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.

ECJ: Judgments on Brussels I Regulation

Today, the ECJ delivered two judgments on the interpretation of the Brussels I Regulation.

1. Falco Privatstiftung and Rabitsch (C-533/07)

The first case, which had been referred to the ECJ by the Austrian *Oberster Gerichtshof* (*OGH*), concerns the interpretation of Art. 5 Brussels I Regulation (see with regard to the background of the case our previous post on the opinion of *Advocate General Trstenjak* which can be found here).

With the **first question** referred to the ECJ, the *OGH* basically aims to know whether a contract under which the owner of an intellectual property right grants its contractual partner the right to use the right in return for remuneration, constitutes a contract for the provision of services within the meaning of the second indent of Art. 5 (1) (b) Brussels I Regulation.

The Court followed the opinion of the AG and held that

> *The second indent of Article 5(1)(b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and enforcement of judgments in civil and commercial matters, is to be interpreted to the effect that a contract under which the owner of an intellectual property right grants its contractual partner the right to use that right in return for remuneration is not a contract for the provision of services within the meaning of that provision.*

In its reasoning, the Court *inter alia* stated that the concept of "provision of services" cannot be interpreted in the light of the Court's approach with regard to the freedom to provide services within the meaning of Art. 50 EC since Art. 50 EC requires a broad interpretation (para. 34 et seq.) while Art. 5 (1) Brussels I has to be interpreted narrowly due to the fact that it derogates – as a special jurisdiction rule – from the general principle that jurisdiction is based on the defendant's domicile (para. 37).

While it was – in the light of the answer given to the first question – not necessary to answer the second question referred to the ECJ, the *OGH* aims to know with its **third question** whether jurisdiction as regards payment of royalties under Art. 5 (1) (a) and (c) Brussels I is still to be determined in accordance with the principles which result from the case law on Art. 5 (1) Brussels Convention.

Also in this respect the Court followed the opinion given by the AG and held – in particular in view of the identical wording and the aim of Community legislature to ensure continuity which is also apparent from Recital 19 of the Brussels I Regulation (paras. 48 et seq.):

> *In order to determine, under Article 5(1)(a) of Regulation No 44/2001, the court having jurisdiction over an application for remuneration owed pursuant to a contract under which the owner of an intellectual property right grants to its contractual partner the right to use that right, reference must continue to be made to the principles which result from the case-law of the Court of Justice on Article 5(1) of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, as amended by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic.*

2. Draka NK Cables Ltd. (C-167/08)

The second case has been referred to the ECJ by the Belgian *Hof van Cassatie* and concerns Art. 43 Brussels I.

With its reference, the Belgian court aims to know whether Art. 43 (1) Brussels I Regulation has to be interpreted as meaning that a creditor may lodge an appeal against a decision on the request for a declaration of enforceability even then if he has not formally appeared as a party in the proceedings in which another creditor of that debtor applied for that declaration of enforceability.

According to the referring Belgian court, this question arises due to the different wording of Art. 36 Brussels *Convention* and Art. 43 Brussels *Regulation*: While Art. 36 of the Convention stated that the party against whom enforcement of the judgment in the main proceedings was sought could appeal against the decision authorising that enforcement, Art. 43 of the Regulation provides that the decision on the application for a declaration of enforceability may be appealed against by "either party". Due to these differences, the Belgian court took the view that the approach which had been taken by the ECJ with regard to Art. 36 of the Convention according to which only the parties to the foreign order or judgment may appeal against the declaration of enforceability (see case C-148/84), was no longer obvious.

The Court answered the referred question in the negative and held that

> *Article 43(1) 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 a creditor of a debtor cannot lodge an appeal against a decision on a request for a declaration of enforceability if he has not formally appeared as a party in the proceedings in which another creditor of that debtor applied for that declaration of enforceability.*

In its reasoning, the ECJ stated that Art. 43 Brussels Regulation may not be compared only with Art. 36 Brussels Convention, but rather with a combination of Artt. 36 and 40 (para. 22). Thus, it is, according to the Court, apparent "from the wording of both those provisions […] that either party to the enforcement proceedings is able to appeal against the decision authorising enforcement, which

corresponds to the content of Article 43 (1) of Regulation No 44/2001" (para. 23). Consequently, the differing wording in Art. 43 Brussels Regulation does not result in a substantive change which leads to the result that the Court's interpretation of the Convention in this respect – according to which Art. 36 of the Convention excludes procedures whereby interested third parties may challenge an enforcement order under domestic law (see para. 27 and C-148/84 (para. 17)) – can be transferred to the Regulation (paras. 24, 30).

New Book on Rome II

Brill / Martinus Nijhoff has recently published *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations: A New International Litigation Regime*. The book is edited by John Ahern and William Binchy of Trinity College Dublin. Full details of the book are available here. It can be ordered through this link from the publisher or web sites like Amazon.

The book is the result of a conference held in Dublin in June 2008. It contains fifteen chapters by authors from across Europe and North America.

Commission's Report and Green Paper on Brussels I Regulation

Yesterday, on 21 April 2009, the European Commission adopted a **report** and a **green paper** on the functioning of the existing rules on jurisdiction of the courts and the recognition and enforcement of foreign judgments (Regulation (EC) No. 44/2001).

The background of the Commission's report and green paper is as follows: Art.

73 Brussels I Regulation requires the Commission to evaluate the operation of the Regulation and to present a report on the application of the Regulation which shall be accompanied, if necessary, by proposals for adaptations to the Regulation.

In preparation of the Commission's report, a study has been carried out on behalf of the Commission by an external contractor – the Institute for Private International Law, University of Heidelberg. While this study shows that the Regulation operates, in principle, well, it reveals some difficulties as well which need to be addressed.

Thus, the Commission addresses in the report and the green paper, as stated in its memo, the following issues:

> *– The removal of the remaining obstacles to a free circulation of judgments, i.e. the removal of "exequatur"*
>
> *– The protection of European citizens and companies in case of disputes with parties domiciled in third States, in particular by ensuring equal access to the courts of the Member States and equal protection against judgments given by the courts of third States against European defendants;*
>
> *– Finally, certain imperfections in the application of certain rules of the Regulation, such as avoiding parallel proceedings in different Member States and ensuring the sound application of contractual agreements as to which courts will deal with the case in the Union*

According to the Commission, the report and the green paper aim at launching a broad public consultation on possible ways forward with regard to the mentioned issues. The deadline for consultation is 30 June 2009 (see also here). A proposal for revision of the Regulation is planned for the end of this year.

The Commission's press release can be found here. The Brussels I report can be found here, and the Green Paper can be found here.

On the Desirability of the Alien Tort Statute

> *Judicially made corporate human rights litigation is a luxury we can no longer afford.*

This is the conclusion of an op-ed (Rights Case Gone Wrong) published yesterday in the *Washington Post* by two leading American international law professors, Curtis Bradley (Duke) and Jack Goldsmith (Harvard).

An interesting debate is now following at opiniojuris between the supporters and the critics of the Alien Tort Statute: see the comments of, inter alia, Kevin Jon Heller, Julian Ku, Kenneth Anderson and Eric Posner.

New publication on Israeli PIL

Private International Law in Israel

by Prof Talia Einhorn

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Visiting Senior Research Fellow / Tel-Aviv University Faculty of Management

Kluwer Law International

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396 pages

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Israel's PIL is not codified, nor is it clearly traceable to any one legal system. Since the style and method of legal development in Israel has primarily followed the tradition of the common law, the author first critically analyzes the case law to draw the pertinent rules. However, the study does not confine itself to the rules already existing in Israeli PIL, but establishes rules in areas where such are missing, guided by the methods and principles which the court and legislature would have adopted had they been confronted with these problems.

Subjects covered in the book include:
– national and international sources of Israeli PIL;
– types of choice-of-law rules;
– characterization of legal matters;
– natural and legal persons;
– contractual and non-contractual obligations;
– property law (movables, immovables, trusts, cultural property)
– intellectual and industrial property rights;
– companies organized under the civil or commercial law of any state;
– insolvency;
– family law and succession;
– scope of international jurisdiction in Israeli courts;
– proof of foreign law;
– judicial assistance;
– recognition and enforcement of foreign judgements;
– international arbitration; and
– the role of literature and legal doctrine.

Conference: The Future of Transnational Litigation

The Future of Transnational Litigation Conference will be taking place in Vienna, Austria on 4-5 June 2009. The organizer is the International Bar Association. Topics will include:

- The future for international litigation in Europe: revising the Brussels Regulation
- A role-playing exercise in which an international client, general counsel and lead external counsel consider where to bring suit to recover damages from a multi-national price fixing cartel and counsel from potential venues make the case for bringing suit in their respective fora
- Recent developments in choice of law clauses in international contracts and the case for a new global instrument
- Cross-border litigation: developments in US law

For more information, have a look at the conference website.

CLIP Principles for Conflict of Laws in Intellectual Property: First Preliminary Draft

The European Max-Planck Group for Conflict of Laws in Intellectual Property, or simply CLIP, has published the first version of their Principles which are available for download at their web page. The purpose of publishing the First Preliminary Draft is to invite scholars and practitioners outside the Group to make suggestions or advance critical remarks in regard to the proposed rules on international jurisdiction, applicable law, and recognition and enforcement of foreign decisions in matters of intellectual property. They expect to bring foraward the Second Draft by the end of October 2009, while the final version of the Principles accompanied with the commentary is planned to be published next year.

Lawrence Collins Appointed to the House of Lords

It does not seem very long ago that we announced the appointment of Sir Lawrence Collins (co-author and General Editor of Dicey Morris and Collins: *The Conflict of Laws*) to the Court of Appeal; and, in fact, it wasn't. After two years sitting as a Lord Justice of Appeal, Sir Lawrence has been appointed a Lord of Appeal in Ordinary, and will replace Lord Hoffman (who is retiring) on 20th April 2009. Here is, in relevant part, the rest of the press release:

> *Lord Justice Lawrence Antony Collins (67) was admitted as a solicitor in 1968, took Silk in 1997 and was appointed a Deputy High Court Judge in 1997. He was appointed to the High Court in 2000 and made a Bencher (Inner Temple) in 2001. He was appointed to the Court of Appeal in 2007. He has been a Fellow of Wolfson College, Cambridge since 1975 and a Fellow of the British Academy since 1994. Lord Justice Collins was knighted in 2000.*
>
> *Lord Justice Collins…will become a Justice of the Supreme Court of the United Kingdom when it is launched on 1 October 2009. On that date The Right Honourable Lord Phillips of Worth Matravers will become the President of the Supreme Court and the Law Lords will become Justices of the Supreme Court.*

Sir Brian Kerr will be replacing Lord Carswell on 28th June 2009.

Manitoba Law Reform Commission

Releases Report on Private International Law

The province of Manitoba's Law Reform Commission has released a report on Private International Law (available here). It considers three central issues:

1. Should legislation be adopted to modify the common law choice of law rule for torts as formulated in *Tolofson v. Jensen*?

2. Should legislation be adopted regarding the characterization of limitation periods?

3. Should Manitoba adopt the Uniform Law Conference of Canada's model Court Jurisdiction and Proceedings Transfer Act?

A secondary question under the first issue is how similar the legislation should be to the English PIL(MP)Act 1995.