

ERA Conference on Stockholm Programme

The Academy of European Law (ERA) will host another interesting conference titled

New Horizons for Civil Justice in Europe: Towards the “Stockholm Programme”

The conference will discuss the key issues for the Stockholm Programme in terms of cooperation in civil matters as presented in the Commission communication COM (2009) 262 of 10 June 2009, such as

- mutual recognition
- abolishment of exequatur
- speeding up cross-border debt recovery
- an optional European contract law (a ‘twenty-eighth’ system)
- e-justice

The conference will take place in Trier (Germany) from 5th - 6th November 2009.

More information on fees and registration can be found at the ERA website.

Update: *The conference programme is now available and can be found [here](#).*

Latest Issue of “Rabels Zeitschrift”

The latest issue of the **Rabels Zeitschrift** (Vol. 73, No. 4, October 2009) is a special issue on the occasion of the 60th birthday of *Professor Jürgen Basedow* and contains the following articles:

- **Dietmar Baetge:** Contingency Fees – An Economic Analysis of the Federal Constitutional Court’s Decision Authorising Attorney Contingency

Fees – the English abstract reads as follows:

In Germany, until recently, contingency fees were prohibited. In December 2006, the legal ban on contingency fees was declared unconstitutional by the Federal Constitutional Court (Bundesverfassungsgericht). Implementing the Court's ruling, the German legislator, in 2008, legalised contingency fees on a limited basis. This paper attempts to analyse the Constitutional Court's decision from an economic vantage point. The main constitutional reasons given to justify the legal ban on contingency fees are translated into economic terms and further elaborated. Points of discussion include the problem of moral hazard between the lawyer and the judge on the one hand and the lawyer and his client on the other. A third question dealt with in the paper is the extent to which contingency fees may influence the efficient allocation of resources. The paper concludes that access to the instrument of contingency fees should not be limited to poor clients but also extended to affluent persons.

- **Moritz Bälz:** Japan's Accession to the CISG – the English abstract reads as follows:

On 1 July 2008 Japan, as the 71st state, acceded to the United Nations Convention on the International Sale of Goods (CISG). As of 1 August 2009, the most important convention in the field of uniform private law will thus enter into force in Japan, leaving Great Britain as the sole major trading nation not yet party to the convention. The article examines the complex reasons why Japan did not accede earlier as well as why this step was finally now undertaken. It, furthermore, offers an assessment of the importance of the CISG for Japan prior to the accession and the impact to be expected from the convention on the reform of the Japanese Civil Code which is currently under way. Finally, it is argued that Japan's accession nourishes the hope that the CISG will spread further in Asia, thus not only extending its reach to one of the world's most dynamic regions, but also opening up opportunities for a future harmonisation of Asian contract law.

- **Friedrich Wenzel Bulst:** The Application of Art. 82 EC to Abusive Exclusionary Conduct – the English abstract reads as follows:

The article addresses recent developments in the application of the prohibition

of abuse of dominance in EC competition law. The European Commission has published a communication providing guidance on its enforcement priorities in applying Art. 82 EC to abusive exclusionary conduct of dominant undertakings. Under this more effects-based approach which focuses on ensuring consistency in the application of Arts. 81 and 82 EC as well as the Merger Regulation, priority will be given to cases where the conduct in question is liable to have harmful effects on consumers. After a brief introduction (section I), the author outlines the main elements of the communication and illustrates how the Commission's approach to providing guidance in this area has evolved since the publication of its 2005 discussion paper on exclusionary abuses (section II). The author then addresses the scope of the communication against the background of the case law on the Commission's discretion (not) to pursue cases (section III). The central concept of the communication is that of »foreclosure leading to consumer harm«. Against this background the author discusses, in the context of refusal to supply abuses both in and outside an IP context, the operationalisation of the criterion of harm to consumers (section IV) before concluding (section V).

- **Anatol Dutta:** The Death of the Shareholder in the Conflict of Laws – the English abstract reads as follows:

The death of the shareholder raises the question how the law applicable to the company and the law governing the succession in the deceased shareholder's estate have to be delimited. This borderline becomes more and more relevant against the background of recent jurisprudence of the European Court of Justice (ECJ) in Centros, Überseering and Inspire Art concerning the freedom of movement of companies in the Community. On the one hand, as a consequence of this jurisprudence the laws governing the company and the succession often differ. On the other hand, the ECJ's jurisprudence might further blur the boundaries between the laws governing companies and successions. The article tries to draw the border between the relevant choice-of-law rules. It comes to the conclusion that the consequences of the shareholder's death for the company and his share are subject to the conflict rules for companies (supra III.). More problematic, though, is the characterisation of the succession in the share of the deceased shareholder. Some legal systems contain special succession regimes for shares in certain private companies and partnerships. The article argues (supra IV.) that the succession in shares has to be dually-

characterised and subjected to both, the law governing the company and the succession. Yet clashes between the applicable company and succession laws are to be solved by giving precedence to the applicable company law. The precedence of company law should be clarified by the legislator – by the German legislator when codifying the conflict rules for companies and by the European legislator when codifying the conflict rules for successions upon death (supra V.).

- **Franco Ferrari:** From Rome to Rome via Brussels: Remarks on the Law Applicable to Contractual Obligations Absent a Choice by the Parties (Art. 4 of the Rome I Regulation)
- **Christian Heinze:** Industrial Action in the Conflict of Laws – the English abstract reads as follows:

The introduction of a special conflicts rule for industrial action in Art. 9 Rome II Regulation can be considered as a felicitous innovation of European Private International Law. The application of the law of the country where the industrial action is to be taken or has been taken is founded on the public (social) policy concerns of the country where the action takes place and will therefore, in general, obviate the need for any enforcement of this country's strike laws by means of the ordre public or as internationally mandatory provisions (at least as far as intra-European cases are concerned). The major drawback of Art. 9 does not derive from the rule itself but rather from its restriction to »non-contractual liability«. Article 9 Rome II Regulation may therefore designate a substantive law applicable to the non-contractual liability for the industrial action which is different from the law applicable to the individual employment contract (Art. 8 Rome I Regulation) or a collective labour agreement. This may be unfortunate because the industrial action will usually have consequences for at least the individual employment contract (e.g. a suspension of contractual obligations) which might be governed by a different law (Art. 8 Rome I Regulation) than the industrial action itself (Art. 9 Rome II Regulation). Possible conflicts between these laws can be resolved by extending the scope of Art. 9 Rome II Regulation to the legality of the industrial action in general, thus subjecting any preliminary or incidental questions of legality of industrial actions to Art. 9 Rome II Regulation while applying the lex contractus to the contractual consequences of the action.

- **Eva-Maria Kieninger:** The Full Harmonisation of Standard Contract Terms – a Utopia? – the English abstract reads as follows:

The article discusses the proposal for a consumer rights directive of October 2008, in which the European Commission suggests to move from minimum to full harmonisation of specific areas of consumer contract law. The article specifically examines whether full harmonisation of the law relating to the judicial control of unfair contract terms, even if politically desirable, will be feasible in the context of non-harmonised national contract law. Examples are presented for cases which were decided differently by national courts on the basis of divergent rules of general contract law. The article discusses whether the Draft Common Frame of Reference (DCFR) can be used by the European Court of Justice (ECJ) and the national courts as a common yardstick to measure the unfairness of a contractual term. Two problems present themselves: one is the question of legitimacy because, until now, the DCFR is no more than a scientific endeavour which in part rests on the autonomous decisions of its drafters and does not merely present a comparative restatement of Member States' laws; second, the DCFR makes excessive use of the term »reasonableness« so that, in many instances, its ability to give guidance in the assessment of the unfairness of a specific contract term is considerably reduced. The question of legitimacy could be solved by an optional instrument which could be chosen by the parties as the applicable law.

- **Jan Kleinheisterkamp:** Internationally Mandatory Rules and Arbitration – A Practical Attempt – the English abstract reads as follows:

This article treats the impact that internationally mandatory rules of the forum state may have on the effectiveness of arbitration agreements if the claims are based on such internationally mandatory rules but the parties had submitted their contract to a foreign law. The specific problems of conflicts of economic regulation are illustrated and discussed on the basis of Belgian and German court decisions on disputes relating to commercial distribution and agency agreements. European courts have adopted a restrictive practice of denying the efficacy of such tandems of choice-of-law and arbitration clauses if there is a strong probability that their internationally mandatory rules will not be applied in foreign procedures. This article shows that neither this approach nor the much more pro-arbitration biased solutions proposed by critics are convincing.

It elaborates a third solution which allows national courts both to reconcile their legislator's intention to enforce a given public policy with the parties' original intention to arbitrate and to optimize the effectiveness of public interests as well as that of arbitration.

- **Axel Metzger:** Warranties against Third Party Claims under Arts. 41, 42 CISG – the English abstract reads as follows:

The United Nations Convention on Contracts for the International Sale of Goods (CISG) provides two regimes for warranties against third party claims. The general rule of Art. 41 establishes a strict liability rule for all third party claims not covered by Art. 42. Article 42 limits the seller's liability for infringement claims based on intellectual property. A seller under the CISG warrants only against third party intellectual property claims he »knew or could not have been unaware« at the time of the conclusion of the contract. In addition, his liability is territorially restricted to claims based on third party intellectual property rights in the countries contemplated by the parties at the conclusion of the contract. This article provides an overview of seller's warranties under Arts. 41 and 42. It examines, more specifically, whether the limited scope of seller's warranties for third party intellectual property claims is efficient and whether it is expedient from a comparative law perspective. Under a traditional economic analysis of law approach, the party who can avoid third party claims most cheaply should bear the risk of infringement claims. This will often be the seller, especially if he has produced the goods or has specific knowledge of the industry. But it may also occur that the buyer is in the superior position to investigate intellectual property rights, e.g. if the buyer is a specialized player in the industry and the seller is a mere vendor without specific knowledge in the field. Article 42 allows an efficient allocation of the risk by the court. The party charged with the risk, be it seller or buyer, should not only warrant against third party rights he knew but also for those he could have been aware of after investigation in the patent and trademark offices of the relevant countries or through other resources. Such a duty to investigate may also exist with regard to unregistered rights like copyrights. A strict interpretation of the seller's (or buyer's) duty is in accordance with international standards. Seller's warranties are strict liabilities rules in many countries with an exception in case of bad faith on the part of the buyer.

- **Ralf Michaels:** Rethinking the UNIDROIT Principles: From a law to be chosen by the parties towards a general part of transnational contract law – the English abstract reads as follows:

1. The most talked-about purpose of the UNIDROIT Principles of International and Commercial Contracts (PICC) is their applicability as the law chosen by the parties. However, focusing on this purpose in isolation is erroneous. The PICC are not a good candidate for a chosen law – they are conceived not as a result of the exercise of freedom of contract, but instead as a framework to enable such exercise. Their real potential is to serve as objective law – as the general part of transnational contract law. 2. This is obvious in practice. Actually, choice of the PICC is widely possible. National courts accept their incorporation into the contract; arbitrators frequently accept their choice as applicable law. However, in practice, the PICC are rarely chosen. The most important reason is that they are incomplete. They contain no rules on specific contracts. Further, they refer to national law for mandatory rules and for standards of illegality and immorality. This makes their choice unattractive. 3. The nature of the PICC is much closer to that of the U.S. Restatement of the law. The U.S. Restatement becomes applicable not through party choice but rather as an articulation of background law. Actually, this describes the way in which the PICC are typically used in practice. 4. This use as background law cannot be justified with an asserted legal nature of the PICC (their »law function«). Rather, the use is justified insofar as they fulfill two other functions: the »restatement function« (PICC as description of a common core of legal rules) and the »model function« (PICC as model for a superior law). 5. From a choice-of-law perspective, such use cannot be justified under traditional European choice of law, which designates legal orders, not incomplete codifications, as applicable. 6. By contrast, application could be justified under U.S. choice of law. Under the governmental interest analysis, the PICC could be applicable to situations in which no state is interested in the application of its own law. Their international character qualifies the PICC for the Restatement (2d) Conflict of laws. Finally, for the better-law theory, according to which the substantive quality of a law is a criterion for choice of law, the PICC are a candidate insofar as they perform a model function. 7. In result, the PICC are comparable to general common law or the ius commune, within which regulatory rules of national, supranational and international origin act like islands. 8. Altogether, this results in a complex picture of transnational contract law, which combines national, international

and non-national rules. The PICC can be no more, but no less, than a general part of this contract law.

- **Hannes Rösler:** Protection of the Weaker Party in European Contract Law - Standardised and Individual Inferiority in Multi-Level Private Law - the English abstract reads as follows:

It is a permanent challenge to accomplish freedom of contract effectively and not just to provide its formal guarantee. Indeed, 19th century private law already included elements guaranteeing the protection of this »material« freedom of contract. However, consensus has been reached about the necessity for a private law system which also provides for real chances of self-determination. An example can be found in EC consumer law. Admittedly, this law is restrained – for reasons of legal certainty – by its personal and situational typicality and bound to formal prerequisites. However, the new rules against discrimination are dominated by approaches which strongly focus on the protection of the individual. It is supplemented by national provisions, which especially counter individual weaknesses. The autonomy of national law can be explained by the different traditions with regard to »social« contract law in the Member States. The differences are especially apparent regarding public policy, good faith or breach of duty before or at the time of contracting (culpa in contrahendo). They form another argument against the undifferentiated saltation from partial to total harmonisation of contract law.

- **Giesela Rühl:** The Presumption of Non-Conformity in Consumer Sales Law - The Jurisprudence of the Federal Court of Justice in comparative perspective - the English abstract reads as follows:

The Law on the Modernisation of the Law of Obligations has introduced a large number of provisions into the German Civil Code. One of these provisions has kept German courts particularly busy during the last years: § 476. The provision implements Art. 5 III of the Consumer Sales Directive and provides that any lack of conformity which becomes apparent within six months of delivery of the goods is presumed to have existed at the time of delivery unless this presumption is incompatible with the nature of the goods or the nature of the lack of conformity. The presumption has proved to be difficult to apply in practice: the German Federal Court of Justice (Bundesgerichtshof; hereinafter

BGH) alone as issued eight – highly controversial – decisions. And numerous articles, case notes and commentaries have analysed and criticised each and every one of them. It is therefore surprising to see that both the BGH and the German literature refrain from exploiting one very obvious source of information that might help to deal with § 476: comparative law. Even though Art. 5 III of the Consumer Sales Directive has been implemented in all Member States except for Lithuania nobody has endeavoured to analyse its application in other countries to this date. The above article tries to fill this gap and looks at § 476 from a comparative perspective. It finds that courts across Europe apply the provision in the same way as the BGH regarding the exclusion and the rebuttal of the presumption. However, regarding the scope of the presumption, the BGH stands alone with its strict interpretation. In fact, no other court in Europe refuses to apply the presumption in cases in which a defect that occurs after delivery might be the result of a basic defect present at the time of delivery. The article, therefore, concludes that the BGH should rethink its position regarding the scope of the presumption and refer the next case to the European Court of Justice.

- **Jens M. Scherpe:** Children Born out of Wedlock, their Fathers, and the European Convention on Human Rights – the English abstract reads as follows:

Unlike in many European countries, only a father married to the mother will automatically have parental custody (*elterliche Sorge*) in Germany. A father not married to the mother is effectively barred from obtaining parental custody unless the mother agrees, and there is not even the possibility – unlike e.g. in England – for the courts to interfere with the mother's decision, cf. §§ 1626a, 1672 BGB. The legal rules are based on the – somewhat questionable – assumption that the mother's motives for refusal of parental custody are based on the welfare of the child. The German statutory provisions have been challenged unsuccessfully in the German Constitutional Court (*Bundesverfassungsgericht*; *BVerfG*). However, the *BVerfG* voiced some doubt as to the premises upon which these rules rested and has demanded that further development be monitored closely. The vast majority of German academic authors also doubts the constitutionality of § 1626a BGB and are in favour of reforming the law. The matter is now the subject of a case pending at the European Court of Human Rights (ECtHR), *Zaunegger v. Germany*, in which

the applicant claims, inter alia, that his right of respect for family life under Art. 8 ECHR is being violated. In previous cases, McMichael v. United Kingdom and Balbontin v. United Kingdom, challenges of Scots and English law on parental responsibility for fathers not married to the mother have failed. This article critically analyses the legal rules in England and Germany and, based on the differences between them and the relevant case law of the ECtHR, suggests that the Court will find that the German rules are indeed in breach of the European Convention. The article concludes with suggestions for reform.

- **Wolfgang Wurmnest:** Unilateral Restrictions of Parallel Trade by Dominant Pharmaceutical Companies – Protection of Innovation or Anti-competitive Market Foreclosure? – the English abstract reads as follows:

The elimination of cross-border barriers to trade as means of encouraging competition in the single market lies at the heart of EC-competition policy. Limitations of parallel trade were therefore treated as restrictions of competition. With regard to the pharmaceutical sector the merit of such a competition policy has been called into question. It is said that the unique features of the market for pharmaceuticals, namely the existence of price regulation at the national level for prescription medicines, makes parallel trade socially undesirable as it does not foster real price competition and undermines investment in R&D to the detriment of the consumer. Hence, unilaterally imposed restrictions of parallel trade by dominant producers, such as supply quota systems, should not be regarded as a violation of Art. 82 EC. This article discusses the legal and economic arguments in favour of a policy shift in light of the recent case Lélos v. GlaxoSmithKline. In this case the European Court of Justice (ECJ) has held that a pharmaceutical company in a dominant position cannot be allowed to cease honouring the ordinary orders of an existing customer for the sole reason that the customer engages in parallel trade, but that Art. 82 EC does not prohibit a dominant undertaking from refusing to fill orders that are out of the ordinary in terms of quantity in order to protect its commercial interests. It is argued that the ECJ was right in denying pharmaceutical companies a general right to limit the flow of pharmaceutical products by unilateral measures as the pro-competitive effects of parallel trade are greater than often assumed.

- **Nadjma Yassari:** The Reform of the Spousal Share under Iranian Succession Law – An example of the transformability of Islamic law – the English abstract reads as follows:

It is generally held that Islamic law is a static system of rules, unable to accommodate change. This is especially thought true of family and succession laws that are firmly rooted in a religious foundation. Nonetheless, one can observe in the last decades how active the Iranian legislator has been in reforming its family laws, with the result that a number of traditional provisions have undergone remarkable changes. Most recently, the Iranian Parliament ventured into the field of succession law by amending the inheritance portion received by the surviving wife, which so far had been limited to movables. Under the new regulations, she takes her portion also from immovable property. The previous limitations placed on the inheritance portion of the widow have no base in the Koran, the primary source of Islamic shi'i law, and were deduced from another primary source of law, notably the traditions of the twelve Imams. This article examines the religious foundations of the inheritance rule on the spousal share, its codification in the Iranian Civil Code and the proposed amendments by the Iranian Parliament. It shows how the Iranian Parliament by emphasising another interpretation of the sources has been successful in changing a rule that has prevailed in Iranian law for over 80 years. Without doubt, this reform is a significant step towards the harmonisation of the widow's inheritance share and the elimination of the harsh economic consequences of the rule as it stood. Beyond this effect however it can also be taken as an illustration of the way legal development can be set within an Islamic framework. Moreover, it shows that it is ultimately the intrinsic structure of the sources of Islamic law and the methods by which law is deduced from them that makes reform possible.

Text of the Commission's Proposal on Succession and Wills Finally Available

Following our previous post on the **presentation by the Commission of the Proposal for a regulation on succession and wills** (COM(2009) 154 fin. of 14 October 2009), the text of the Proposal has been made available on the PreLex website, where the codecision procedure has been filed under no. 2009/0157/COD. Only the English, French and German versions are currently accessible.

The proposal is accompanied by two Commission Staff working documents (in English):

- doc. n. SEC(2009)410 of 14 October 2009, Impact Assessment;
- doc. n. SEC(2009)411 of 14 October 2009, Summary of the Impact Assessment.

Direct linking to these supplements does not currently work: to download them, use the search form at the bottom of this page.

European Commission Presents Proposal on Succession and Wills

According to a press release by the DG Freedom, Security and Justice (IP/09/1508), **the long-awaited Proposal for a Regulation on succession and wills**, whose presentation, initially expected in last March, had been significantly delayed, **was finally released on 14 October 2009 by the European Commission**.

The official reference *should* be the following: 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 fin. of 14 October 2009.

The text of the proposed regulation, along with the Commission's explanatory memorandum, is not yet available on the institutional websites. Interested readers may have a look at the press release and at a basic set of Q&A (MEMO/09/447) prepared by the Commission. References to the preparatory studies, the 2005 Green Paper and the subsequent public consultation can be found in our previous post [here](#).

Moving to France to Bypass German Insolvency (and Tax) Law

On 16 September 2008, the Court of Appeal of Colmar (Alsace) ruled that a  German debtor could not benefit from French insolvency law, as he had apparently moved to France for that sole reason. Had he followed the advice of <http://www.insolvenz-frankreich.de> ?

I understand that under German law, insolvency proceedings do not have the effect of immediately cancelling debts. By contrast, under French law, insolvency proceedings result in the immediate cancellation of all debts, irrespective of whether the liquidation of the assets was sufficient to pay creditors. The Colmar court specifically insisted that the goal of the German debtor was to benefit from this rule of French law.

The German debtor had allegedly moved to France in 2005. He waited for two years before filing for insolvency in Strasbourg in November 2007. He then claimed that he lived in France and worked there part-time for a French company. He also claimed that he had become insolvent as he owed €56,000 to a German company. At a later stage, he added that he also owed €155,000 to German tax authorities. He alleged he had no assets.

Now, this did not really convince the court, for a variety of reasons:

1. The French company was not paying him much (€600), and he was not really able to explain in court what his job there actually was.
2. German tax authorities were seeking payment of taxes for years 2005, but also 2006 and 2007, which was hard to reconcile with the claim that he had not worked in Germany during that time. Indeed, he admitted that he was still registered as an auditor there.
3. The German company to which he owed €56,000 had its seat at his address in Germany, in Wissembourg.
4. A garage from Haguenau had notified him with an injunction of payment, which was hard to reconcile with the claim that he had no assets, and in particular no car.
5. Finally, he had allegedly moved to France at the very moment when he had received a notification of debt from the German tax authorities. Strange coincidence, really. Did he make up the other € 56,000 debt to conceal that the point was to avoid paying the tax debt?

Until recently, French law did not provide for insolvency for individuals. This was different in Alsace - Lorraine, which always kept that possibility even after it became French again after the war. There is thus a special provision in the French commercial code which provides that all individuals domiciled in Moselle, Haut-Rhin and Bas-Rhin can enjoy the benefit of insolvency, but only if they are in “good faith” and “notoriously insolvent” (Com. code, art. L. 670-1). The Court found that he was not in good faith, and thus that the requirements under French insolvency law were not met. This means that, thanks to this substantive provision of French insolvency law, the Court did not have to discuss whether there had been any *fraude à la loi*, the traditional concept used by French conflict scholars to tackle strategic behavior of this kind.

Finally, the application of the European Insolvency Regulation was not discussed.

Conferences on International Family Law at the French Cour de cassation

In November, two conferences will be held on family law at the French Supreme Court for private and criminal matters (*Cour de cassation*). Access is free, although participants should register in advance. Speeches will be delivered in French. 

The first conference will be held on November 9, from 9:30 am until 5:30 pm. The general theme will be the importance of nationality in Franco-Moroccan relations (*Les enjeux de la nationalité dans les relations franco-marocaines*). Conflict issues will be mostly addressed in the afternoon. Speakers will be judges from France and Morocco. The program can be found [here](#).

The second conference will be held on November 20, from 9:30 am until 6 pm. It will evaluate 20 years of application of the U.N. Convention on the rights of the child. Speakers will have various backgrounds, but will essentially include judges and practitioners. The program can be found [here](#).

Croatian Conference on Brussels I

Institute of European and Comparative Law of the University of Rijeka Faculty of Law and the Croatian Comparative Law Association are organising the international conference titled ***The Brussels I Regulation: Challenges for Croatian Judiciary***. The conference program covers the topics concerned with general issues and special heads of jurisdiction under the Brussels I Regulation, with particular emphasis on the new developments and relationships with third countries. The aim of the conference is to offer guidance to Croatian lawyers on how to implement the Regulation provisions as a part of the capacity building for the accession to the EU. Besides, it is intended to provide the lawyers interested

in the topic with an insight into some of the recent issues.

The conference is dedicated to one of the most prominent Croatian private international lawyers and scholars Professor Petar Sarcevic to whom the University of Rijeka Faculty of Law is highly indebted for his scientific and teaching contributions throughout his academic career. This conference is intended to be the first in the series of the conferences devoted to specific topics of private international law organised by the Institute.

The conference is to be held on **13 and 14 November 2009** at the Hotel Milenij Grand in Opatija, Croatia.

The Mess of Manifest Disregard

What is the impact of the much commented decision of the U.S. Supreme Court *Hall Street Associates v. Mattel Inc.* on the doctrine of manifest disregard of the law? This judicially crafted ground for vacatur of arbitral awards empowers American courts to review awards on the merits, which is an old difference between the common law and the civil law worlds.

Hall Street was not about whether manifest disregard was good law. It was about whether parties could change the grounds for vacatur of awards. As the Court held that the American *Federal Arbitration Act* (FAA) should be strictly applied and thus that the parties did not have such power, *Hall Street* immediately raised the issue of whether it impacted the power of courts to continue to use judicially crafted exceptions to the FAA such as manifest disregard.

A recent article by Hiro Aragaki (*The Mess of Manifest Disregard*, 119 Yale L.J. Online 1 (2009)) summarizes how U.S. Courts have reacted, and shows that there is a split in the making among circuits in the U.S. For some, *Hall Street* has indeed spelled the end of manifest disregard, while for others, manifest disregard remains, but must now be founded in one of the statutory grounds of the FAA. Aragaki offers a third interpretation.

The article, which has the great advantage of being unusually short (14 pages) by American standards, can be downloaded [here](#).

ECJ: First Ruling on the Rome Convention

On March 2008, the Hoge Raad der Nederlanden (Netherlands) made reference for a preliminary ruling to the ECJ, regarding the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980 (see Giorgio Buono's post). The reference relates to Article 4 of the convention, which establishes the applicable law in the absence of a choice by the parties. AG Bot's opinion was delivered on 19 May 2009; the ECJ judgment (Grand Chamber) has been released today.

The dispute in the main proceedings concerned a contract entered into in August 1998 between Intercontainer Interfrigo SC (ICF) and Balkenende and MIC. That contract provided that ICF was to make train wagons available to MIC, and would ensure their transport via the rail network. Although the contract was not in written, ICF sent to MIC a written draft contract, which contained a clause stating that Belgian law had been chosen as the law applicable; that draft was never signed by any of the parties to the agreement. On November and December 1998, ICF sent invoices to MIC for the amounts of EUR 107 512.50 and EUR 67 100 respectively. Only the second of those amounts was paid by MIC. On December 2002, ICF brought an action against Balkenende and MIC before the Rechtbank te Haarlem (Local Court, Haarlem) (Netherlands) seeking an order for payment of the sum corresponding to the first invoice. Balkenende and MIC submitted that the claim at issue in the main proceedings was time-barred under the law applicable to the contract, in this case Netherlands law. By contrast, according to ICF, Belgian law was applicable to the contract, and the claim was not yet time-barred.

Both the Rechtbank te Haarlem and the Gerechtshof te Amsterdam (Netherlands)

(Regional Court of Appeal, Amsterdam) (Netherlands), applied Netherlands law and upheld the objection of limitation raised by Balkenende and MIC. The courts categorised the contract at issue as a contract for the carriage of goods, but they also said that if, as ICF maintained, the contract at issue in the main proceedings was not categorised as a contract of carriage, then Article 4(2) of the Convention was not applicable since it was apparent from the circumstances of the case that that contract was more closely connected with the Kingdom of the Netherlands, and thus the derogating provision in the second sentence of Article 4(5) of the Convention must be applied.

ICF appealed alleging an error of law in the categorisation of the contract as a contract of carriage, and also the possibility of the court's derogating from the general rule laid down in Article 4(2) of the Convention to apply Article 4(5) thereof. In view of those divergences on the interpretation of Article 4 of the Convention, the Hoge Raad der Nederlanden decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

- ‘1. Must Article 4(4) of the ... Convention ... be construed as meaning that it relates only to voyage charter parties and that other forms of charter party fall outside the scope of that provision?
2. If [the first question] is answered in the affirmative, must Article 4(4) of the ... Convention then be construed as meaning that, in so far as other forms of charter party also relate to the carriage of goods, the contract in question comes, so far as that carriage is concerned, within the scope of that provision and the applicable law is for the rest determined by Article 4(2) of the ... Convention?
3. If [the second question] is answered in the affirmative, which of the two legal bases indicated should be used as the basis for examining a contention that the legal claims based on the contract are time-barred?
4. If the predominant aspect of the contract relates to the carriage of goods, should the division referred to in [the second question] not be taken into account and must then the law applicable to all constituent parts of the contract be determined pursuant to Article 4(4) of the ... Convention?
5. Must the exception in the second clause of Article 4(5) of the ... Convention be interpreted in such a way that the presumptions in Article 4(2) [to] (4) of the ... Convention do not apply only if it is evident from the circumstances in their

totality that the connecting criteria indicated therein do not have any genuine connecting value, or indeed if it is clear therefrom that there is a stronger connection with some other country?”

Bringing together the first question and the first part of the second question, both relating to the application of Article 4(4) of the Convention to charter-parties, the ECJ has stated that the last sentence of Article 4(4) of the Convention “must be interpreted as meaning that the connecting criterion provided for in the second sentence of Article 4(4) applies to a charter-party, 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”.

As for the second part of the second question and the third and fourth questions, relating to the possibility of the Court’s dividing the contract into a number of parts for the purpose of determining the law applicable, the ECJ has answered that “the second sentence of Article 4(1) of the Convention must be interpreted as meaning that a part of a contract may be governed by a law other than that applied to the rest of the contract only where the object of that part is independent”.

Through the fifth question the ECJ is asked whether the exception in the second clause of Article 4(5) of the Convention must be interpreted in such a way that the presumptions in Article 4(2) to (4) of the Convention do not apply only if it is evident from the circumstances in their totality that the connecting criteria indicated therein do not have any genuine connecting value, or whether the court must also refrain from applying them if it is clear from those circumstances that there is a stronger connection with some other country. In this regard, the ECJ has stated that “as is apparent from the wording and the objective of Article 4 of the Convention, the court must always determine the applicable law on the basis of those presumptions”, but that “however, where it is clear from the circumstances as a whole that the contract is more closely connected with a country other than that identified on the basis of the presumptions set out in Article 4(2) to (4) of the Convention, it is for that court to refrain from applying Article 4(2) to (4)”.

Enforcement in France of a U.S. Financial Penalty

Earlier this year, the French *Cour de cassation* (Supreme court for private and criminal matters) confirmed a declaration of enforceability of a U.S. financial penalty of 13 million dollars in a judgment of 28 January 2009.

The *Cour de cassation* characterized the foreign penalty as an *astreinte*. Its enforceability was challenged on the grounds that it was criminal in nature, as it sanctioned a contempt of court, and that it was not proportionate to the offence. By contrast, and although the introductory report prepared by one of the members of the court did discuss the issue, the judgment did not address whether *astreinte* was an exercise of state power which as such ought to remain strictly territorial.

The case was about another Ponzi scheme perpetrated in the U.S.. The accused was an American citizen, Richard Blech, who lived in France (he was eventually extradited to and jailed in New York and in California). He was the manager of an American corporation, Credit Bancorp, that he had used to commit the fraud. In January 2000, the District Court for the Southern District of New York appointed a receiver for Credit Bancorp, who was meant to trace the proceeds of the fraud committed by Blech. Some times later, the receiver sought an injunction from the US Court ordering Blech to cooperate with him. As he would not, he applied for a renewal of the injunction, together with a sanction of US\$ 100 per day of non-compliance, which was to double each day. At that point in time, I understand that Blech was found to be in contempt of court for not complying with the injunction. Four months later, the same receiver applied for the penalty to be calculated, which was done by the court in an order of 25 July 2000 which ordered Blech to pay a bit more than 13 million dollars.

The receiver then sought to enforce the order of July 25, 2000, in a ski resort in France, where Blech owned a property. In 2003, the competent first instance court of Thonon-les-Bains (French Alps) declared the American judgment

enforceable. The judgment was confirmed by the Chambery Court of Appeal in 2006. Blech appealed to the Cour de cassation.

Blech first challenged the lower courts' decisions on the ground that they had recognised a foreign criminal order. Here, much of the argument revolved around the fact that Blech was found to be in contempt of court. The reason why was that, in the *Stolzenberg* case, the *Cour de cassation* had said *obiter* that contempt of court was criminal in nature. Then, the point was to declare enforceable in France a *Mareva* injunction, and the court had ruled that a freezing order is civil in nature irrespective of the sanction of "contempt of court" (cited as such in the judgment) which backs it, and which is criminal. In *Blech*, the issue was not anymore to recognize the foreign injunction, but its sanction. A mechanical application of *Stolzenberg* would have led to rule that it was thus a US penal judgment which could not be enforced in France. But this is not what the *Cour de cassation* did. It held that the financial penalty which was the sanction for non complying with a foreign injunction was civil in nature, and could thus be declared enforceable.

As mentioned earlier, the judgment does not discuss whether, though not criminal, the foreign sanction could have been regarded as an exercise of American state authority, and should thus have produced effect on American soil only. The likely reason is that, as the foreign penalty had been calculated, it was perceived as not raising such an issue. French scholars all agree that as soon as a threat of financial sanction ceases to be a mere threat and is turned into an actual order to pay, the problem is not anymore one of exercising state authority. Support for this position is thought to be in article 49 of the Brussels I Regulation, although it obviously did not apply in this case.

Blech further challenged the recognition of the U.S. order on the ground that it was a disproportionate penalty: 13 million for not cooperating with the receiver. The Court answered that trial judges could not be criticized for finding that it was a perfectly proportionate sanction given that the fraud was for US\$ 200 million. Implicitly, however, the Court accepted that foreign civil penalties could only be recognized if proportionate. The Court referred to the proportionality principle which lies both in the French Constitution (1789 *Declaration des droits de l'homme et du citoyen*, article 8) and in European Human Rights Law (Article 1 of the First Protocol to the European Convention on Human Rights). In another context, this is what the European Court of Justice recently held in *Gambazzi*.

M. Blech has served his sentence in California and is now back to France.