Preemptive Jurisdiction Trumps Forum Non Conveniens in Panama

I am grateful to Henry Saint Dahl, the President of the Inter-American Bar Foundation, for contributing this report.

On March 17, 2009, the First Superior Court of the First Judicial District of Panama affirmed a ruling for lack of jurisdiction in *Sara Grant Tobal et al v. Multidata Systems International Corp. et al.*, a lawsuit filed in Panama pursuant to a forum non conveniens (FNC) dismissal order issued by a U.S. court, in Saint Louis, Missouri. Multidata had manufactured and sold X-ray machinery used in a Panamanian hospital. Patients who used this machine were overexposed to radiation and died painfully. A lawsuit was initially filed by relatives of the victims in Missouri, USA, where defendants were domiciled. Defendants raised FNC. In 2003 the case was refiled in Panama, from where it was dismissed for lack of jurisdiction all the way to the Panamanian Supreme Court.

A motion for reinstatement was then filed in August 2005, before the original US court. Defendants argued that the Panamanian case had been manipulated by plaintiffs to secure a dismissal. Defendants argued that the suit was filed in the wrong venue in Panama. American court accepted defendants' arguments and in March 2006 it dismissed the case again, on FNC grounds.

For the second time plaintiffs re-filed in Panama. The Panamanian District Court dismissed for lack of jurisdiction and the Appellate Court, as stated, affirmed the ruling. Defendants classified the case as one about *lis pendens*, raising Art. 232 of the Judicial Code: "*National jurisdiction is not excluded by the pendency of the case, or of a connected case, before a foreign judge.*" Plaintiffs relied on preemptive jurisdiction, contemplated in Art. 238 of the same code, which states: "*Preemptive jurisdiction happens when there are two or more courts with jurisdiction over a case. The first court to hear the matter preempts and precludes the jurisdiction of the other courts.*"

Defendants argued that preemptive jurisdiction only applies to domestic cases. Plaintiffs' position was that preemptive jurisdiction applies internationally as well. The Appellate Court affirmed the District Court's decision finding that preemptive

jurisdiction dissolves Panamanian jurisdiction when the lawsuit is filed first in another country that has jurisdiction according to its own legal system.

This case is interesting because it decides an issue that usually arises in Latin American – US FNC disputes. Sometimes the party raising FNC alleges that preemptive jurisdiction is a misconstruction or a ploy by plaintiffs in order to block Latin American jurisdiction. Actually preemptive jurisdiction has an impeccable pedigree in Roman law where it was known as *perpetuatio iurisdictionis* or *forum praeventionis*, making its way to Latin American jurisdictions through French, Spanish and Italian law (Conf. Chiovenda, Instituciones de Derecho Procesal, Argentina, 2005, p. 46).

In 2006 Panama enacted a statute on international litigation that rejects FNC: "*Lawsuits filed in the country as a consequence of a forum non convenience judgment from a foreign court, do not generate national jurisdiction. Accordingly they must be rejected sua sponte for lack of jurisdiction because of constitutional reasons or due to the rules of preemptive jurisdiction*." (Section 1421). An English copy can be seen here. The decision under analysis did not deem it necessary to reach this source, relying on the traditional rule of preemptive jurisdiction. The clear lesson from this case is that in Panama preemptive jurisdiction denies an alternative forum in a FNC situation. The same is true of Mexico, Costa Rica, Venezuela and other Latina American countries where the issue the issue of FNC has been considered.

The text of the case was facilitated by the Panamanian attorney Ramón Ricardo Arosemena Quintero, Counsel for plaintiffs.

Publication: Bariatti, "Casi e materiali di diritto internazionale

privato comunitario”

The Italian publishing house Giuffré has recently published the second edition of a very rich reference book on EC Private International Law, authored by ***Prof. Stefania Bariatti*** (University of Milan): “**Casi e materiali di diritto internazionale privato comunitario**“.

The volume (which is updated to October 2008, but includes later material, such as the ECJ judgment in *Cartesio*) is a valuable source of reference, providing a comprehensive and thorough coverage of the current state of EC legislation and case law in PIL matters, as well as of the ongoing initiatives in the field.

The complete table of contents is available on the publisher’s website. A brief presentation has been kindly provided by the author:

> *The volume is divided into chapters where all the EC private international law provisions may be found, whether the relevant legislative instrument is based on Article 65 EC or not.*
>
> *After the general rules, including provisions concerning external competence (Chapter 1), fundamental principles, public policy and mandatory norms (Chapter 2) and EU and double nationality (Chapter 3), the relevant acts are divided into jurisdiction in civil and commercial matters (Chapter 4), insolvency proceedings (Chapter 5), law applicable to contractual (Chapter 6) and non contractual obligations (Chapter 7), rights in rem and IP rights (Chapter 8), company law (Chapter 9), social security (Chapter 10), privacy, personal status and family relationships (Chapter 11), judicial assistance (Chapter 12). All ECJ interpretative judgments on the 1968 Brussels Convention and on the regulations based upon Article 65 EC are reported, as well as the most important judgments that touch upon conflicts-of-laws issues in the other acts.*
>
> *An introduction by the author describes the general framework and the development of the Community competence in the field of private international law and discusses the solutions already adopted for solving some topical problems.*

Title: “**Casi e materiali di diritto internazionale privato comunitario**“, by

Stefania Bariatti (in collaboration with *Serena Crespi*, *Eva de Gotzen*, *Cristina Mariottini*, *Giuseppe Serrano'*, *Carola Ricci*), Giuffrè (Milano), II edition, 2009, XXXIV – 1126 pages.

ISBN: 8814143366. Price: EUR 68,00. Available at Giuffrè.

Harris: "The Proposed EU Regulation on Succession and Wills: Prospects and Challenges"

As has already been noted on this site, the European Commission will present its proposed Regulation on Succession and Wills on 24th March 2009. In anticipation of that announcement, Professor Jonathan Harris (who has been advising the UK Ministry of Justice throughout the process) has written a lengthy article on the proposed Regulation: "**The Proposed EU Regulation on Succession and Wills: Prospects and Challenges**" (2008) 22 Trust Law International 181-235. The scope of the article is described thus:

> *In March 2005, the European Commission issued its Green Paper on Succession and Wills. In it, it argued that:*
>
> *'… the growing mobility of people in an area without internal frontiers and the increasing frequency of unions between nationals of different Member States, often entailing the acquisition of property in the territory of several Union countries, are a major source of complication in succession to estates. The difficulties facing those involved in a transnational succession mostly flow from the divergence in substantive rules, procedural rules and conflict rules in the Member States. Succession is excluded from Community rules of private international law adopted so far. There is accordingly a clear need for the adoption of harmonised European rules.'*
>
> *In the spring of 2009, it is expected to publish a draft Regulation in this area.*

This article reflects upon the challenges that the Regulation is likely to present, particularly for the UK.

The full text of the article is available to Westlaw subscribers, as well as Trust Law International subscribers. Highly recommended reading for all those interested in the proposed Regulation.

Colloquium on Choice of Law Clauses

On 10 June 2009, the Institute for Civil and Business Law (Vienna University of Economics and Business Administration) will host together with the Austrian Academy of Sciences, Insitute for European Tort Law and the University of Vienna a colloquium on the limits and chances of choice of law clauses: "**Rechtswahl – Grenzen und Chancen**".

There is no booking fee, registration is recommended until 1 June 2009.

More information on the venue and the programme can be found here.

Many thanks to Thomas Thiede for the tip-off.

Spanish Homosexual Couple and Surrogate Pregnancy (II)

In a previous post I related how a certificate issued in the U.S.A., establishing the parenthood of a baby born in this country to a surrogate mother, had been denied

registration in Spain. The interested parties lodged an application for review before the *Dirección General de los Registros y el Notariado* (DGRN); on February 18, 2009, their appeal has been upheld. This post sums up the arguments on which the Spanish resolution is based.

The DGRN starts selecting the correct methodological approach: the request for registration in Spain of a birth certificate from a foreign authority arouses questions of recognition, and not of conflicts of law; hence art. 81 *Reglamento del Registro Civil* should apply. According with this article, facts can be registered by means of Spanish public documents; public foreign deeds are also accepted, provided they are given force in Spain under the laws or international treaties. A foreign deed has to meet three conditions in order to be suitable for registration in Spain:

.- The deed must be a public one: it has to stem from a public authority and meet the necessary requirements to be considered "full evidence" (i.e., to display privileged evidentiary strength) when used before the courts of the country of origin. Apostille or legalisation are usually called for; so does translation. In the instant case, the Californian certificate of birth and filiation satisfies those conditions.

.- The public authority granting the document has to be equivalent to the Spanish ones; that is, she mut provide with guarantees similar to those required by the Spanish law for entering into public registers. According to the DGRN, the authority responsible for civil registration in California satisfies this requirement.

.- The act contained in the foreign registration certificate must endorse a legality test involving three elements: international jurisdiction of the foreign authority, due process, and compatibility with Spanish ordre public. In the instant case only the third requirement seems questionable. The DGRN devotes the rest of its reasoning to explain why incorporation of the foreign certificate to the Spanish Registro Civil is not contrary to our public policy; why it "does not alter the smooth and peaceful running of the Spanish society". To this end the DGRN develops several points that may be summarized as follows:

1) Registering parenthood of two male subjects in the Spanish Registro Civil does not violate public order, since Spanish law admits paternity of two males in cases of adoption, and adopted children and biological children are equal in the eyes of

law.
2) Spanish law allows registration of parenthood of female couples; to deny it in the case of a couple composed of two male individuals would be discriminatory.
3) To deny entry into a Spanish public register of facts concerning parenthood, already inscribed in a foreign register, would go against the best interests of the child as conceived in UN Convention on the Rights of the Child. The DGRN also recalls ECJ case law, such as *Garcia Avello* (C- 148/02) and *Grunkin-Paul* (C-353/06), where the ECJ argues in favour of a unique identity of the child. Later on the DGRN would reintroduce the argument of the child's interest: allowing registration in Spain in the same terms as Californian registration is better than leaving the children without any registration in Spain, and also preferable to having two different entries, one in the U.S. and another one in Spain.
4) In Spanish law, parenthood is not necessarily determined from the genetic linkage of those involved.
5) The interested parties have not acted in fraud of law; they have not tried to change the nationality of children in order to prompt the application of Californian law. The babies, born to a Spanish person, are Spanish.
6) The interested parties have not engaged in forum shopping or any fraudulent attempt to circumvent the application of Spanish mandatory rules. The Californian certificate of registration is not a court decision with res judicata effect. Any party may challenge the content of the birth registration before the courts; if so, the Spanish Courts would establish the paternity of children once and for all.

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (2/2009)

Recently, the March/April issue of the German legal journal "Praxis des Internationalen Privat- und Verfahrensrechts" (**IPRax)** was released.

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

- ***Robert Freitag***: "Die kollisionsrechtliche Behandlung ausländischer Eingriffsnormen nach Art.9 Abs. 3 Rom I-VO" – the English abstract reads as follows:

The article examines the conditions under which foreign mandatory rules "may be given effect" under article 9 par. 3 of the Rome I-Regulation. Freitag argues that the application of foreign mandatory rules is in theory itself mandatory but that the national judge has a discretion as to the evaluation of the compatibility of the relevant foreign law with domestic values. Another strong emphasis is put on the definition of "the country in which the contract is to be performed". The author favors an interpretation of art. 9 par. 3 Rome I-Regulation according to which the place of performance is to be determined by the proper law of the contract, resulting in the possibility of a plurality of relevant foreign mandatory rules. Furthermore, Freitag considers the rule to be of a strict and limiting nature so that the national judge may not give effect (in the meaning of the Regulation) to the mandatory provisions of foreign laws other than the one(s) determined pursuant to art. 9 par. 3 Rome I-Regulation. The article concludes with a criticism of the inapt formulation and adverse effects of art. 9 par. 3 of the Regulation.

- ***Karsten Kühnle/Dirk Otto***: "'Neues' zur kollisionsrechtlichen Qualifikation Gläubiger schützender Materien in der Insolvenz der Scheinauslandsgesellschaft – Drei Fragen, ein Gesetz, ein Referentenentwurf und ein höchstrichterliches Urteil" – the English abstract reads as follows:

Is a director of a pseudo-foreign company (e.g. a British private company limited by shares) having its centre of main interest in Germany obliged to file a petition for insolvency pursuant to German laws? Which law governs shareholder loans granted to such a company becoming insolvent? Are shareholders of such a company subject to the rules on piercing of the corporate veil developed by German courts if they cause the company's insolvency by unlawful actions? These three questions have dominated legal discussions in the past five years not only for their practical importance but also for the complexity of issues involved in a pseudo-foreign company's insolvency, e.g. determination of the company's COMI and avoidance of forum shopping, qualification of issues which are a matter of company law (lex fori societas) rather than a matter of insolvency law (lex fori concursus) against the background of Article 4 of the European Insolvency Regulation and the impact of the ECJ's judicature on freedom of establishment. From today's perspective, it appears that three events have clarified the legal position: (i) The German Reform Act to the Limited Liability Company Act (MoMiG), which came into force on 1st November 2008, explicitly addresses the question whether a pseudo-foreign company's director's duty to file for insolvency is governed by the lex fori concursus rather than the lex fori societas. (ii)

In January 2008, the German Federal Ministry of Justice has produced a bill on Rules on Conflict of Laws pertaining to Companies, which deals with shareholder loans and their legal classification from a conflict of laws perspective. (iii) The German Supreme Court has reshaped the legal fundament of piercing of the corporate veil in 2007 in the "Trihotel"-case. This case law needs to be considered when deciding whether shareholders of a pseudo-foreign company can be held personally liable for the company's insolvency.

- ***Jochen Glöckner***: "Keine klare Sache: der zeitliche Anwendungsbereich der Rom II-Verordnung" – the English abstract reads as follows:

Pursuant to its Art. 31 the Rome II-Regulation shall apply to events giving rise to damage which occur after its entry into force, while Art. 32 Rome II-Reg. determines that the regulation shall apply from 11 January 2009, except for Art. 29, which shall apply from 11 July 2008. Mostly, both provisions are simply paraphrased in a sense that the Regulation has to be applied by the courts from 11 January 2009 to events that occurred after its entry into force. Some scholars, however, tend to equate the entry into force referred to in Art. 31 with the date of application as determined in Art. 32 Rome II-Reg. requiring courts to apply the regulation only to events occurring after 11 January 2009. The wording of the various language versions of the Regulation, the drafting technique of the European legislator as exemplified in Art. 24 Reg. No. 1206/2001 (Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, OJ 2001 No L 174/1), Art. 29 Reg. No. 861/2007 (Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, OJ 2007 No L 199/1), Art. 26 Reg. No. 1393/2007 (Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000, OJ 2007 No L 324/79) or Art. 29 Reg. No. 593/2008 (Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ 2008 No L 177/6) as well as the legislative history and the purpose of both provisions however indicate, quite to the contrary, that entry into force must not be confused with applicability. That is why the provision in Art. 32 Rome II-Reg. does not amount to a specification of the date of entry into force under Art. 254 para. 1 EC and the Rome II-Regulation consequently entered into force on the twentieth day following the day of its publication. So, from 11 January 2009 on Member States Courts are under a duty to apply the Rome II-Regulation not only to all events giving rise to damage, which occur after the same day, but to all events which occur or have occurred since 20 August 2007.

- ***Alexander Bücken***: "Intertemporaler Anwendungsbereich der Rom II-VO" – the English abstract reads as follows:

According to its Article 32 the essential provisions of the Rome II-Regulation apply from 11 January 2009. Article 31

provides that the Regulation applies to events giving rise to damage which occur after its entry into force. There is uncertainty about the date of the entry into force, because there is no provision concerning it in the Regulation. The prevailing opinion states that the Regulation enters into force as from 11 January 2009. The following observations examine, why this opinion is right and which negative effects it would have if the Rome II-Regulation would enter into force as from an earlier date as the date of its application.

- ***Andreas Spickhoff*** on recent decisions of the Federal Court of Justice, the Court of Appeal Koblenz and the Court of Appeal Stuttgart concerning the concurrence of contractual claims and claims based on tort on the level of international jurisdiction and choice of law: "Anspruchskonkurrenzen, Internationale Zuständigkeit und Internationales Privatrecht"
- ***Stefan Huber***: "Ausländische Broker vor deutschen Gerichten – Zur Frage der Handlungszurechnung im internationalen Zuständigkeits- und Kollisionsrecht" – the English abstract which has been kindly provided by the author reads as follows:

The author analyses a judgment of the Court of Appeal of Düsseldorf which granted a claim for damages brought by German investors against a broker situated in New York. Dealing with the questions of jurisdiction and conflict of laws, he agrees with the outcome of the decision but criticises the reasoning of the appellate court. The court assumed jurisdiction because the securities transactions in question had been arranged by a German financial service provider. In the author's view such a reasoning would lead to an exorbitant jurisdiction of German courts under certain circumstances. He proposes a different line of reasoning based on the place where the damage occured.

- ***Gregor Bachmann***: "Internationale Zuständigkeit bei Konzernsachverhalten" – the English abstract reads as follows:

The number of foreign investors in German stock corporations is rising. If they use their influence for the detriment of the company, the question arises where those investors can be sued. In a case to be decided by the Landgericht Kiel (Trial Court), a German shareholder sued a large French company (France Telecom S.A.) who supposedly had deprived the company of a valuable corporate opportunity and thus diminished the value of the shares. The claim was brought at the seat of the claimant. In applying the rules of the Brussels I Regulation, the court found that it was competent to decide the case. It based its decision on Art. 5 Nr. 3 of this regulation, according to which in matters relating to tort,

delict or quasi-delict the defendant may be sued at the place "where the harmful event occurred". While the court was right to interpret „tort" or „delict" in a broad sense encompassing detrimental shareholder influence, it cannot be followed in its result. Although the European Court of Justice does not give clear guidance as to where the place of occurrence must be located, it clearly holds that it cannot be generally identified with the place where the claimant resides. Therefore, in cases such as the one at hand the place of occurrence must be either the seat of the company or the place where the shares are stored. Since the latter is just a matter of chance, it must be rejected. The proper place to sue foreign shareholders rather is the place where the company's seat is located. This is in accordance with the general aim of the Brussels Regulation to avoid a splitting-up of jurisdictions and not to unduly favour the claimant.

- ***Stefan Kröll*** on a decision of the German Federal Court of Justice dealing with the principle of venire contra factum proprium in the context of the declaration of enforceability of foreign arbitral awards: "Treu und Glauben bei der Vollstreckbarerklärung ausländischer Schiedssprüche"
- ***Jan von Hein*** on a decision of the Austrian Supreme Court of Justice dealing with the ordering of protective measures with regard to German adults: "Zur Anordnung von Maßnahmen zum Schutz deutscher Erwachsener durch österreichische Gerichte"
- ***Peter Mankowski*** on the final decision of the Dutch Hoge Raad in the "Leffler-case": Übersetzungserfordernisse und Zurückweisungsrecht des Empfängers im europäischen Zustellungsrecht – Zugleich ein Lehrstück zur Formulierung von Vorlagefragen"

AG Opinion on Brussels II bis ("Hadadi")

Yesterday, Advocate General *Kokott* delivered her opinion in case C-168/08 (*Hadadi*).

The case concerns the interpretation of the Brussels II *bis* Regulation and raises the question whether a Hungarian or a French court has jurisdiction over a

divorce decree where both spouses are habitually resident in France and have both Hungarian and French nationality.

The French Cour de Cassation had referred the following questions to the ECJ for a preliminary ruling:

> *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?*
> *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 dominant of the two nationalities?*
> *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?*

In her opinion, the AG proposes that the ECJ should answer these questions as follows:

> *1. Where the court of a Member State has to examine whether, under 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 Regulation (EC) No 1347/2000, the court of the Member State in which a judgment was originally given would have had jurisdiction under Article 3(1)(b) of that regulation, it may not regard spouses who both possess the nationality of the Member State of the court seised and of the Member State of origin as being exclusively of its own nationality. Rather, it must take into account the fact that the spouses also possess the nationality of the Member State of origin and that the courts of the latter State accordingly would have had jurisdiction in respect of the judgment.*
>
> *2. For the purposes of determining jurisdiction under Article 3(1)(b) of Regulation No 2201/2003 in the case of spouses who hold more than nationality, not only the more effective nationality is to be taken into account. The courts of all Member States whose nationality is held by both spouses have jurisdiction under that provision.*

Related Actions and Jurisdiction Clauses

On 19 June 2008, the Supreme Court of Luxembourg for private and criminal matters (*Cour de cassation*) delivered a judgment in an interesting case involving related actions and a jurisdiction clause.

The related actions were pending before Belgian and Luxembourg courts. Bonds had been issued by a Luxembourg financial institution and sold by a Belgian bank to a Belgium couple, who had then resold them to a member of their family, who lived in Belgium. The new holder of the bonds initiated proceedings to set aside the initial sale and decided to sue both the issuer and the seller of the bonds.

Understandably, it seems that the plaintiff wanted to have both actions tried by one single court. However, he did not directly sue both defendants before the Belgian court. Instead, he sued the Belgian seller in Belgium and the Luxembourg issuer in Luxembourg, but only then to argue that the Luxembourg court ought to decline jurisdiction in favor of the Belgian court on the ground of the law of related actions. The actions were certainly similar, since they each aimed at setting aside the sale, but they did not meet the conditions of *lis pendens*, as the parties were different. Article 28 of the Brussels I Regulation clearly controlled.

The judgment of the Luxembourg *Cour de cassation*

The first instance court of Luxembourg (*tribunal d'arrondissement*) had resolved the dispute by ruling that the claim was inadmissible. It was reversed by the Court of appeal of Luxembourg, which first addressed the issue of jurisdiction and agreed to decline jurisdiction in favor of the Belgian court. The defendant appealed to the *Cour de cassation*.

The first issue that the *Cour de cassation* had to resolve was that the Belgian Court was the first instance court of Liège. The language of Article 28, however, seemed to imply that its scope is limited to actions pending before courts of first instance ("Where these actions are pending at first instance"), and that it does

not apply to an appeal court. The *Cour de cassation* dismissed the argument by ruling that the purpose of this condition is to protect the right of the parties to an appeal. In other words, the Court held that there was no real issue as long as the parties would not lose the opportunity to appeal, which would not be the case when an appeal court would decline jurisdiction in favor of a first instance court. The Luxembourg *Cour de cassation* does not cite the authorities on which it relies, but a judgment of the French *Cour de cassation* of 27 October 1992 which had reached the same solution was relied upon in the proceedings and clearly influential.

The second issue was the extent to which the Luxembourg Court had cared about the consequences of its decision in respect of the dispute which it would not handle. Article 28 rightly requires that any European court willing to decline jurisdiction on the ground of related actions verify "if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof". In that case, that meant that the Luxembourg court ought to have verified whether the Belgian court would have had jurisdiction over the action initiated in Luxembourg against the Luxembourg defendant. The *Cour de cassation* found that the court of appeal had explored neither the jurisdiction of the Belgian court, nor whether Belgian law allowed consolidation, and thus allowed the appeal. The solution seems obvious, so much so that one wonders how the court of appeal could have missed it.

The jurisdiction clause

Although the *Cour de cassation* did not care to mention it, there was a jurisdiction clause in the bonds' prospectus. It had been drafted by a clever lawyer, so clever that it was not easy to understand what the clause meant.

> *Any dispute arising between the bond holders and the Issuer and/or the Guarantor will be settled by the courts of Luxembourg and/or Belgium as far as the Guarantor is concerned (translation from the French)*

The clause could be construed in at least two ways. First, it could have provided for the exclusive jurisdiction of the courts of two countries for two different kinds of disputes. In other words, Luxembourg courts could have had jurisdiction over actions against the Luxembourg party (the Issuer), while Belgian courts would have had exclusive jurisdiction over disputes against the Belgian party (the seller

and possibly the Guarantor). If the plaintiff construed the clause that way, that might explain why he decided to sue each of the defendants in their own courts: because he thought the jurisdiction clause actually compelled him to.

Alternatively, the clause could have meant that the parties had an option, and could choose to sue before either court. In particular, the plaintiff could have sued the issuer either in Luxembourg or in Belgium. That is how the court of appeal interpreted the clause. And this simplified any issue of jurisdiction of Belgian courts the Court of appeal of Luxembourg might face. Obviously, if the clause allowed the parties to choose between the courts of both countries, this meant that each of these courts had jurisdiction. So, the Court of appeal of Luxembourg had not applied so badly article 28.

However, the Court of appeals of Luxembourg went on to rule that there was no evidence that the clause had actually been accepted by both parties, and that it was part of their agreement. The clause had thus been found unenforceable. It could not confer jurisdiction on any court. And the *Cour de cassation* was therefore right to allow the appeal.

So the case is not as interesting as it could have been. Article 28 still awaits its *Gasser* case.

Conference on European Tort Law

The European Centre of Tort and Insurance Law will host its annual Conference on European Tort Law in Vienna from 16th-18th April.

Detailed information on the programme, registration and accomodation can be found on their specially-designed website and on the following information folder.

Many thanks to Thomas Thiede for the tip-off.

Interesting New Book: The Law Market, by Professors Erin O'Hara and Larry E. Ribstein

I just caught wind of an interesting new read from Oxford University Press. Here's the quick summary on their website:

> *Today, a California resident can incorporate her shipping business in Delaware, register her ships in Panama, hire her employees from Hong Kong, place her earnings in an asset-protection trust formed in the Cayman Islands, and enter into a same-sex marriage in Massachusetts or Canada–all the while enjoying the California sunshine and potentially avoiding many facets of the state's laws. In this book, Erin O'Hara and Larry E. Ribstein explore a new perspective on law, viewing it as a product for which people and firms can shop, regardless of geographic borders. The authors consider the structure and operation of the market this creates, the economic, legal, and political forces influencing it, and the arguments for and against a robust market for law. Through jurisdictional competition, law markets promise to improve our laws and, by establishing certainty, streamline the operation of the legal system. But the law market also limits governments' ability to enforce regulations and protect citizens from harmful activities. Given this tradeoff, O'Hara and Ribstein argue that simple contractual choice-of-law rules can help maximize the benefits of the law market while tempering its social costs. They extend their insights to a wide variety of legal problems, including corporate governance, securities, franchise, trust, property, marriage, living will, surrogacy, and general contract regulations. The Law Market is a wide-ranging and novel analysis for all lawyers, policymakers, legislators, and businesses who need to understand the changing role of law in an increasingly mobile world.*

In a recent talk on the book at the American Enterprise Institute, Professor Ribstein contended that "widespread enforcement of choice-of-law clauses

powerfully enhances [the] 'law market,' whose forces can in turn profoundly affect legal systems." When people can choose the laws by which they are governed or create contracts, they said, "a new set of political actors gains influence, and state lawmakers are thereby more effectively disciplined." Professor Ribstein called for:

> *a federal statute to require that states adhere to contractual choice-of-law provisions, except in cases where states pass "explicit legislation" to designate which choice-of-law provisions they will refuse to enforce. Ribstein contended that this solution offers "predictability, which is one thing we're not getting from the chaos of state choice-of-law rules now," as well as more interest group and individual involvement in state legislative processes. Over time, he argued, the proposal will produce an "equilibrium" that protects contractual rights, allows states and local jurisdictions to enact "reasonable regulations," and offers contracting parties "a way out of the tangle" of existing federal, state, and local laws.*

I haven't read it yet, but I certainly will soon. The early reviews have certainly been very good. You can order the book here.