

Hess on West Tankers

Burkhard Hess is professor of law and director of the Institute for Comparative Law, Conflict of Laws and International Business Law in Heidelberg. He has published extensively in the areas of private international law and international procedural law and is co-author of the General Report of the Study on the Application of Regulation Brussels I ("Heidelberg Report").

1. The outcome of the ECJ's judgment is not surprising and, from the point of view of continental procedural law, the findings are completely in line with the framework of the Brussels I Regulation. As the Italian court in Syracuse has been seised under the Regulation, it is for this court to decide on its jurisdiction (Article 5 no 3 Brussels I) and (this is only the second issue) on the scope and the validity of the arbitration clause (Article II NYC).

Despite of some heated criticism which has been brought forward against the conclusions of AG *Kokott*, the Court comprehensively followed her reasoning. The line of arguments developed in para. 24 of the judgment seems to be similar to the arguments of the ECJ in the Lugano Opinion: The Grand Chamber relies on the *effet utile* of the Regulation, its "objective of unification of the rules of conflicts of jurisdiction in civil and commercial matters and the free movement of decisions in those matters". Mutual trust is only used as an additional argument, but much later (para. 30). In my view the judgment demonstrates that the ECJ is "defending" the proper operation of the Regulation and, finally, the priority of Community law. *West Tankers* is, as Lugano, a political decision.

2. However, as the AG clearly stated, the present situation under the Brussels I Regulation is not satisfactory. With all due respect, I disagree with *Adrian Briggs* that the issues raised by the House of Lords and the ECJ are not important. After *West Tankers*, the issue should be addressed in the context of the expected revision of the Brussels I Regulation. In this respect I would like to come back to the proposals of the Heidelberg Report:

The Heidelberg Report on the Application of Brussels I proposed a different mechanism for the protection of arbitration agreements. According to this proposal, a new Article 27 A shall address the situation of threatening parallel arbitral and litigious proceedings, especially when a party institutes proceedings

in a domestic court of a Member State instead of enforcing the arbitration agreement. Article 27 A should read as follows: *“A court of a Member State shall stay the proceedings once the defendant contests the jurisdiction of the court with respect to existence and scope of an arbitration agreement if a court of the Member State that is designated as place of arbitration in the arbitration agreement is seised for declaratory relief in respect to the existence, the validity, and/or scope of that arbitration agreement”*.

This provision aims to concentrate all proceedings on the validity of the arbitration agreement in the domestic courts of the Member State where the arbitration takes place. In this respect, the Heidelberg Report proposes to insert a new Article 22 no 6 to the Brussels I_Regulation. The new articles shall establish an exclusive competence for proceedings challenging the validity of the arbitration agreement. These proceedings shall exclusively take place in the Member State in which the arbitration takes place.

Article 27 A shall operate as follows: Imagine that a civil court in Member State A is called upon by a party contesting the validity of an arbitration clause providing for arbitration in Member State B. Under Article 27 A Brussels I, the civil court in Member State A shall stay its proceedings until the matter has been referred to the competent court in Member State B. The court in Member State B then decides exclusively on the validity of the arbitration clause (see Article 72 of the English Arbitration Act). In addition, the civil court of Member State A, when staying its proceedings, may set a time limit for the plaintiff (who is contesting the validity of the arbitration clause) to access the courts in Member State B where the arbitration shall take place. Still, the other party may seek redress in the courts of Member State B to get a judgment on the validity of the arbitration clause. If the plaintiff does not institute arbitral proceedings in the “designated” Member State B in a timely manner, the civil court of Member State A will dismiss its proceedings. This example illustrates the proposal’s intention to give full effect to arbitration agreements and to achieve uniform results in all EU Member States.

3. Besides, I fully agree with *Horatia Muir Watt’s* recent remark that the principle of mutual trust does not automatically imply the (absolute) priority of the court first seised in parallel litigation. European procedural law also provides for a (untechnical) hierarchy between the courts of different Member States (striking examples are found in Articles 11 and 20 of the Brussels II_bis Regulation). To my

opinion, the Brussels I Regulation should also adopt a hierarchical system giving priority to the court agreed upon in choice of court agreements and to the courts of the place of arbitration in arbitration proceedings.

I am well aware that the proposal of the Heidelberg Report to delete the arbitration exception of Article 1 (2)(d) has been criticised by many stakeholders of the “arbitration world”. However, after *West Tankers/Adriatica* the legal doctrine should elaborate a more balanced solution in the framework of Brussels I.

4. Finally, some authors raised the question whether the findings of the ECJ also relate to third states. I don’t believe that the Grand Chamber addressed this constellation. However, as the judgment refers to general principles of EC law (paras. 24 and 30), their application in relation to third states seems to be unlikely.

III International Seminar on Private International Law

The III International Seminar on Private International Law, coordinated by Professors José Carlos Fernández Rozas and Pedro de Miguel Asensio, took place at the Faculty of Law, Universidad Complutense de Madrid, on the 5th and 6th February. The Seminar, entitled “Self-regulation and unification of international contract law”, was divided into five sessions dedicated to offering a different perspective on the leitmotif of the encounter. Each session involved a general introduction, followed by communications from researchers and professionals of law. The seminar was rich in contents, and also a good opportunity for the meeting and discussion of academics and lawyers from different parts of Spain, as well as from European and Latin American countries.

As was only to be expected, the recent Rome I Regulation was the main topic of the first session. The general introduction was given by the Spanish

representative in the negotiations, Professor Garcimartín Alferez, who highlighted the main features of the text and explained the reasons that led to them. His intervention was followed by five papers on specific aspects of the new instrument. First, Professor Asin Cabrera, from La Laguna, focused on International maritime labour contracts, and in particular on the difficulties in determining the law applicable to them with the criteria laid down by art. 8 of the Rome I Regulation. Professor Gardeñes Santiago, from Barcelona (Universidad Autonoma), also referred to Art. 8 of the Regulation, this time from a general point of view, regretting the missed opportunity to change the orientation of the article: that is, correcting its logic of proximity in order to transform it into a rule with substantive guidance. After him, Rosa Miquel Sala, from Bayreuth, presented art. 7, which incorporates insurance contracts into the Regulation. Alberto Muñoz Fernandez, from the University of Navarra, reflected on legal representation as a phenomenon partially excluded from the Regulation. Finally, Paula Paradela Areán, from Santiago de Compostela, summarized the Spanish courts practice on the Rome Convention throughout its 15 years of life.

The second session, entitled “Substantive Unification and international trade: universal dimension”, was held on Thursday afternoon. Professor Sánchez Lorenzo, from Granada, took charge of the general introduction. He was followed by Professor M.J. Bonell, from La Sapienza (Italy), who focused on the UNIDROIT principles and their possible contribution to a global law of contracts. Professor Garau Juaneda, from the University of Palma de Mallorca, exposed the problems of the retention of title in today’s international trade. Professor Espiniella González, from the University of Oviedo, explained the dual role of the place of delivery in international contracts: for the determination of the applicable law, and as a criterion of international jurisdiction. Speaking from his own experience in international arbitration, Alfredo de Jesús O. referred to the arbitrator’s role as an agent to promote international self-regulation. Professor Otero García, from the Complutense University of Madrid, referred to standards in international trade regulation, highlighting the efforts undertaken by stakeholders in their harmonization. Professor Carmen Vaquero from Valladolid talked about the legal treatment of the delay to comply with obligations. The session ended with the intervention of Professor Boutin, from Panama, with an entertaining account of the history of the freedom of choice of the applicable law in Latin American countries.

The first session on Friday morning dealt with international unification from a European perspective. The general introduction, given by Professor Pedro de Miguel, discussed the need for standardization at the European level in parallel to the UNIDROIT Principles; his presentation brought up points like the scope of standardization and how it could be carried out. Professor Leible, of Bayreuth, addressed the question of whether the common frame of reference can be chosen by the parties to a contract as applicable law: a question that raised an interesting debate between Professor Leible and Professor M.J. Bonell. Marta Requejo Isidro, from Santiago de Compostela, made reference to the relationship between the harmonization of consumer protection through Directives, and art. 3.4 of the Rome I Regulation. Professor D. Pina, from Lisbon, then alluded to the influence of competition rules on private contracts, and finally, Cristian Oró from Barcelona (Universidad Autonoma) reflected on art. 9 of the Rome I Regulation and its implications for competition rules as mandatory provisions.

The fourth session, on the new trends on international contracts, also took place on Friday morning. The general introduction this time was presented by Professor Forner Delagüa (University of Barcelona). He was followed by A. Boggiano, from Buenos Aires, who recalled the traditional dispute centered on the choice of *lex mercatoria* as the law applicable to an international contract. Professor Juan José Álvarez Rubio from the University of País Vasco spoke about international maritime transport in the Rome I Regulation, indicating the continuity with respect to the Rome Convention, and highlighting divergences from the UN Draft of 2007. Professor Nicolás Zambrana Tévar, from University of Navarra, presented some of the main issues that determine the character of the indirect holding system; the exposition paid special attention to the transaction mechanism of financial instruments. José Heriberto García Peña, from the Instituto Tecnológico de Monterrey, closed the meeting with a paper centered on the difficulties in determining the law applicable to on-line contracts, especially in the absence of choice of law.

The final session, held on Friday afternoon, focused on Latin America, with the attendance of Professor Lionel Perez Nieto, from the UNAM of Mexico, who explained the evolution of international uniform (conventional) law in Latin American countries, differentiating the experience of Mexico and Venezuela from that of the other States. Professor Roberto Davalos, from Havana, made an entertaining description of the cultural and legal features of China, emphasizing

those that, from his experience, make it difficult to contract with partners from this Asian country. Hernán Muriel Ciceri, from Sergio Arboleda University in Bogota, offered a comparison between the Rome I Regulation and the Convention of Mexico of 1994. Finally, Iñigo Iruretagoiena Aguirrezabalaga (University of País Vasco) referred to investment arbitration, underlining the characteristics that make it different from the paradigm of contractual arbitration.

The seminar was brought to a close by Professor Ms Elisa Pérez Vera, now a member of the Spanish Constitutional Court. All the presentations and papers will soon be published in the *Anuario Español de Derecho Internacional Privado*.

Many thanks to Paula Paradela Areán and Vesela Andreeva Andreeva.

West Tankers: Online Symposium

The European Court of Justice has delivered its judgment in the *West Tankers* case.

This decision was much awaited. It raises critical issues, in particular in respect of the actual scope of European civil procedure, the consequences of the principle of mutual trust and the tolerance of the European Union with regard common law procedural devices.

In the days to come, *Conflict of Laws* will organize an online symposium on this case. Leading scholars from a variety of European jurisdictions will share with us their first reaction to the judgment. We hope that this will be an occasion for debate, and we invite all interested readers to contribute by using the comment section which will be available after each post, or by contacting us. Contributions to the symposium from those leading scholars will be listed here, so that you can see at a glance all of the debates on *West Tankers*.

Contributions to the Symposium:

- **AG Opinion in *West Tankers***
- **ECJ Judgment in *West Tankers***
- **Hess on *West Tankers***
- **Dickinson on *West Tankers*: Another One Bites the Dust**
- **Harris on *West Tankers***
- **Pfeiffer on *West Tankers***
- **Kessedjian on *West Tankers***
- **Arenas on *West Tankers***
- **Layton on *West Tankers***

ECJ Judgment in *West Tankers*

The European Court of Justice delivered its judgment in *West Tankers* this morning (we had previously reported on the conclusions of Advocate General Kokott in this case).

The issue before the court was, in the words of the court,

19. ... essentially, whether it is incompatible with Regulation 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, even though Article 1(2)(d) of the regulation excludes arbitration from the scope thereof

The ECJ answers that it is indeed incompatible:

It is incompatible with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 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.

In order to reach this conclusion, the Court offers a reasoning in two steps. First, the Regulation applies. Second, the Regulation excludes anti-suit injunctions.

Scope of Regulation 44/2001

This was arguably the key issue. The Regulation excludes arbitration from its scope. Yet, the Court finds that the Regulation still controls:

In that regard it must be borne in mind that, in order to determine whether a dispute falls within the scope of Regulation No 44/2001, reference must be made solely to the subject-matter of the proceedings (Rich, paragraph 26). More specifically, its place in the scope of Regulation No 44/2001 is determined by the nature of the rights which the proceedings in question serve to protect (Van Uden, paragraph 33).

Proceedings, such as those in the main proceedings, which lead to the making of an anti-suit injunction, cannot, therefore, come within the scope of Regulation No 44/2001.

However, even though proceedings do not come within the scope of Regulation No 44/2001, they may nevertheless have consequences which undermine its effectiveness, namely preventing the attainment of the objectives of unification

of the rules of conflict of jurisdiction in civil and commercial matters and the free movement of decisions in those matters. This is so, inter alia, where such proceedings prevent a court of another Member State from exercising the jurisdiction conferred on it by Regulation No 44/2001.

It is therefore appropriate to consider whether the proceedings brought by Allianz and Generali against West Tankers before the Tribunale di Siracusa themselves come within the scope of Regulation No 44/2001 and then to ascertain the effects of the anti-suit injunction on those proceedings.

In that regard, the Court finds, as noted by the Advocate General in points 53 and 54 of her Opinion, that, if, because of the subject-matter of the dispute, that is, the nature of the rights to be protected in proceedings, such as a claim for damages, those proceedings come within the scope of Regulation No 44/2001, a preliminary issue concerning the applicability of an arbitration agreement, including in particular its validity, also comes within its scope of application. This finding is supported by paragraph 35 of the Report on the accession of the Hellenic Republic to the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1978 L 304, p. 36) ('the Brussels Convention'), presented by Messrs Evrigenis and Kerameus (OJ 1986 C 298, p. 1). That paragraph states that the verification, as an incidental question, of the validity of an arbitration agreement which is cited by a litigant in order to contest the jurisdiction of the court before which he is being sued pursuant to the Brussels Convention, must be considered as falling within its scope.

Regulation 44/2001 excludes anti-suit injunctions

Once the Regulation was found applicable, it could certainly be expected, in the light of *Turner*, that the Court would not allow anti-suit injunctions:

It follows that the objection of lack of jurisdiction raised by West Tankers before the Tribunale di Siracusa on the basis of the existence of an arbitration agreement, including the question of the validity of that agreement, comes within the scope of Regulation No 44/2001 and that it is therefore exclusively for that court to rule on that objection and on its own jurisdiction, pursuant to Articles 1(2)(d) and 5(3) of that regulation.

Accordingly, the use of an anti-suit injunction to prevent a court of a Member State, which normally has jurisdiction to resolve a dispute under Article 5(3) of Regulation No 44/2001, from ruling, in accordance with Article 1(2)(d) of that regulation, on the very applicability of the regulation to the dispute brought before it necessarily amounts to stripping that court of the power to rule on its own jurisdiction under Regulation No 44/2001.

It follows, first, as noted by the Advocate General in point 57 of her Opinion, that an anti-suit injunction, such as that in the main proceedings, is contrary to the general principle which emerges from the case-law of the Court on the Brussels Convention, that every court seised itself determines, under the rules applicable to it, whether it has jurisdiction to resolve the dispute before it (see, to that effect, Gasser, paragraphs 48 and 49). It should be borne in mind in that regard that Regulation No 44/2001, apart from a few limited exceptions which are not relevant to the main proceedings, does not authorise the jurisdiction of a court of a Member State to be reviewed by a court in another Member State (Case C-351/89 Overseas Union Insurance and Others [1991] ECR I-3317, paragraph 24, and Turner, paragraph 26). That jurisdiction is determined directly by the rules laid down by that regulation, including those relating to its scope of application. Thus in no case is a court of one Member State in a better position to determine whether the court of another Member State has jurisdiction (Overseas Union Insurance and Others, paragraph 23, and Gasser, paragraph 48).

Further, in obstructing the court of another Member State in the exercise of the powers conferred on it by Regulation No 44/2001, namely to decide, on the basis of the rules defining the material scope of that regulation, including Article 1(2)(d) thereof, whether that regulation is applicable, such an anti-suit injunction also runs counter to the trust which the Member States accord to one another's legal systems and judicial institutions and on which the system of jurisdiction under Regulation No 44/2001 is based (see, to that effect, Turner, paragraph 24).

Lastly, if, by means of an anti-suit injunction, the Tribunale di Siracusa were prevented from examining itself the preliminary issue of the validity or the applicability of the arbitration agreement, a party could avoid the proceedings merely by relying on that agreement and the applicant, which considers that the agreement is void, inoperative or incapable of being performed, would thus

be barred from access to the court before which it brought proceedings under Article 5(3) of Regulation No 44/2001 and would therefore be deprived of a form of judicial protection to which it is entitled.

Consequently, an anti-suit injunction, such as that in the main proceedings, is not compatible with Regulation No 44/2001.

Verona Conference on the Rome I Regulation

The Faculty of Law at Verona are hosting a conference on the Rome I Regulation on 19-20 March 2009. The conference flyer describes its scope thusly:

Since it is believed that the proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, for the conflict-of-laws rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought, it cannot surprise that efforts have been made to draft uniform European conflict-of-laws rules in the area of contract law as well. This conference will examine in detail the result to which these efforts have led, namely the Regulation (EC) No 593/2008 of the European Parliament and the of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

The programme itself, along with details on how to register, can be found on the flyer.

Volume 4, Issue 3, Journal of Private International Law

The latest issue of the *Journal of Private International Law* is out, and the contents are:

- **Understanding the English Response to the Europeanisation of Private International Law** by *Jonathan Harris*
- **Licences and Assignments of Intellectual Property Rights Under the Rome I Regulation** by *Paul LC Torremans*
- **Matrimonial Property on Divorce: All Change in Europe** by *CMV Clarkson*
- **A Defence of the Established Approach to the Grave Risk Exception in the Hague Child Abduction Convention** by *Peter Ripley*
- **Cross-Border Recognition and Enforcement of Foreign Judgments in Vietnam** by *Ngoc Bich Du*
- **The Damage of Damages: Agreements on Jurisdiction and Choice of Law** by *CJS Knight*

Subscribe to the Journal [here](#).

Respect for Algerian/Moroccan Children's Origin

I am grateful to Horatia Muir Watt to have accepted to react to my post on Adoption of Algerian/Moroccan Children in France.

I certainly agree with Gilles Cuniberti that the prohibition resulting from article 370-3 of the Civil Code certainly lacks nuance. In many cases, it seems clearly contrary to the interests of a child who has been abandoned at birth in her country of origin and is growing up in France with a foster parent under a *kefala*,

to refuse to allow the adoption. As Gilles Cuniberti points out, the lower courts are very often ready in such cases to overlook the prohibitive content of the personal law of the child and the *Cour de cassation*'s own approach before the legislative reform in 2001 was to facilitate adoption whenever the natural parents or guardians of the child were fully aware of the radical consequences of an "adoption plénière" under French law, which cuts off all blood-ties between the child and its natural family.

Beyond the policy of discouraging financial transactions between prosperous prospective adoptive parents and young women from poor countries who are ready to conceive and abandon a child for money (a problem not specific to cases involving children from countries where adoption is unknown or prohibited), which is more generally that of the 1993 Hague Convention (under the aegis of which, henceforth, the 2001 channels the flow of inter-country adoptions), the 2001 reform was designed to defer to the refusal of other legal systems to accept adoption, either for religious reasons, or to avoid a generation of children from being drained from developing economies towards Western homes.


This "cultural deference" argument was not based on mere diplomatic considerations – as such it would not have passed muster under the New York Convention, which requires the interest of the child (not of governments) to be paramount – but was formulated in the name of the superior interest of the child. The idea was that the potential trauma linked, in the context of any adoption (whether domestic or inter-country, legal or illegal), to the fact that the child, whose own birth may often already be accompanied by psychologically damaging circumstances, is severed from her natural parents, is likely to be accentuated by ignoring the cultural content of the child's personal status. "Respect for the child's origins" meant respect for the prohibition contained in the child's national law.

This metaphor must of course be taken seriously. Adoption can be psychologically difficult for the child in any circumstances, however loving and understanding the adoptive parents may be, and when the child has been displaced from a very different cultural environment (be it exclusively pre-natal), involving far-reaching linguistic, religious, social and economic changes in her life, the consequences should not be under-estimated. One may wonder however whether the refusal to go against the prohibitive content of the child's personal status is not taking the (very legitimate) desire to "respect the child's origins" much too far. Forcing the

consent of the child's mother, which should of course be severely sanctioned and is so under the Hague regime, is one thing; deferring to the content of the child's national law notwithstanding the present interest of the child is clearly another! This is, at any rate, what the French lower courts seems to think. Particularly when, as seems frequent in practice, the authorities of the country of origin allow the child (who may well not have a family to reclaim it) to leave the territory with a guardian by virtue of a *kefala*, knowing full well that the guardian may later ask for an adoption in France.

It is true that the prohibition contained in article 370-3 is only effective when the child is actually born in the country which prohibits adoption. When a foreign child is abandoned at birth in France, she will be given French citizenship and a brand new personal status (article 19 of the Code Civil). But does it make sense to treat a child differently according to the place in which he has the fortune, or the misfortune, of being abandoned? Of course, if the child grows up in France, she may also accede to French nationality on her majority (article 21-7 of the Civil Code). But is it really worthwhile to maintain the barrier during her childhood? The child will grow up with a status which is not in line with reality. The case-law to which Gilles Cuniberti refers tends to show that the difficulty is very real. It seems to me that an eminently respectable idea such as "respect for the child's origins" should not be used to justify the rigid application of a prohibitive personal status when the child is growing up in France, with the full consent of her natural parent(s), if any, and the tacit approval of the authorities of the country of origin.

No Adoption in France for Algerian/Moroccan Children

Children from Algeria or Morocco may not be adopted in France. This is  because under French law, the law of the child controls the issue of whether adoption is possible at all. Thus, children from countries where adoption is unknown are unadoptable. As there is no adoption in Islam, children

from countries such as Algeria and Morocco may not be adopted.

The rule is not new. It is the result of a statutory intervention of 2001, which has amended the Civil Code.

Article 370-3 of the Civil Code now provides:

The requirements for adoption are governed by the national law of the adopter or, in case of adoption by two spouses, by the law which governs the effects of their union. Adoption however may not be ordered where it is prohibited by the national laws of both spouses.

Adoption of a foreign minor may not be ordered where his personal law prohibits that institution, unless the minor was born and resides usually in France.

Whatever the applicable law may be, adoption requires the consent of the statutory representative of the child. Consent must be free, obtained without any compensation, subsequent to the birth of the child and informed as to the consequences of adoption, specially where it is given for the purpose of a plenary adoption, as to the entire and irrevocable character of the breaking off of the pre-existing parental bond.

The law is crystal clear, but this does not prevent French couples or individuals to try to adopt Algerian or Moroccan children. They find the children in Algeria or Morocco, come back to France, ask a French court to grant the adoption, and ... win before lower courts, including courts of appeal! French prosecutors then appeal to the supreme court for private and criminal matters (*Cour de cassation*), which allows the appeal and sets aside the judgment granting the adoption.

Only last summer, the *Cour de cassation* allowed the appeal against a judgment of the court of appeal of Limoges. The adopter was a Franco-Algerian woman who had found the child in Algeria where it had been abandoned at birth. The woman obtained from Algerian authorities the right to look after the child (*kafala*), came back to France and sought a judgment of adoption. She won before the first instance court of Limoges, then before the Court of appeal. In a judgment of July 8, 2008, the *Cour de cassation* held that *kafala* was not an adoption, and that, as the Court of appeal had noticed in its judgment, Algerian law does not allow adoption. The judgment and the adoption were set aside. On October 10, 2006,

the *Cour de cassation* had already made the same decision in respect of an Algerian and a Moroccan *kafala*. In each of these cases, the lower courts had resisted and granted the adoption.

✘ So, here are, on the one hand, tons of French couples who cannot have children, are trying to adopt, and cannot find what they are looking for. On the other hand, it is likely that there are quite a few, if not very many, children in Algeria or Morocco who have been abandoned by their parents and would have a much better life with these couples. If these couples could adopt these children, everybody would be happy. This may well appear clearly to French judges all over France, since so many lower courts just look for a way to allow the adoption. And indeed, it might be that the *Cour de cassation* does not disagree, since its case law before the reform was precisely that, as long as the person in charge of the child in the foreign country had actually understood and consented to the change of parenthood, whether the law of origin of the child allowed was irrelevant.

But now, the law has changed, and the *Cour de cassation* probably thinks that it does not have the legitimacy to challenge the will of the French parliament.

How could the French society end up with a rule which, in most cases, so patently hurts the interests of all the persons involved?

Uruguay - Case on Carrier's Liability

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

On October 10, 2008, the Civil Court of Appeals in Montevideo, Uruguay, affirmed the decision of the 14th Civil Court of Montevideo in *Royal & Sun Alliance Seguros Uruguay Sociedad Anónima v. Panalpina, Pantainer Express Line* holding that in a multimodal transportation contract between Guatemala and Montevideo, Guatemalan law exempted the carrier from liability when the carrier had followed

instructions from the owner, which lead to the cargo being stolen from the place where it was left in custody.

The court applied Art. 2399 of the Uruguayan Civil Code and, as the most important conflict rule, Art. 34 (4) (b) of the 1889 Montevideo Civil International Law Treaty (Tratado sobre Derecho Internacional Civil de 1889), which states that

... contracts concerning things certain are ruled by the law of the place where they are situated at the time the contract is made ... if the effects of such contracts relate to a special place, those contracts are ruled by the law of such place.

The court held that the effect of the contract related to Guatemala, which made Guatemalan law applicable. In its turn, Art. 817 of the Guatemalan Commercial Code relieved the carrier from liability when the total or partial loss of the cargo resulted from “an act or instructions given by the owner or his representative.” Interestingly, domestic Uruguayan law would have lead to the opposite result since it imposes strict liability on the carrier (*obligación de resultado*). The mere fact that the cargo did not arrive to its final destination would have made the carrier liable.

In support of the applicability of Guatemalan law, the judgment stressed that the relevant events (instructions given and cargo stolen) took place in Guatemala.

The text of the decision was provided by Uruguayan attorney Eduardo Lapenne.

Reference from Irish Supreme Court to ECJ: Same Proceedings

Pending in a non European State

I am grateful to Michelle Smith de Bruin BL for preparing the following report on a recent reference from the Irish Supreme Court to the European Court of Justice.

On 30 January 2009, the Irish Supreme Court decided in *Goshawk Dedicated Limited and Kite Dedicated Limited formerly known as Goshawk Dedicated (No. 2) Ltd, and Cavell Management Services Ltd, and Cavell Managing Agency Ltd v. Life Receivables Ireland Limited* ([2009] IESC 7) to refer to the European Court of Justice the question of whether the Brussels I Regulation has mandatory application in circumstances where there are pre-existing proceedings between the same parties in a non-Member State.

Facts

The defendant was incorporated in Ireland and had its principal place of business in Ireland. The plaintiffs were companies incorporated in England and had their principal places of business in London. In June 2005 the defendant purchased a partnership interest in a Delaware partnership known as Life Receivables II LLP in which the defendant and Life Receivables Holdings are the only partners but in which the defendant would appear to be the only partner with a financial stake. The partnership is, in turn, a beneficiary of Life Receivables Trust whose commercial value derives from trust property, being life insurance policies purchased in the early years of this decade together with a contingent cost insurance issued by Goshawk in respect of those policies. The defendant, as plaintiff in the U.S. proceedings, alleged that it was induced into buying into the partnership as a result of misrepresentation on the part of the defendants in the U.S. proceedings. The defendant has commenced proceedings in Georgia, U.S.A., against the plaintiffs and a number of others who were involved in a series of transactions which were at the heart of the dispute between the parties.

Briefly, the complaint in those proceedings alleges securities fraud, common law fraud, negligent misrepresentation and conspiracy to commit fraud in connection with a transaction valued at a figure in excess of U.S.\$14 million. The primary jurisdiction invoked is in respect of the securities fraud pursuant to United States law, and a supplemental jurisdiction is alleged of the common law claims, again pursuant to United States law, on the grounds that the same facts and circumstances give rise to all claims. Apart from the securities claims, one of the

major allegations made is that Goshawk, relying on material furnished through or by an actuarial company located in Atlanta, Georgia, American Viatical Services, made representations appearing on the face of the life policies, to persons including Life Receivables, the defendant in the Irish proceedings. It is also alleged that Cavell, acting through one of its principals, devised a run off scheme to commute Goshawk's obligations to, *inter alia*, Life Receivables. It is alleged that at certain times that principal, acting on behalf of both Goshawk and Cavell, made material misrepresentations and omissions.

Proceedings

The proceedings commenced by the defendant in Georgia, U.S.A., on the 29th June, 2007, were first in time. The plaintiffs commenced the Irish proceedings which seek declarations that the plaintiffs did not make the misrepresentations, together with other similar relief, on the 6th September 2007. The Irish proceedings are a mirror image of the Georgia proceedings, except that none of the additional co-defendants in Georgia are parties in the Irish proceedings. On the 5th September, 2007, the plaintiffs in the Irish proceedings moved, in the U.S. District Court, by motion, to dismiss the defendant's complaint, on the basis that that court lacks "subject matter jurisdiction" over the defendants because the transactions in issue in the case are "predominantly foreign" and lack the necessary domestic conduct or effects to permit the application by that court of American securities laws. The defendant in these proceedings resisted that motion, and a ruling by the US District Court was awaited, at the time of the appeal to the Irish Supreme Court.

Judgments of Irish Courts

The High Court considered the doctrine of forum non conveniens and lis pendens (including the decision in *Owusu*) and held that, under the Brussels I Regulation, as and between Member States, a strict application of the doctrine of *lis pendens* applies. Courts of one jurisdiction are precluded from exercising jurisdiction over a dispute until the courts of a jurisdiction first seised with that dispute have dealt with the question of whether that court first seised has jurisdiction. The Supreme Court agreed with this.

Another issue was whether the recognition afforded to both the doctrine of *lis pendens* and the appropriateness of affording recognition, in accordance with private international law of the relevant Member State, to third party state judgments, is sufficient to warrant a departure from what seems to be the clear

mandatory language of Article 2, as interpreted by the European Court of Justice Owusu.

The High Court concluded that there was no basis for staying the proceedings. There is nothing wrong with negative declaratory proceedings. The Court held that a court in Ireland retains and must exercise the mandatory jurisdiction conferred on it by Article 2, notwithstanding the fact that there may be proceedings in a non-Member State.

Reference

Approximately eleven grounds of appeal were made to the Irish Supreme Court. The Supreme Court ultimately decided to refer two questions to the ECJ. The exact form and wording is still to be finalised, but the two principal issues are:

- (i) If a defendant is sued in its country of domicile, is it inconsistent with Regulation 44/2001 for the court of a Member State to decline jurisdiction or to stay proceedings on the basis that proceedings between the same parties and involving the same cause of action are already pending in the courts of a non-Member State and therefore first in time?
- (ii) What criteria is to be applied by a Member State in coming to a decision whether to stay pending proceedings in a Member State, depending on the response to the first, primary, question to be posed.