do not know whether Germany intends to do anything about it.

In the same TV show, Bambersky also explained how he had Krombach followed in Germany for 10 years so that he would always know where he was. It was reported that the people he hired for that job could inform him that Krombach had changed addresses in Germany seven times over a decade. It was reported that Bambersky would have taken the decision to initiate the process which led to the abduction when he learnt that Krombach was on the verge of changing addresses again.

Finally, Bambersky was charged with kidnapping, but he was not kept in preventive custody. When asked whether he feared to go to prison, he said that given that he had been deported in Poland during the war as a kid, it would be ok.

Bertoli: Party Autonomy and the Rome II Regulation

Paolo Bertoli (University of Insubria) has published two interesting articles (in English) on the role of party autonomy in the Rome II regulation. Here are the references:

Choice of Law by the Parties in the Rome II Regulation, in *Rivista di diritto internazionale*, 2009, pp. 697-716.

Party Autonomy and Choice-Of-Law Methods in the “Rome II” Regulation on the Law Applicable to Non-Contractual Obligations, in *Il Diritto dell’Unione europea*, 2009, pp. 229-264.

An abstract has been kindly provided by the author:

The articles discuss, also in comparison with American private international law theories and methods, the innovative provisions relating to party autonomy set forth in the EC “Rome II” regulation on the law applicable to non-contractual obligations, the choice-of-law methods that such provisions follow, and their role and significance in the framework of the European “federalized” private international law system. In particular, the articles demonstrate that a distinction can, and should, be made between cases in which party autonomy operates in the context, and demonstrates the existence in Rome II, of: (i) a traditional (or, in American terminology, “jurisdiction-selecting”) choice-of-law method, (ii) a “content-oriented” choice-of-law method, and (iii) a European lex fori approach.

With reference to the development of EC private international law, see also the author’s thorough analysis of the role of the European Court of Justice, in his volume “Corte di giustizia, integrazione comunitaria e diritto internazionale privato e processuale” (Giuffrè, 2005) and “The Court of Justice, European Integration and Private International Law” (in *Yearbook of Private International law*, vol. VIII-2006, pp. 375-412: the article can be browsed through the Libreka! website).

New Title of De Conflictu Legum Collection

Prof. Laura Carballo Piñeiro (University of Santiago de Compostela) has just published her monograph entitled *Las acciones colectivas y su eficacia extraterritorial. Problemas de recepción y transplante de las class actions en Europa* (Collective actions and their extraterritorial effectiveness. Issues on the reception and adaptation of class actions in Europe).

The book, the last one of the Collection De Conflictu Legum directed by Prof. Santiago Álvarez, deals with PIL problems of collective actions. Most of the proceedings implying collective actions take place in the United States, whilst in Europe there is still an ongoing debate concerning whether to introduce or to improve collective litigation in each single national legislation, and whether to develop some specific Community instrument on the subject (as suggested by the White Paper on damages actions for breach of the EC antitrust rules, and by the Green Paper on Consumer Collective Redress). Nevertheless, PIL problems are also of importance for European countries: an American class action may need to be served or enforced in Europe. From now on, as a result of the increasing number of States dealing with collective actions, international jurisdiction and conflict of laws issues are also at stake .

The book starts with a thorough identification of the procedural problems arising from collective actions. Prof. Carballo makes clear how the many misunderstandings on the topic -mostly due to mistrust of US-American class actions- are a hurdle in itself, not only for the introduction of collective justice in many States, but also for its practical application. Spain provides a good example: although collective-friendly, Spanish rules on collective actions on consumer matters lack clarity and basic guarantees are not laid down.

PIL issues follow this procedural introduction. Prof. Carballo studies if and how the international jurisdiction criteria laid down by Regulation *Brussels I* may apply when the action is collective; the application of international and

community instruments in order to identify and notify absent class members; if it is necessary to create special conflict rules for collective actions in the European area of justice; and recognition and enforceability issues.

Surprise? Yes and No

I am grateful to Horatia Muir Watt, a professor of private international and comparative law at the Paris Institute of Political Science, to have accepted to comment on the recent In Zone Brands decision of the Cour de cassation ruling that an American anti-suit injunction could be declared enforceable in France.

To my mind, this case was well decided. But did it really come as such a surprise, as Gilles' and Raphael's comments seem to imply? Well, yes and no. But before explaining why, I want to start with two parentheses about legal comparison.

1. Firstly, it is wise before drawing conclusions from a decision of the Cour de cassation to consulting the accompanying preparatory documents (the "Rapport" of the juge-rapporteur, whose name figures at the bottom of the decision and from whom the Report can be obtained directly, when it is not published spontaneously on the Cour de cassation's website, and/or the "avis" of the Advocate general). The attention of the common law world has often been drawn to the importance of these documents, particularly since Mitch Lasser's magnificent "Judicial Self-Portraits" [1], in which he explains that behind the concise one-sentenced syllogism which constitutes an "arrêt", the various rapports and avis which accompany the decision are functional equivalents to the longer motivation of judgments in the common law tradition - and may indeed reveal dissenting opinions within the court "[2]. In this particular case, the thoughtful Report of Madame Pascal makes it easier to understand, for instance, how the procedure developed before the lower courts and, perhaps more importantly, the position of the Cour de cassation in respect of the implications of West Tankers.
2. Secondly, countries belonging to the civilian legal tradition do not

constitute a homogeneous block with a single legal perspective on such institutions as anti-suit injunctions. Of course, the coexistence of the civilian and common law cultures within the European common judicial area has now revealed profound divergences on jurisdictional issues – unsurprisingly, since such issues are linked to conceptions about the very function of adjudication – , and it may well have been that before the *antisuit/forum non conveniens* crisis, such differences were underestimated on the civilian side, either through the inadequacy of comparative legal studies, or in a misguided quest for legal uniformity. However, while the epistemological and methodological divide between these two legal traditions is undisputable, it does not mean that within the civilian “camp”, there are not equally significant differences in legal reasoning or indeed in judicial policy. In the particular case of anti-suit injunctions (and much could also be said in the same vein about *forum non conveniens*), the French courts cannot be said to have been hostile to anti-suit injunctions (beyond the dictum in the *Stolzenberg* decision, to which I shall come back) and their position on this point certainly cannot be inferred from the often cited German or Belgian cases which have explicitly refused to recognize or enforce anti-suit injunctions. Moreover, legal scholarship on this point, to which the Rapport is extremely attentive, has been far from antagonistic.

This having been said, the content of the *arrêt* of 14th October 2009 appears to me to conform to the general orientation of the Cour de cassation’s case-law. Firstly, as the report itself emphasises, the Cour has itself, in a pre-Regulation insolvency case, awarded something that looks very like an anti-suit injunction, in the form of an order to desist from judicial proceedings abroad sanctioned by an “*astreinte*” (a sum of money by way of a private penalty to be paid to the claimant per day of non-performance/obedience to the order): see *Banque Worms* (Cass civ 1re, 19 nov. 2002). In that case, the Advocate general’s Conclusions and the Report, which cite Gilles Cuniberti’s own work on this point, show that the Court was paying particular attention to the risks attendant to the use of such injunctions insofar as they might be perceived to intrude on the jurisdiction of foreign courts, and is careful to emphasize that the French courts were themselves asserting jurisdiction in this case on grounds which justified their attempt to retain the proceedings before them. Secondly, the Cour de cassation was recently willing to allow effect to be given to an American judgment awarding

a large penalty against a company director for contempt of court (Cass civ 28 janvier 2009, n° 07-11.729 Bull civ. I, n°15), sweeping aside the argument according to which contempt of court is quasi-penal in nature and therefore contrary to French public policy. This was already the Cour de cassation's position in *Stolzenberg* (Cass civ 1re, 30 juin 2004, which the French challenger invokes here). The latter case, however, contained an obiter dictum (interestingly characterized as such in *Mme Pascal's Report*) according to which anti-suit injunctions (as opposed to freezing orders) "affect the jurisdiction of foreign courts". This dictum must however be interpreted in the light of *Banque Worms*, also cited by the Report, and, beyond the fact that the *Stolzenberg* case actually gave effect to a *Mareva* injunction, seems mainly to have been designed to draw the attention of the lower courts once again to the potential risks involved in enjoining foreign proceedings – but does not necessarily exclude the use of such measures when protecting choice of forum agreements, or at least, when protecting the jurisdiction of the chosen court to decide on the validity of the clause.

This latter consideration seems to have been decisive in the present case. The Report underlines, citing various scholarly opinions on this point, that in circumstances such as this, the injunction is merely designed to ensure the performance of the parties' contract (which of course includes the choice of forum clause). And, as Adrian Briggs has already pointed out, this is excellent judicial policy. The recognition of the American judgment here means that the French courts seized in apparent violation of the clause have refrained from ruling on its validity, in favour of the decision of the chosen court on this point. True, one might wonder why the detour via the enforcement of the American injunction was necessary: did it not suffice that the French court, whose jurisdiction was challenged on the basis of the choice of forum agreement, decline to exercise such jurisdiction, at least pending the decision of the American court? The explanation appears to be that the American judgment was presented very quickly with a view to obtain an *exequatur*, and, on appeal, the Court of Versailles had not yet had the opportunity to hear the appeal on the jurisdictional issue. If one takes the sole issue of jurisdiction, it might of course have made more practical sense for the Court to stay the *exequatur* proceedings until it had decided on the (lack of) jurisdiction of the French courts under the choice of forum clause (or at least, ruled on the basis of *Kompetenz-Kompetenz*). But since the American judgment appears to have contained both the injunction and a decision on the merits,

allowing enforcement meant that the jurisdictional issue and the issue of the French distributor's debt were on fact resolved in one fell swoop. Of course, as Raphael points out, enforcing the injunction may mean that the Cour de cassation is ready to go further than English courts, which stop short of enforcing foreign judicial orders which are not purely monetary. However, this point needs to be clarified in future cases, since the injunction came as a package with the judgment on the merits.

Perhaps the most interesting aspect of the Cour de cassation's decision, here again enlightened by the report, concerns its reading of the implications of *West Tankers*. The report clearly opines that while the Cour de cassation is now bound not to allow recognition of, say, an English anti-suit injunction when the enjoined proceedings are in France (or indeed before an arbitrator in France), it remains free to recognize injunctions issued by the courts of third states. This of course is where things become sticky. Of course, the choice of forum agreement concerns the court of a third state and is as such apparently outside the bounds of the Brussels Regulation. But then, of course, so were the arbitration proceedings in *West Tankers*. In that case, the fact that the party in apparent breach of the arbitration clause had seized the court of a Member State (with jurisdiction under the Regulation? this requirement is no doubt superfluous) was enough to prohibit the use of the injunction by the English courts, under the "effet utile" and mutual trust doctrines. Do the latter apply here? Could such principles prevent the court of a Member State from declining its own jurisdiction in favour of the courts of a third state? Surely not? But this very question shows that the problem may well not lie in the anti-suit aspect of things at all, but in *Owusu* and its (unclear) implications as to the scope of the Regulation as far as choice of law agreements in favour of the courts of third states are concerned, when the defendant is domiciled in a Member State. Does it really make any difference here where the French court declines jurisdiction on the basis of a choice of forum agreement (either because it says it is valid under principles of common French private international law or because it decides to apply the *Kompetenz-Kompetenz* principle in favour of the chosen court's jurisdiction to rule on its own jurisdiction under the agreement) or because it decides to recognise an American anti-suit injunction? For the moment, as the Cour de cassation's decision shows (cf *Konkola Mines*), national courts are resisting the expansion of the Regulation into the relationship between a Member state and a third state, as far as choice of law agreements are concerned. But current work in progress within the European

institutions and study groups is now envisaging this relationship, which may make a case for the ratification of the 2005 Hague Convention. In the meantime, if priority was recognised to the (presumptively) chosen forum to rule on its own jurisdiction, whether it be a court or an arbitrator, or in a Member State or not, life would no doubt be a little simpler.

[1] "Judicial (Self-)Portraits: Judicial Discourse in the French Legal System," 104 *Yale Law Journal* 1325-410 (1995).

[2] It is also important, of course, not to underestimate the procedural constraints which weigh on the Cour de cassation (and which are high-lighted by the report when it discusses the legal arguments raised by the parties), which is bound by the way in which the legal issue is framed before it (by virtue of what is known here as the "linguistic police" of the judiciary), and whose decisions may not have the same significance according to whether the Court quashes the decision of the lower court or merely dismisses the "pourvoi".