Article on Passengers' Rights

Jens Karsten (Brussels/Oslo) has written a paper on recent developments in the field of European passenger law with references to PIL issues. "Im Fahrwasser der Athener Verordnung zu Seereisenden: Neuere Entwicklungen des europäischen Passagierrechts" has been published in the German law journal "Verbraucher und Recht" (VuR) vol. 6/2009, pp. 213 et seq.

The article mainly deals with Regulation (EC) No. 392/2009 on the liability of carriers of passengers by sea in the event of accidents. The Athens Regulation incorporates most of the Athens Convention 2002 (www.imo.org) into the acquis communautaire but postpones the implementation of its Articles 17 and 17bis on jurisdiction and enforcement (deviating from 'Brussels I') until such time as the EC has acceded to the Convention.

Beyond the discussion of the Athens Regulation, the paper also presents new references for preliminary rulings and recent decisions of the ECJ linking travel law and PIL. The author refers inter alia to the "Rehder" case (which in the meantime – as we have reported – has been decided). It also introduces the Austrian reference on Art. 15(3) 'Brussels I' in the "Pammer" case (now also Case C-144/09, Alpenhof v. Heller).

Most significant for the development of EU-PIL, the paper raises the question of the interaction of the European Commission proposal of 8 October 2008 for a Directive on Consumer Rights (COM(2008) 614 final) with the 'Rome I'-Regulation (first discussed in this forum by Giorgio Buono on 9 October 2008: "EC Commission Presents a Proposal for a Directive on Consumer Rights"). The proposal aims at merging four existing directives on consumer rights: Directive 85/577/EEC on contracts negotiated away from business premises; Directive 93/13/EEC on unfair terms in consumer contracts; Directive 97/7/EC on distance contracts; and Directive 1999/44/EC on consumer sales and guarantees. Three of these directives provide for conflict-of-law clauses concerning the scope of EC consumer law (scope clauses). Those clauses, where applicable, have the effect of making, for instance, unfair term control as foreseen in EC law under Directive 93/13/EEC on Unfair Terms in Consumer Contracts possible even when the law of a third country is chosen. Somewhat hidden in its provisions, the proposal would abolish the scope clauses of its predecessor directives. The author assesses the

impact of this change in EC-PIL de lege ferenda, taking in particular into account Article 5 and Article 3(4) of 'Rome I', both new provisions compared to the Rome Convention. The choice of law of a third, non-EU-country for seat-only sales would consequently be possible also in those areas of EC consumer law whose application is so far guaranteed by the scope clauses. This significant change is welcomed; however, uncertainty remains whether this consequence has been properly considered in the proposal. The author encourages therefore a discussion on the territorial scope of EC consumer law with regard to passengers' rights.

United States Congress Considering Legislation Relating to Pleading

As was recently reported on this blog, this past May the United States Supreme Court decided the case of *Ashcroft v. Iqbal*, which will have relevance for pleading private international law cases in United States federal courts. The five-member majority in *Iqbal* (Justice Kennedy joined by Chief Justice Roberts and Justices Scalia, Thomas, & Alito) made clear that the heightened standards of pleading announced in 2007 in *Bell Atlantic v. Twombly* should be applied in cases beyond the antitrust context. In *Twombly*, the Court held that to comply with Federal Rule of Civil Procedure 8(a)(2) (requiring that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief") that a complaint must contain "enough facts to state a claim to relief that is plausible on its face." There had been some confusion in the lower federal courts as to whether that heightened pleading standard of "plausibility" applied in cases outside of the antitrust context. The Court in *Iqbal* answered that question in the affirmative, generally requiring all civil plaintiffs to meet the following standard: "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Slip op. at 14. As such, enough facts must be plead to allow "the court to draw

the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. A complaint must therefore show more than "a sheer possibility that the defendant has acted unlawfully." *Id*.

On Wednesday, Senator Arlen Specter of Pennsylvania introduced a bill to return pleading standards in United States federal courts back to the "standards set forth by the Supreme Court of the United States in *Conley v. Gibson*, 355 U.S. 41 (1957)." That standard, which was overturned by *Twombly*, merely required that the complaint "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." Likewise, *Conley* provided that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitled him to relief." That approach to pleading, generally described as "notice pleading," enabled plaintiffs to describe their case in the complaint in very general terms and then to use the mechanics of discovery to prove up their claims at trial and/or force settlement before trial. In overturning that case in *Twombly* and in clarifying in *Iqbal* that in *all* civil cases a complaint must meet the heightened pleading standard of plausibility, the Supreme Court has moved pleading in the the United States ever so slightly towards the civil law's "fact pleading" standard.

Senator Specter's bill would return the United States to the simple "notice pleading" of the pre-*Twombly* era. A couple of observations are in order. *First*, it is clear that *Iqbal* is a blockbuster decision. As recently described by Adam Liptak in the *New York Times*: "The most consequential decision of the Supreme Court's last term got only a little attention when it landed in May. . . . But the lower courts have certainly understood the significance of the decision, *Ashcroft v. Iqbal*, which makes it much easier for judges to dismiss civil lawsuits right after they are filed. They have cited it more than 500 times in just the last two months." The impact for private international law cases will be substantial in that those cases often require extensive discovery to make out claims, as the acts and/or occurrences allegedly giving rise to unlawful activity occur outside the borders of the United States and present unique problems of factual development given their transnational dimension.

Second, Congress has now entered the fray given the importance of that decision to all civil cases. While Senator Specter's bill may be elegant in its simplicity, one wonders whether a bill more carefully crafted and detailed might be in order. For

instance, might it be useful to have a carve out for cases, such as private international law ones, that pose unique pleading problems. Or, might it be useful for Congress to more precisely detail the discretion to be employed by district court judges in reviewing civil complaints. To be sure, both *Conley*'s liberal standard and *Iqbal*'s heightened standards are not studies in clarity. Thus, it might be better to provide more-focused principles to be employed by the courts in civil cases rather than merely returning to *Conley*'s opaque standard.

Finally, it should be asked from a comparative perspective whether US courts and Congress might look to the experience of fact pleading abroad before returning to the *Conley* standard. In Europe, there is a rich experience with heightened pleading standards that might provide concrete rules for application in the United States. For instance, perhaps moderating principles of judicial administration might be explored to lessen the seemingly blunt pronouncements in *Twombly* and *Iqbal*. This would be especially relevant in private international law cases, where cases sit at the interstices of the common law and civil law divide.

At bottom, private international lawyers should keep a close watch on these developments.

Publication: "La nuova disciplina comunitaria della legge applicabile ai contratti (Roma I)"

The papers presented at the conference on the Rome I Regulation hosted in November 2008 by the University of Venice "Ca' Foscari" (see here for the webcast) have been published by the Italian publishing house Giappichelli under the editorship of *Nerina Boschiero*: **"La nuova disciplina comunitaria della legge applicabile ai contratti (Roma I)"**.

Here's the table of contents:

Presentazione (*N. Boschiero*).

Introduction. Considérations de méthode (*P. Lagarde*).

Parte I: Problemi generali.

- Funzione ed oggetto dell'autonomia della volontà nell'era della globalizzazione del contratto (*F. Marrella*);
- I limiti al principio d'autonomia posti dalle norme generali del regolamento Roma I. Considerazioni sulla "conflict involution" europea in materia contrattuale (*N. Boschiero*);
- La legge applicabile in mancanza di scelta dei contraenti (*U. Villani*);
- Le norme di applicazione necessaria nel regolamento "Roma I" (*A. Bonomi*);
- A United Kingdom Perspective on the Rome I Regulation (*J. Fawcett*).

Parte II: Temi specifici.

- La definizione dell'ambito di applicazione del regolamento Roma I: criteri generali e responsabilità precontrattuale (*P. Bertoli*);
- I contratti di assicurazione tra mercato interno e diritto internazionale privato (*P. Piroddi*);
- Contratti con i consumatori e regolamento Roma I (*F. Seatzu*);
- La legge applicabile ai contratti individuali di lavoro nel Regolamento "Roma I" (*F. Seatzu*);
- Il contratto internazionale di trasporto di persone (*G. Contaldi*);
- Le relazioni intercorrenti tra il regolamento Roma I e le convenzioni internazionali (in vigore e non) (*A. Bonfanti*);
- La legge applicabile alla negoziazione di strumenti finanziari nel regolamento Roma I (*F.C. Villata*);
- La legge regolatrice delle conseguenze restitutorie e risarcitorie della nullità del contratto nei regolamenti Roma I e Roma II (*Z. Crespi Reghizzi*);
- I contratti relativi alla proprietà intellettuale alla luce della nuova disciplina comunitaria di conflitto. Analisi critica e comparatistica (*N. Boschiero*).

Osservazioni conclusive (*T. Treves*).

Title: **“La nuova disciplina comunitaria della legge applicabile ai contratti (Roma I)“**, edited by *Nerina Boschiero*, Giappichelli (Torino), 2009, XVI – 548 pages.

ISBN: 978-88-348-9562-7. Price: EUR 50. Available at Giappichelli.

Publications on International Surrogate Motherhood

A paper of Prof. Anna Quiñones Escámez (Pompeu Fabra Univerity, Barcelona) has just been published in the Spanish electronic magazine InDret. The English abstract reads as follows:

> *The following pages focus on Private International Law issues raised by the Resolution of the Spanish “Dirección General de los Registros y del Notariado” (DGRN) of last February the 18th. Reversing the previous decision of the Consular Register, the Resolution agrees to register in the Spanish Office of foreign birth certificates the double paternity of twins born by means of surrogate motherhood in California. Once submitted the main issue settled by the DGRN, we will examine the pending questions and the resolution methods available at Private International Law (mandatory rules, conflict of laws and recognition of official certificates, judicial decisions and legal situations). At this point we will take into account the relationship (cause-effect) between the judicial decision and the birth certificate as a title (artículo 83 RRC). Later on, we will review the limits provided by some domestic laws in order to avoid creating “limping situations” valid in the country of origin but illegal abroad. We will follow remarking the aspects of fraud in the jurisdiction (forum shopping) and the “fraud in the conflict of qualifications”. Both aspects are relevant since the contract issue (surrogacy) is the one which attracts affiliation issues before the courts (and law) of the country where surrogacy is practised and where the children will be born. We will conclude with some remarks regarding the role of “the best interest of the Child clause” (supra-national rule*

of law) and the "best interest of the children" in this case.

The article itself can be downloaded (see here).

Australia to accede to Hague Convention on Service Abroad

On 25 June 2009, the Commonwealth Attorney General tabled the *Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters 1965* in Parliament. This is the first step to Australia's becoming a party to the *Convention*. In anticipation of that, there have been amendments to the rules of the Federal Court and those of the State Supreme Courts (see eg Victoria) relating to service under the *Convention*, which will commence on the day the *Convention* enters force in Australia.

ECJ: Judgments in "Hadadi" and "Zuid-Chemie BV"

Yesterday, the ECJ delivered its judgments in cases C-189/08 (*Zuid-Chemie BV v. Philippo's Mineralenfabriek NV/SA*) and C-168/08 (*Laszlo Hadadi (Hadady*))

1. ***Zuid-Chemie*** concerns the interpretation of Art. 5 (3) Brussels I Regulation. The *Hoge Raad der Nederlanden* (Netherlands) had referred the following questions to the ECJ:

1. *Which damage is, in the case of unlawful conduct such as that which*

forms the basis for Zuid-Chemie's claim, to be treated as the initial damage resulting from that conduct: the damage which arises by virtue of the delivery of the defective product or the damage which arises when normal use is made of the product for the purpose for which it was intended?

2. If the latter is the case, can then the place where that damage occurred be treated as "the place where the harmful event occurred" within the meaning of Article 5(3) of … Regulation … No 44/2001 … only if that damage consists of physical damage to persons or goods, or is this also possible if (initially) only financial damage has been incurred?

The ECJ now held as follows:

Article 5(3) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that, in the context of a dispute such as that in the main proceedings, the words 'place where the harmful event occurred' designate the place where the initial damage occurred as a result of the normal use of the product for the purpose for which it was intended.

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

2. The second case, ***Hadadi***, concerns the interpretation of the Brussels II *bis* Regulation. Here, the *Cour de cassation* (France) had referred the following questions to the ECj:

(1) Is Article 3(1)(b) [of Regulation No 2201/2003] to be interpreted as meaning that, in a situation where the spouses hold both the nationality of the State of the court seised and the nationality of another Member State of the European Union, the nationality of the State of the court seised must prevail?

(2) If the answer to Question 1 is in the negative, is that provision to be interpreted as referring, in a situation where the spouses each hold dual nationality of the same two Member States, to the more effective of the two nationalities?

(3) If the answer to Question 2 is in the negative, should it therefore be considered that that provision offers the spouses an additional option, allowing those spouses the choice of seising the courts of either of the two States of which they both hold the nationality?

The Court now ruled as follows:

1. Where the court of the Member State addressed must verify, pursuant to Article 64(4) of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Council Regulation (EC) No 1347/2000, whether the court of the Member State of origin of a judgment would have had jurisdiction under Article 3(1)(b) of that regulation, the latter provision precludes the court of the Member State addressed from regarding spouses who each hold the nationality both of that State and of the Member State of origin as nationals only of the Member State addressed. That court must, on the contrary, take into account the fact that the spouses also hold the nationality of the Member State of origin and that, therefore, the courts of the latter could have had jurisdiction to hear the case.

2. Where spouses each hold the nationality of the same two Member States, Article 3(1)(b) of Regulation No 2201/2003 precludes the jurisdiction of the courts of one of those Member States from being rejected on the ground that the applicant does not put forward other links with that State. On the contrary, the courts of those Member States of which the spouses hold the nationality have jurisdiction under that provision and the spouses may seise the court of the Member State of their choice.

See also our previous posts on the AG's opinion as well as the reference.

Publication. Punitive damages: Common Law and Civil Perspectives

On a previous post (see here) I gave notice of a Vienna Conference on Punitive Damages held in November 2008, organised by the Institute for European Tort Law and chaired by Sir Henry Brooke and Prof. Ken Oliphant. Following this event a book has just been published, entitled *Punitive Damages: Common Law and Civil Law Perspectives*. The study covers jurisdictions that openly endorse punitive damages -in particular, England, South Africa and the United States- as well as those jurisdictions which purport to deny their existence . The position in France, Germany, Italy, Spain, Hungary, the Scandinavian countries as well as EU Law are thus considered. The study also includes a report on punitive damages from an insurance, law and economics and private international law perspective. A report on aggravated damages precedes a comparative report and conclusions.

More information on the publication and a link to the index of contents is to be found here.

Round-Up of Canadian Conflicts Publications

Readers of this web site might find some of the following publications to be of interest. I have tried to gather togther recent work by Canadian conflicts scholars. Please post a comment if you are aware of another piece.

Vaughan Black & Angela Swan, “Concurrent Judicial Jurisdiction: A Race to the Court House or to Judgment?” (2008) 46 C.B.L.J. 292

Joost Blom, “Concurrent Judicial Jurisdiction and Forum Non Conveniens – What

is to be Done?" (2009) 47 C.B.L.J. 166

Wayne Gray & Robert Wisner, "The Russians are Coming, But Can They Enforce their Foreign Arbitral Award?" (2009) 47 C.B.L.J. 244

Jacqueline King & Andrew Valentine, "The Structure of Jurisdictional Analysis" (2008) 34 Adv. Q. 416

Kenneth C. MacDonald, *Cross-Border Litigation: Interjurisdictional Practice and Procedure* (Aurora: Canada Law Book, 2009)

James Mangan, "The Need for Cross-Border Clarity: Recognizing American Class Action Judgments in Canada" (2009) 35 Adv. Q. 375

Tanya Monestier, "Lepine v. Canada Post: Ironing Out Wrinkles in the Interprovincial Enforcement of Class Judgments" (2008) 34 Adv. Q. 499

Austen Parrish, "Comity and Parallel Foreign Proceedings: A Reply to Black and Swan" (2009) 47 C.B.L.J. 209

Nicholas Pengelley, "Alberta Says Nyet! Limitation Act Declares Russian Arbitral Award DOA" (2009) 5 J.P.I.L. 105

Stephen Pitel, "Rome II and Choice of Law for Unjust Enrichment" in John Ahern & William Binchy, *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations* (Leiden: Martinus Nijhoff Publishers, 2009) 231

Stephen Pitel, "Choice of Law for Unjust Enrichment: Rome II and the Common Law" [2008] Nederlands Internationaal Privaatrecht 456

Antonin Pribetic, "Staking Claims Against Foreign Defendants in Canada: Choice of Law and Jurisdictional Issues Arising from the In Personam Exception to the Mocambique Rule for Foreign Immovables" (2009) 35 Adv. Q. 230

Prasanna Ranganathan, "Survivors of Torture, Victims of Law: Reforming State Immunity in Canada by Developing Exceptions for Terrorism and Torture" (2008) 71 Sask. L. Rev. 343

Geneviève Saumier, "Transborder Litigation and Private International Law: The View from Canada" in F. Cafaggi & H.-W. Micklitz, eds., *New Frontiers of Consumer Protection: The Interplay between Private and Public Enforcement*

(Antwerp: Intersentia, 2009) 361

Janet Walker, “Recognizing Multijurisdictional Class Action Judgments Within Canada: Key Questions – Suggested Answers” (2008) 46 C.B.L.J. 450

Janet Walker, “Teck Cominco and the Wisdom of Deferring to the Court First Seised, All Things Being Equal” (2009) 47 C.B.L.J. 192

Summer Seminar in Urbino

The Faculty of Law of the University of Urbino will host this summer its 51st Seminar of European Law.

The majority of the courses taught over the two weeks of the seminar (17-29 August) will deal with conflict issues, in particular European regulations. Although courses can be taught in English, this is a franco-italian seminar where courses are typically taught in French or Italian, with a translation in the other language.

This year, speakers will come from France, Italy, Portugal or Lebanon, and include Horatia Muir Watt, Bertrand Ancel, Luigi Mari, and Tito Ballarino.

The full program can be found here.

ECJ: Recent Judgments and References on Brussels I and

Brussels II bis

I. Judgments on Brussels I:

1. SCT Industri AB i likvidation v. Alpenblume AB (C-111/08)

The *Högsta domstolen* (Sweden) had referred the following question to the ECJ for a preliminary ruling:

> *Is the exclusion under Article 1(2)(b) of Regulation [No 44/2001] of bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings from the scope of that regulation to be interpreted as meaning that it covers a decision given by a court in one Member State (A) regarding registration of ownership of shares in a company having its registered office in Member State A, the shares having been transferred by the liquidator of a company having its registered office in another Member State (B), where the court based its decision on the fact that, in the absence of an international agreement on the mutual recognition of insolvency proceedings, Member State A does not recognise the liquidator's powers to dispose of property situated in Member State A?*

The ECJ now held:

> *The exception provided for in Article 1(2)(b) of Council Regulation No 44/2001 (EC) of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as applying to a judgment of a court of Member State A regarding registration of ownership of shares in a company having its registered office in Member State A, according to which the transfer of those shares was to be regarded as invalid on the ground that the court of Member State A did not recognise the powers of a liquidator from a Member State B in the context of insolvency proceedings conducted and closed in Member State B.*

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

2. Peter Rehder v. Air Baltic Corporation (Case C-204/08)

The *Bundesgerichtshof* (Germany) had referred the following questions to the ECJ for a preliminary ruling:

> *1. Is the second indent of Article 5(1)(b) of Regulation [No 44/2001] to be interpreted as meaning that in the case also of journeys by air from one Member State to another Member State, the single place of performance for all contractual obligations must be taken to be the place of the main provision of services, determined according to economic criteria?*
>
> *2. Where a single place of performance is to be determined: what criteria are relevant for its determination; is the single place of performance determined, in particular, by the place of departure or the place of arrival of the aircraft?*

The ECJ now held:

> *The second indent of Article 5(1)(b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that, in the case of air transport of passengers from one Member State to another Member State, carried out on the basis of a contract with only one airline, which is the operating carrier, the court having jurisdiction to deal with a claim for compensation founded on that transport contract and on Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, is that, at the applicant's choice, which has territorial jurisdiction over the place of departure or place of arrival of the aircraft, as those places are agreed in that contract.*

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

II. References: Further, several questions on the interpretation of Brussels I – as well as one reference on Brussels II *bis* – have been referred to the ECJ for a preliminary ruling:

1. Ceská podnikatelská pojišťovna, a.s., Vienna Insurance Group v Michal Bílas(Case C-111/09)

The *Okresní Soud v Cheb* (Czech Republic) has referred the following questions to the ECJ for a preliminary ruling:

> *Should Article 26 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('the Regulation') be interpreted as not authorising a court to review its international jurisdiction where the defendant partipates in the proceedings, even when the case is subject to the rules on compulsory jurisdiction under Section 3 of the Regulation and the application is brought contrary to those rules?*
>
> *Can the defendant, by the fact that he partipates in the proceedings, establish the international jurisdiction of the Court within the meaning of Article 24 of the Regulation even where the proceedings are otherwise subject to the rules of compulsory jurisdiction in Section 3 of the Regulation and the application is brought contrary to those rules?*
>
> *If the answer to question (2) is in the negative, may the fact that the defendant participates in the proceedings before a court which otherwise under the Regulation does not have jurisdiction in a case concerning insurance, be regarded as an agreement on jurisdiction within the meaning of Article 13(1) of the Regulation?*

***2*.Hotel Alpenhof GesmbH v. Oliver Heller (Case)C-144/09)**

The *Oberster Gerichtshof* (Austria) has referred the following question to the ECJ for a preliminary ruling:

> *Is the fact that a website of the party with whom a consumer has concluded a contract can be consulted on the internet sufficient to justify a finding that an activity is being 'directed', within the terms of Article 15(1)(c) of Regulation (EC) No 44/2001 ('the Brussels I Regulation')?*

3. Ronald Seunig v. Maria Hölzel (Case C-147/09)

The *Oberlandesgericht Wien* (Austria) has referred the following quesitons to the ECJ for a preliminary ruling:

1. (a) Is the second indent of Article 5(1)(b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('Regulation No 44/2001') applicable in the case of a contract for the provision of services also where the services are, by agreement, provided in several Member States?

If the answer to that question is in the affirmative,

Should the provision referred to be interpreted as meaning that

(b) the place of performance of the obligation that is characteristic of the contract must be determined by reference to the place where the service provider's centre of business is located, which is to be determined by reference to the amount of time spent and the importance of the activity;

(c) in the event that it is not possible to determine a centre of business, an action in respect of all claims founded on the contract may be brought, at the applicant's choice, in any place of performance of the service within the Community?

2. If the answer to the first question is in the negative,

Is Article 5(1)(a) of Regulation No 44/2001 applicable in the case of a contract for the provision of services also where the services are, by agreement, provided in several Member States?

4. Peter Pammer v. Reederei Karl Schlüter GmbH & Co. KG (C-585/08)

This reference, made by the *Oberster Gerichtshof* (Austria) concerns first the interpretation of "a contract which, for an inclusive price, provides for a combination of travel and accomodation" in terms of Art. 15 No. 3 Brussels I and second the question whether it is sufficient to assume that activities are "directed" to a certain Member State if a website can be consulted via the internet.

Those questions have arisen in this case between a claimant domiciled in Austria and a company having its seat in Germany. The claimant booked a sea voyage on a freighter with the sued company via the website of an agent seated in Germany. As submitted by the claimant, the offer should – according to the agent's website

– include inter alia a cabin for two persons with bath room, separate living room, TV, further a gym and a swimming pool. In addition, several shore leaves should be encompassed as well. According to the claimant's submission, most of these statements were incorrect why the claimant declined to start the journey and sues for repayment before Austrian courts.

Thus, the first question arising in this case is the question of international jurisdiction of Austrian courts. Art. 15 No. 3 Brussels I, however, states that Section 4 – which would, in principle, be relevant due to the existence of a consumer contract – is not applicable to contracts of transport other than a contract which, for an inclusive price, provides for a combination of travel and accomodation. Consequently, Section 4 is applicable with regard to package travel – which raises the question whether the present contract can be regarded as package travel.

Since the Austrian Supreme Court had doubts as to whether the present contract can be compared with a cruise – which is classified as package travel by the predominant opinion – it has referred the following question to the ECJ:

> *Does a 'voyage by freighter' constitute package travel for the purposes of Article 15(3) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters?*

In case the ECJ should answer this first question in the affirmative, a second issue would need clarification – the question of whether it can be regarded as sufficient for the application of Art. 15 No. 1 (c) Brussels I if a website can be consulted on the internet in another Member State. With regard to this question, the Supreme Court emphasises – with reference to the Joint Council and Commission Statement on Articles 15 and 73 (14139/00) – that the mere fact that a website is accessible is not sufficient for the application of Art. 15. Rather it is necessary that the website solicits the conclusion of distance contracts and that a contract has actually been concluded.

Since, according to the Supreme Court, the requirements of "directed" in terms of Art. 15 No. (c) Brussels I need clarification, the court referred also the following question to the ECJ for a preliminary ruling:

If the answer to Question 1 is in the affirmative: Is the fact that an agent's website can be consulted on the internet sufficient to justify a finding that activities are being 'directed' within the terms of Article 15(1)(c) of Regulation No 44/2001?

The referring decision of the Austrian OGH can be found (in German) here.

5. Wood Floor Solutions Andreas Domberger GmbH v. Silva Trade, SA (C-19/09)

Futher, the *Oberlandesgericht Wien* (Austria) has referred to the ECJ interesting questions on the interpretation of Art. 5 No. 1 (b) Brussels I with regard to cases where the services are provided in several Member States:

1. (a) Is the second indent of Article 5(1)(b) of Council Regulation (EC) No 44/201 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('Regulation No 44/2001') applicable in the case of a contract for the provision of services also where the services are, by agreement, provided in several Member States?

If the answer to that question is in the affirmative,

Should the provision referred to be interpreted as meaning that

(b) the place of performance of the obligation that is characteristic of the contract must be determined by reference to the place where the service provider's centre of business is located, which is to be determined by reference to the amount of time spent and the importance of the activity;

(c) in the event that it is not possible to determine a centre of business, an action in respect of all claims founded on the contract may be brought, at the applicant's choice, in any place of performance of the service within the Community?

2. If the answer to the first question is in the negative: Is Article 5(1)(a) of Regulation No 44/2001 applicable in the case of a contract for the provision of services also where the services are, by agreement, provided in several Member States?

6. German Reference on Brussels II *bis*

Further, the *Bundesgerichtshof* has referred with decision of 10 June 2009 a question on the interpretation of Brussels II *bis* to the ECJ for a preliminary ruling: The case concerns the question whether provisional measures in terms of Art. 20 Brussels II *bis* constitute "judgments" in terms of Art. 2 No. 4 Brussels II *bis* and thus whether provisional measures can be recognised under Artt. 21 Brussels II *bis* et seq.

As stated by the *Bundesgerichtshof*, this question is debated controversially by legal writers and there is no constant jurisdiction so far. Consequently, the Bundesgerichtshof decided to refer the following question to the ECJ:

> *Are Articles 21 et. seq. Regulation (EC) No. 2201/2003 (Brussels II bis) also applicable with regard to provisional measures concerning the rights of custody in terms of Art. 20 Brussels II bis?*

(Approximate translation from the German decision. The case is apparently not available at the ECJ's website so far, but can be found (in German) under XII ZB 182/08 at the website of the Federal Court of Justice).

Many thanks to Jens Karsten (Brussels) for the tip-off with regard to several of these cases.

***Update**: As we have been kindly informed by Professor Christian Kohler, the reference has been received by the ECJ in the meantime and is pending under C-256/09 (Purrucker).*