Article on Google Book Search Settlement

Yesterday's issue of the *Frankfurter Allgemeine Zeitung* (***FAZ***) contains an interesting article on the Google Book Search Settlement written by ***Prof. Burkhard Hess:***

The settlement concerns a class action lawsuit between Google and – as plaintiffs – the Authors Guild, the Association of American Publishers as well as individual authors and publishers about books scanned for the Google Book Search without the authors' consent. Basically, the proposal for the settlement provides on the one side the payment of compensation for class members and the establishment of a registry of rights to books while it contains on the other side an authorisation of Google to scan books, maintain an electronic database and to make worldwide commercial uses of books.

The problematic issue the present article is dealing with, is the opt-out-mechanism provided by the settlement: Authors who do not object within the opt-out deadline (which has been extended until 4 September 2009) will be bound by the settlement. Thus, authors are "compelled" to take action if they don't want to be bound by the settlement. In other words – the opt-out mechanism is meant to substitute the authors' consent in the digitalisation and marketing of their books.

Hess points out in his article that the strategy of an opt-out mechanism might involve difficulties in view of the Berne Convention for the Protection of Literary and Artistic Works since this Convention guarantees a certain minimum standard of protection: In his article, *Hess* raises doubts whether the opt-out mechanism – which would lead to an automatic deprivation of the authors' copyright – meets the requirements of this protection standard.

With regard to the fairness hearing – which will take place in New York on 3 September – *Hess* suggests that it is not only the concerned authors who should intervene – rather he suggests that also the German Federal Government could do so, as an amicus curiae, in order to submit the reservations against the settlement.

The article titled "Es wird Zeit, dass die Bundesregierung eingreift" can

be found (in German) also online on the website of the FAZ.

China Antitrust Gets Global

In an interesting Editorial, the *Financial Times* discussed yesterday recent rulings of Chinese authorities demonstrating their willingness to enforce Chinese anti-monopoly law in respect of global deals. Indeed, the *FT* reports that two out of three of the deals had only secondary implications in China (other reports on the deals can be found here and here).

As the *Editorial* notes, an interesting consequence is that Chinese law will only be another legislation purporting to reach global deals:

> *The three rulings … show that Beijing will not hesitate to intervene in largely extra-territorial deals. That means China has joined the US and the European Union as a global competition referee, providing M&A lawyers with a fresh set of problems to wrestle with.*

What is too bad for M&A lawyers, of course, is that you cannot really pick up one of the relevant laws. The traditional choice of law methodology does not work. Each forum is concerned with the protection of its own market, and does not really consider applying foreign law. You could give a variety of rationales for that result, but the most common is probably that antitrust laws are mandatory rules.

So your options are either to develop a regime for the resolution of conflicts of mandatory rules, or hope that the authorities of the relevant markets will conclude agreements on the application of their laws, as the U.S. and the E.U. have done. I wonder whether there is any similar agreement with China.

BIICL Seminar on West Tankers

The British Institute for International & Comparative Law are hosting a seminar on Tuesday 12th May (17.30-19.30) entitled *Enforcing Arbitration Agreements: West Tankers – Where are we? Where do we go from here?* Here's the synopsis:

> *The February 2009* West Tankers *ruling of the European Court of Justice has the unintended consequence of disrupting the flow of arbitrators' powers. The precise extent to which these are affected remains unclear, however. In its ruling, the Court stated:*
>
> ***"It is incompatible with Council Regulation (EC) No 44/2001 … for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement."***
>
> *Following this ruling essentially two questions arise: "Where are we?" and "Where do we go from here?". The former question involves an assessment of West Tankers' immediate implications. The second turns on an emerging consensus, encompassing comments from at least Germany, France and the United Kingdom, that legislative change is needed to attend to the unsatisfactory state of the law in this context. The Heidelberg Report 2007 on the Brussels I Regulation proposes amendments bringing proceedings ancillary to arbitration within the Regulation's scope, and to confer exclusive jurisdiction on the courts of the state of the arbitration. Should this proposal be supported?*
>
> *The Institute has convened leading practitioners and academics, including one of the authors of the Heidelberg Report, to rise to the challenge of answering these questions. There will be ample occasion for discussion, so those attending are encouraged to share their thoughts and ideas.*
>
> ***2 CPD hours may be claimed by both solicitors and barristers through attendance at this event.***

Chair: The Hon Sir Anthony Colman, Essex Court Chambers

Speakers:

Alex Layton QC, 20 Essex Street; Chairman of the Board of Trustees, British Institute of International and Comparative Law
Professor Adrian Briggs, Oxford University
Professor Julian Lew QC, Head of the School of International Arbitration (Queen Mary), 20 Essex Street
Professor Thomas Pfeiffer, Heidelberg University; co-author of the Heidelberg Report 2007
Adam Johnson, Herbert Smith
Professor Jonathan Harris, Birmingham University and Brick Court Chambers

Details on prices and booking can be found on the BIICL website.

If you want to do your homework before the event, you might want to visit (or revisit) our West Tankers symposium, not least because four of the speakers at the BIICL seminar were also involved in our symposium.

Garsec discontinued

Readers may recall that a special leave application from the interesting *forum non conveniens* case in the New South Wales Court of Appeal, *Garsec Pty Ltd v His Majesty The Sultan of Brunei* [2008] NSWCA 211; (2008) 250 ALR 682, was to be heard by the High Court. My previous posts are here and here. The case concerned an alleged contract for the sale of an old, rare and beautiful manuscript copy of the Koran by Garsec to the Sultan for USD 8 million. The Court of Appeal unanimously dismissed an appeal from a decision staying the proceeding on *forum* grounds.

One of the key issues between the parties was whether an immunity afforded to the Sultan in the Brunei Constitution would be applicable in proceedings before Australian courts. That issue was said to turn on the characterisation of that immunity as substantive or procedural, according to Australian notions of that characterisation. The Court of Appeal concluded that it was substantive.

Unfortunately, we will not now have the High Court's views on the question, as

the applicant discontinued its application to the High Court. There are some clues to the possible thinking of at least some judges, however, in the transcript of the applicant's original special leave application before Gummow, Heydon and Kiefel JJ. On that application, Gummow J suggested that the question was really one of the "essential validity" of the contract at issue, and that this was governed by the proper law of the contract, which was accepted to be the law of Brunei. Separately, there was debate between the parties as to whether the appropriate approach was to characterise different aspects of Brunei law as procedural or substantive, according to Australian notions of that dichotomy. While that seems to be the hitherto orthodox approach, discussion in the application raises the possibility that the High Court may reconsider it in a future case.

Ph.D. Grant of the International Max Planck Research School for Maritime Affairs

The International Research School for Maritime Affairs at the University of Hamburg will award for the period commencing 1 September 2009 **one Ph.D. grant** for a term of two years (with a possible one year extension).

The particular area of emphasis to be supported by this round of grants is **Maritime Law and Law of the Sea**.

Deadline for applications is 30 June 2009.

More information on the application requirements, the application procedure and the scholarship can be found here.

Nepal Signs 1993 Hague Adoption Convention

The report of the Hague Conference is here.

Article on the Dichotomy of Substance and Procedure

Martin Illmer has written an article titled:
"Neutrality matters – Some Thoughts about the Rome Regulations and the So-Called Dichotomy of Substance and Procedure in European Private International Law"

The article is published in Civil Justice Quarterly 28 (2009) 237 et seq.

The abstract reads as follows:

> *The so-called dichotomy of substance and procedure is a classic problem of every system of private international law. In the emerging European system established by the Rome Regulations the dichotomy is addressed only in a fragmented way lacking a general concept. Aiming at an autonomous European concept, it is argued that one should abandon the common terminology which contrasts substance and procedure, since it disguises the real issue – drawing the line between the realms of the lex causae and the lex fori. To draw this line, the author suggests the criterion of neutrality, illustrated by various examples, which is based on systemic interests of European private international law, the efficiency of enforcing rights in foreign courts and the parties' interests in predictability and reduced time and costs of cross-border litigation, whereas the criterion of inconvenience is rejected.*

French Supreme Court Keeps Flashairlines Case in France

In a previous post, I had reported how the Paris Court of Appeal had accepted to rule on its jurisdiction and to decline it in order to send back a case to the United States.

French victims of a plane crash in Egypt had first sued Boeing and some of its subcontractors in Los Angeles. The District Court had declared itself *forum non conveniens*, but made the dismissal conditional on "*a French Court's acceptance of jurisdiction*". The French victims had subsequently initiated proceedings in France for the sole purpose of obtaining a declaration that French courts lacked jurisdiction. The Paris Court of appeal had entertained the claim and had indeed accepted to decline jurisdiction.

Today, the French Supreme Court for private and criminal matters (*Cour de cassation*) reversed and set aside the judgment of the Paris Court of appeal. It did so, however, on very narrow grounds. It held that, as a matter of French civil procedure, no appeal was allowed from the first instance court to the Paris court of appeal. This is because the first instance court had only ruled on a procedural point (the admissibility of the jurisdictional challenge), and no appeal can be immediately lodged against such decisions under French civil procedure.

The consequence is that the parties are now back before the first instance court of Bobigny. The interim procedural decision had declared that a party could not possibly file suit before a court and then challenge its jurisdiction. Such challenge had been held inadmissible, and the Bobigny Court had directed the parties to argue the merits of the case. Instead, the parties had appealed. The appeal was dismissed and the parties are now meant to get back to where they were, i.e. the merits of the case.

After the judgment of the Court of appeal declining jurisdiction, the plaintiffs hoped to be able to get back to the U.S. Court and argue that, in fact, there was no available court in France, as French courts had declined jurisdiction. As of today, there is a French court available. The plaintiffs must now argue the merits of the case before the first instance court. An appeal will then be available where the parties will have an opportunity to challenge the first instance decision, on the merits but also on the admissibility of the jurisdictional challenge (again).

ECJ Judgment: Apostolides

Yesterday, on 28 April 2009, the ECJ delivered its judgment in case C-420/07 *(Meletis Apostolides v. David Charles Orams, Linda Elizabeth Orams*).

The **background** of the case is – shortly summarised – as follows:

Mr. Apostolides, a Greek Cypriot, owned land in an area which is now under the control of the Turkish Republic of Northern Cyprus, which is not recognised by any country save Turkey, but has nonetheless *de facto* control over the area. When in 1974 the Turkish army invaded the north of the island, Mr. Apostolides had to flee. In 2002, Mr. and Mrs. Orams – who are British citizens – purchased part of the land which had belonged to Mr. Apostolides' family. In 2003, Mr. Apostolides was – due to the easing of travel restrictions – able to travel to the Turkish Republic of Northern Cyprus. In 2004 he issued a writ naming Mr. and Mrs. Orams as defendants claiming to demolish the villa, the swimming pool and the fence they had built, to deliver Mr. Apostolides free occupation of the land and damages for trespass. Since the time limit for entering an appearance elapsed, a judgment in default of appearance was given. Against the judgment by default, an application was issued on behalf of Mr. and Mrs. Orams that the judgment be set aside. This application to set aside the judgment, however, was dismissed by the District Court at Nicosia on the grounds that Mr. Apostolides had not lost his right to the land and that neither local custom nor the good faith of Mr. and Mrs. Orams constituted a defence. The appeal filed by Mr. and Mrs. Orams against this judgment was rejected by the Supreme Court of the Republic

of Cyprus in 2006.

On the application of Mr. Apostolides, a Master of the High Court of Justice (England and Wales) ordered in October 2005 that the judgments given by the District Court of Nicosia should be registered in and declared enforceable in England pursuant to the Brussels I Regulation. However, Mr. and Mrs. Orams appealed successfully in order to set aside the registration, *inter alia* on the ground that the Brussels I Regulation was not applicable to the area controlled by the Turkish Republic of Northern Cyprus due to Art. 1 of Protocol 10 to the Treaty of Accession of the Republic of Cyprus to the European Union. The Court of Appeal, however, hearing Mr. Apostolides' subsequent appeal, decided to stay the proceedings and to refer to the ECJ several questions for a preliminary ruling dealing primarily with the impact of the suspension of Community law in the Northern part of Cyprus and the fact that the land concerned is situated in an area over which the government of Cyprus does not exercise effective control.

The **first question** referred to the ECJ deals with the issue whether the suspension of the application of the *acquis communautaire* in the Northern area of Cyprus – which is provided for in Art. 1 Protocol No. 10 – leads to the result that the application of the Brussels I Regulation is precluded with regard to a judgment given by a Cypriot court of the area controlled by the government, concerning, however, land situated in the Northern area. With regard to this question the Court states that Art. 1 Protocol No. 10 refers only to the application of the *acquis communautaire in* the Northern area, i.e. according to the Court, the suspension provided for by that Protocol is limited to the application of Community law in the Northern area.The present case, however, concerns judgments given by a court situated in the government-controlled area (para. 37).

Thus, the Court holds with regard to the first question:

> *1.* ***The suspension of the application of the acquis communautaire in those areas of the Republic of Cyprus in which the Government of that Member State does not exercise effective control, provided for by Article 1(1) of Protocol No 10 on Cyprus to the Act concerning the conditions of accession [to the European Union] of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic***

> ***and the adjustments to the Treaties on which the European Union is founded, does not preclude the application 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 to a judgment which is given by a Cypriot court sitting in the area of the island effectively controlled by the Cypriot Government, but concerns land situated in areas not so controlled.***

In the following (para. 40 et seq.), the Court turns to the question whether the case falls within the material scope of the Brussels I Regulation, and thus to the question whether the case can be regarded as a "civil and commercial matter" in terms of Art. 1 of the Regulation – which was questioned by the Commission.

In this respect, the Court states that "the action is between individuals […] [,] is brought not against conduct or procedures which involve an exercise of public powers by one of the parties to the case, but against acts carried out by individuals. Consequently, the case at issue […] must be regarded as concerning 'civil and commercial matters' within the meaning of Article 1 (1) of Regulation No 44/2001." (para. 45 et seq.)

By means of the **second question**, the referring court basically asks whether it amounts to an infringement of Art. 22 (1) – and thus justifies a refusal of recognition according to Art. 35 (1) Brussels I – if a judgment is given by a court of a Member State concerning land situated in an area of that State over which the government of this State does not exercise effective control. With regard to this question, the ECJ stresses that Art. 22 Brussels I concerns only the international jurisdiction of the Member States – not jurisdiction within the respective Member State. Since, in the present case, the land in question is situated within the territory of the Republic of Cyprus, the rule of jurisdiction laid down in Art. 22 (1) Brussels I has been observed. According to the Court, "[t]he fact that the land is situated in the northern area may possibly have an effect on the domestic jurisdiction of the Cypriot courts, but cannot have any effect for the purposes of that regulation." (para. 51)

Consequently, the ECJ holds:

> *2.* ***Article 35(1) of Regulation No 44/2001 does not authorise the court of a Member State to refuse recognition or enforcement of a***

judgment given by the courts of another Member State concerning land situated in an area of the latter State over which its Government does not exercise effective control.

By its **third question** the referring court aims to know whether it constitutes a ground for refusal of recognition under Art. 34 (1) Brussels I if a judgment given by the courts of a Member State concerning land situated in an area over which its government does not exercise effective control cannot be enforced – for practical reasons – in the area where the land is situated. This question is answered in the negative by the ECJ basically on the ground that Art. 34 Brussels I has to be interpreted strictly (para. 55): A refusal of recognition can therefore, according to the Court, only be justified "where recognition or enforcement of the judgment given in another Member State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it would infringe a fundamental principle." (para. 59)

Further, the Court refers – even though this question has not been raised explicitly by the referring court – to Art. 38 Brussels I, pointing out that the Court "may extract from the wording formulated by the national court […] those elements which concern the interpretation of Community law, for the purpose of enabling that court to resolve the legal problems before it." (para. 63)

According to the Court, Art. 38 Brussels I might be of relevance in the present case since the enforceability of a judgment in the Member State of origin constitutes a precondition for its enforcement in the State in which enforcement is sought (para. 66). However, the Court holds that "[t]he fact that claimants might encounter difficulties in having judgments enforced in the northern area cannot deprive them of their enforceability and, therefore, does not prevent the courts of the Member State in which enforcement is sought from declaring such judgments enforceable." (para. 70).

Thus, with regard to the third question, the Court holds:

3. ***The fact that a judgment given by the courts of a Member State, concerning land situated in an area of that State over which its Government does not exercise effective control, cannot, as a practical matter, be enforced where the land is situated does not constitute a ground for refusal of recognition or enforcement under Article 34(1) of***

> ***Regulation No 44/2001 and it does not mean that such a judgment is unenforceable for the purposes of Article 38(1) of that regulation.***

By means of the **fourth question** the referring court essentially aims to know whether the recognition or enforcement of a default judgment may be refused on the basis of Art. 34 (2) Brussels I due to the fact that the defendant was not served with the document instituting the proceedings in sufficient time and in such a way as to enable him to arrange for his defence, where he was able to commence proceedings to challenge that judgment before the courts of the Member State of origin. In this respect, the Court states that Art. 34 (2) Brussels I *Regulation* does not necessarily – unlike Art. 27 (2) Brussels *Convention* – require the document instituting the proceedings to be duly served, "but does require that the rights of the defence are effectively respected." (para. 75)

The rights of the defence *are* respected where the defendant does in fact commence proceedings to challenge the default judgment and where those proceedings enable him to argue that he was not served with the document instituting the proceedings. Since in the present case the Orams commenced such proceedings to challenge the default judgment, the Court holds that Art. 34 (2) Brussels I cannot be relied upon (para. 79):

> *4.* ***The recognition or enforcement of a default judgment cannot be refused under Article 34(2) of Regulation No 44/2001 where the defendant was able to commence proceedings to challenge the default judgment and those proceedings enabled him to argue that he had not been served with the document which instituted the proceedings or with the equivalent document in sufficient time and in such a way as to enable him to arrange for his defence.***

See with regard to this case also our previous posts on the reference as well as on the AG opinion.

On the Value of Choice of Forum and Choice of Law Clauses in Spain

A contract was held between two companies: a Spanish company and a foreign one. They agreed to refer any dispute concerning the contract to the courts of Barcelona (Spain), and chose Spanish law as applicable law. Later, the Spanish company decided to sue its counterparty in the United States. The foreign company believed that this behaviour amounts to a breach of contract, and that it results in extra costs (such as fees for local lawyers hired to raise the plea) that should be repaired. The question is, is she right?

The issue was raised for the first time in Spain in a ruling of the Supreme Court (Tribunal Supremo, TS) from February 23, 2007, to which I referred in a previous post . Actually, the main issue in the ruling was international lis pendens. However, the TS also told us that a choice of forum clause is of contractual nature, and that failure to comply with it implies economic consequences: the defaulting party may be sued and sentenced to pay compensation for the legal costs incurred by the counterparty, when forced to defend itself in courts other than those chosen. The elected courts have jurisdiction to decide on the breach of the choice of court agreement.

Recently, the TS ruled again on the issue (STS, from January 12, 2009: see here). The circumstances of the case are those described above. The foreign company sued the Spanish one for breach of contract; both the Court of First Instance (Juez de Primera Instancia) and the Court of Appeals (Audiencia Provincial) denied the claimant's right to compensation. The TS, however, decided otherwise and overturned their rulings.

The inconsistency between opinions is largely due to different understandings of the nature of choice of forum clauses. For the Court of First Instance and the Spanish company, the agreement to submit is not part of the contract, nor is it a contract; on the contrary, it is an agreement of adjective or procedural nature. Its breach (the non-submission of the parties to the elected Court) ends up in a restricted effect: depending on the willingness of the counterparty, the claim

before the non-chosen court will not be decided by this court. The law provides no other penalty for failure to comply with the clause.

The Court of Appeals followed the Court of First Instance opinion, noting that "the principle of contractual freedom does not work the same way in cases where only private interests are at stake, and in case of procedural covenants to submit to jurisdiction" , the latter having limitations of public-procedural order; "agreements of contractual contents (economic agreements) and procedural covenants to submit to jurisdiction cannot be assimilated"; "the pact to submit to a certain jurisdiction is a subsidiary one; it only comes into play when the contract has to be enforced or interpreted." The Court also said that there is no causal link between the breach of the covenant and the damages claimed by the foreign company in Spain: these damages being due for the proceedings before the Courts of Florida, they must be labelled as "costs of the proceedings" (legal costs); and only the Florida Court could determine the costs to be paid.

The claimant's (the foreign company) thesis, quoting Spanish and foreign academics, is the opposite: the choice of forum agreement should be treated like any other contractual clause. The plaintiff also recalled that the agreement was not only a choice of court one; the parties had also chosen Spanish law. Finally, the claimant argued the bad faith of the defendant: sole purpose of the claim (of several hundred million dollars) in Florida was to cause further injury and to intimidate.

The TS ruled in favour of the claimant. The Court expressly stated that "[the choice of forum agreement] is incorporated to the contractual relationship as one of the rules of conduct to be observed by the parties; it creates a duty (albeit an accessory one); failure to comply with it (…) must be judged in relation to the significance that such failure may have in the economy of the contract, as this Court has consistently maintained (…) that breaches determining the economic frustration of contract for one party are to be regarded as having substantial meaning (…)". The TS goes on saying that "(…) in the instant case, the choice of the applicable law and jurisdiction may have been crucial when deciding whether to establish the relationship. If so, they would have clear significance for the economy of the contract, given that Spanish law establishes a concrete contractual framework for the assessment of damages (for instance, it excludes punitive damages, which on the contrary may be awarded under the law of the United States of America);" " The conscious breach of the covenant, raising a

claim where the law of the U.S. was to applied (…) and asking for punitive damages , has created the counterparty the need for a defense, generating costs that go beyond the predictable expenses in the normal or the pathological development of the contractual relationship".

Finally, the TS denied that costs can only be imposed by the Court of Florida. In this regard, the TS said that neither the attorneys' fees nor other damages claimed by the plaintiff are considered "costs" in the U.S. The TS also added that even if they were to be deemed so, this would not have hindered the claim for damages for breach of contract: the only effect would have been the reduction of the amount that could be claimed. Hence the TS quashed the Court of Appeal ruling, without entering to determine whether the Spanish company acted in bad faith or with abuse of her right to litigate.