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.

Consumer Protection: Directive 2008/122/EC

A Directive on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts, repealling Directive 94/47/EC, has been published today (OJ, L, nº 33). The new Directive aims to update Directive 94/47/EC, covering new holiday products similar to timeshare that did not exist in 1994, and also some transactions related to timeshare that were not regulated by the old Directive.

The new text differs significantly from the old one. Directive 94/47/EC contained (art. 11) a minimum harmonisation clause, that is, Member States could adopt stricter rules in order to improve consumer protection. The outcome of doing so was a fragmented regulatory framework across the Community that caused significant compliance cost when entering into cross border transactions. The new Directive provides for full harmonisation, though only for certain aspects (sale and resale of timeshares and long-term holiday products, as well as the exchange of rights deriving from timeshare contracts), in which Member States are not allowed to maintain or introduce national legislation diverging from the Directive. Where no harmonised provisions exist, Member States remain free; due to this fact, conflict of laws rules are still needed. In this sense, Whereas 17 specifies that

> *The law applicable to a contract should be determined in accordance with the Community rules on private international law, in particular Regulation (EC) nº 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).*

In spite of this caution, it is still disputable whether consistency with Regulation (EC) nº 593/2008, Rome I, has really been respected. Actually, due to the differences regarding their respective juridical consequence, a careful job of delimitation is to be made between art. 6 of the Regulation (remember para. 1 and 2 shall not apply to a contract relating to a right in rem in immovable property or a tenancy of immovable property *other than a contract relating to the right to use immovable properties on a timeshare basis within the meaning of Directive 94/47/EC),* and Art. 12 of Directive 2008/122/EC, establishing that "2. Where the applicable law is that of a third country, consumers shall not be deprived of the protection granted by this Directive, as implemented in the Member State of the forum if:

– any of the immovable properties concerned is situated within the territory of a Member State or,
– in the case of a contract not directly related to immovable property, the trader pursues commercial or professional activities in a Member State or, by any means, directs such activities to a Member State and the contract falls within the scope of such activities." Whilst art. 6 Rome I points to the protection provided by the law of the country of the consumer habitual residence, the Directive leans on the law of the forum.

Art. 3.4 of the Regulation, providing for the application of provisions of Community law that cannot be derogated from by agreement, when the parties have chosen as applicable law other than that of a Member State and *all other elements relevant to the situation* are located in one or more Member States, may also be a source of confusion.

The new instrument will enter into force on the 20th day following its publication; Member States shall adopt and publish, by 23 February 2011, the laws, regulations and administrative provisions necessary to comply with the Directive; they will apply from the same date.

Rome I: Commission Decision on the UK's Opt-In Published in the OJ – Response to the UK Government's Consultation

Following the publication in the OJ (no. L 10 of 15 January 2009, p. 22) of the formal **Commission Decision of 22 December 2008 on the request from the United Kingdom to accept the Rome I reg.** (see our previous post on the Commission opinion), **the UK government has published the response to the public consultation** launched in April 2008.

There were 37 responses to the consultation (see the detailed list in Annex A to

the document), from the academic sector (5), commercial, financial and insurance organisations (18), consumer organisations (2), the legal sector (11) and the transport sector (1). **The overwhelming majority of the respondents (95%) agreed that the UK should participate in the Regulation.**

Here's an excerpt from the conclusion (see also, on pp. 16-38, the article-by-article analysis, with the points raised by the respondents and the government response, as well as the comments on various issues relating to EC action in PIL matters, such as the UK's position in future EU dossiers, the role of the ECJ and the Danish government's ambition to put its opt-outs to a referendum):

> *104. The majority of respondents to the consultation were of the view that, given the satisfactory outcome of the negotiations, there was an advantage to British business if the rules determining the governing law were uniform throughout the EU. Aligning UK law in this respect to that in the rest of the EU would reduce legal expense and transaction costs. In addition, some respondents expressed the view that our original decision to opt out of the Regulation had helped to achieve the final positive result. However, they also made the point that if the UK did not participate in Rome I now, having achieved such a good result, it could significantly weaken the effectiveness of our right to not participate in future and damage our negotiating strength in relation to other EU dossiers.*
>
> *105. […] The European Commission adopted a decision to extend the application of the Rome I Regulation to the United Kingdom on 22 December 2008. The Ministry of Justice, the Department for Finance & Personnel (Northern Ireland) and the Scottish Executive will shortly progress implementation planning for the Regulation. The UK will be required to implement the Regulation by 17 December 2009.*
>
> *106. By opting in to the Regulation, it shall be binding and directly applicable to the UK. The Regulation will apply to the UK (England, Northern Ireland, Scotland and Wales) and also to Gibraltar. The UK's participation in the Regulation does not, however, undermine the UK's future use of the Protocol to Title IV of the EC Treaty.*

(Many thanks to Federico Garau, Conflictus Legum blog, and to Andrew Dickinson)

Article: “Extra-territorial Application of Antitrust – The Case of a Small Economy (Israel)”

Michal Gal (University of Haifa, NYU School of Law) has on the NELLCO Legal Scholarship Repository posted a paper titled “Extra-territorial Application of Antitrust – The Case of a Small Economy (Israel)”, which also analyses legal aspects of private international law. This paper is part of a book on Cooperation, Comity And Competition Policy (Andrew Guzman ed., Oxford University Press, 2009).

AG Opinion on Brussels II bis Regulation

Yesterday, Advocate General *Kokott* delivered her opinion in case C-523/07 (*Applicant A*).

The case, which has been referred to the ECJ by the Finnish *Korkein hallinto-oikeus*, concerns three children who lived originally in Finland with their mother (*A*) and stepfather. In 2001 the family moved to Sweden. In summer 2005 they travelled to Finland – originally with the intention to spend their holidays there. In Finland, the family lived on campsites and with relatives and the children did not go to school there. In November 2005 the children were taken into immediate care and placed into a child care unit. This was unsuccessfully challenged by the mother and the stepfather.

The *Korkein hallinto-oikeus*, which is hearing the appeal, had doubts with regard

to the interpretation of the Brussels II *bis* Regulation and referred the following **questions** to the ECJ for a preliminary ruling:

> *1(a) Does Council Regulation (EC) No 2201/2003 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 Brussels IIa Regulation) apply to the enforcement, such as in the present case, of a public-law decision made in connection with child protection, as a single decision, concerning the immediate taking into care of a child and his or her placement outside the home, in its entirety,*
>
> *(b) or, having regard to the provision in Article 1(2)(d) of the regulation, only to the part of the decision relating to the placement outside the home?*
>
> *2 How is the concept of habitual residence in Article 8(1) of the regulation, like the associated Article 13(1), to be interpreted in Community law, bearing in mind in particular the situation in which a child has a permanent residence in one Member State but is staying in another Member State, carrying on a peripatetic life there?*
>
> *3(a) If it is considered that the child's habitual residence is not in the latter Member State, on what conditions may an urgent measure (taking into care) nevertheless be taken in that Member State on the basis of Article 20(1) of the regulation?*
>
> *(b) Is a protective measure within the meaning of Article 20(1) of the regulation solely a measure which can be taken under national law, and are the provisions of national law concerning that measure binding when the article is applied?*
>
> *(c) Must the case, after the taking of the protective measure, be transferred of the court's own motion to the court of the Member State with jurisdiction?*
>
> *4 If the court of a Member State has no jurisdiction at all, must it dismiss the case as inadmissible or transfer it to the court of the other Member State?*

AG *Kokott* suggested in her **opinion** to answer these questions as follows:

> *1. Article 1(1) 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, as amended by Council Regulation (EC) No 2116/2004 of 2 December 2004, must be interpreted as meaning that a single decision ordering a child to be taken into care immediately and placed outside his or her original home in a child care unit is covered by the term "civil matters" for the purposes of that provision, where that decision was adopted in the context of public law rules relating to child protection.

With regard to this first question, the AG could refer to the judgment given by the ECJ in case C-435/06 *(Applicant C*) since the question referred to the Court has essentially been the same. *(See with regard to case C-435/06 our previous posts on the reference, the opinion and the judgment).*

2. A child is habitually resident under Article 8(1) of Regulation No 2201/2003 in the place in which the child – making an overall assessment of all the relevant factual circumstances, in particular the duration and stability of residence and familial and social integration – has his or her centre of interests. Only if no habitual residence in that sense can be established and if no jurisdiction based on Article 12 exists do the courts of the Member State in which the child is present have jurisdiction under Article 13(1) of the regulation.

Of particular interest are the AG's remarks on the second question which concerns the interpretation of the concept of the child's habitual residence – which is not defined in the Regulation itself. Here, the AG emphasises that the basic idea underlying the rules on jurisdiction in Brussels II *bis* is that the courts of the Member State should have jurisdiction which are best placed to take decisions concerning parental responsibility. And these are – because of proximity – the courts of the Member State in which the child is habitually resident (para. 18). Even though also mere presence may establish proximity to the courts of the respective State, the AG stresses that mere presence does not lead to a relationship of the same quality as habitual residence (para. 20). Thus, criteria must be developed in order to distinguish habitual residence from mere presence.

Taking into consideration the wording and objectives of Brussels II *bis* as well as the relevant multilateral conventions, AG *Kokott* states that "the concept of habitual residence in Article 8 (1) of the Regulation should therefore be

understood as corresponding to the actual centre of interests of the child." (para. 38)

As relevant criteria for the distinction between habitual residence and the mere (temporary) presence, the AG designates in particular a certain duration and regularity of residence, which might be interrupted as long as it is only a temporary absence (para. 41 et seq.). Further, the familial and social situation of the child constitute important indicators for habitual residence (para. 47 et seq.).

> *3. (a) Article 20(1) of Regulation No 2201/2003 allows the courts of a Member State in urgent cases to take all provisional measures for the protection of a child who is present in that Member State, even if the courts of another Member State have jurisdiction under the regulation over the substance of the matter. There is urgency if immediate action is, in the view of the court seised in the State of the child's presence, necessary to preserve the child's welfare.*

With regard to this question, the AG stresses that Art. 20 (1) Brussels II *bis* has to be interpreted narrowly since it authorises courts to act which do not have jurisdiction over the substance of the matter (para. 56). Further, the AG clarifies that there are basically three requirements which have to be taken into consideration with regard to the application of Art. 20 (1): First, the measure may relate only to children who are present in the respective Member State (para. 57). Second, there must be an urgent case (para. 58) and third, Art. 20 (1) permits only provisional measures since the final decision is reserved to the court which has jurisdiction over the substance of the matter (para. 60).

> *(b) Article 20(1) of the regulation allows the taking of the provisional measures that are available under the law of the Member State of the court seised, and those measures need not be expressly designated as provisional measures under national law. It is otherwise for the referring court to determine which measures may be taken under national law and whether the provisions of national law are binding.*
>
> *(c) The regulation does not oblige the court which has taken a provisional measure under Article 20(1) to transfer the case to the court of another Member State with jurisdiction over the substance of the matter. However, it does not preclude the court seised from informing the court with jurisdiction,*

directly or via the central authorities, of the measures taken.

4. A court which under the regulation lacks jurisdiction over the substance of the matter and does not consider any provisional measures under Article 20(1) of the regulation to be necessary must declare that it lacks jurisdiction, under Article 17 of the regulation. The regulation does not provide for a transfer to the court with jurisdiction. However, it does not preclude the court seised from informing the court with jurisdiction, directly or via the central authorities, of its decision.

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

Special Issue Rome II Nederlands Internationaal Privaatrecht

The latest issue of the Dutch PIL journal *Nederlands Internationaal Privaatrecht* (2008, no. 4 – published in December) is dedicated to the Rome II Regulation. It includes the following eleven contributions:

M. Wilderspin, The Rome II Regulation; Some policy observations, p. 408-413

Xandra Kramer, The Rome II Regulation on the Law Applicable to Non-Contractual Obligations: The European private international law tradition continued. Introductory observations, scope, system, and general rules, p. 414-424

Thomas Kadner Graziano, The Rome II Regulation and the Hague Conventions on Traffic Accidents and Product Liability – Interaction, conflicts and future perspectives, p. 425-429

Andreas Schwartze, A European regime on international product liability: Article

5 Rome II Regulation, p. 430-334

Timo Rosenkranz and Eva Rohde, The law applicable to non-contractual obligations arising out of acts of unfair competition and acts restricting free competition under Article 6 Rome II Regulation, p. 435-439

Dick van Engelen, Rome II and intellectual property rights: Choice of law brought to a standstill, p. 440-448

Aukje van Hoek, Stakingsrecht in de Verordening betreffende het recht dat van toepassing is op niet-contractuele verbintenissen (Rome II) , p. 449-455 (includes English abstract)

Stephen Pitel, Choice of law for unjust enrichment: Rome II and the common law , p. 456-463

Bart Volders, Culpa in contrahendo in the conflict of laws: A first appraisal of Article 12 of the Rome II Regulation, p. 464

Herman Boonk, De betekenis van Rome II voor het zeerecht, p. 469-480 (includes English abstract)

Tomas Arons, 'All roads lead to Rome': Beware of the consequences! The law applicable to prospectus liability claims under the Rome II Regulation, p. 481-487

In case you are interested in contributing to this journal, please contact Xandra Kramer (kramer@frg.eur.nl) (editor-in-chief).

AG Opinion on the Interpretation of Art. 5 (1) Brussels I Regulation

Yesterday, *Advocate General Trstenjak`s* opinion in case C-533/07 (*Falco Privatstiftung und Rabitsch*) was published.

This case is of particular interest since it concerns the interpretation of the notion of "services" (Art. 5 (1) (b) second indent Regulation (EC) Nr. 44/2001 (Brussels I Regulation)) which has not been interpreted by the ECJ in the context of the Regulation so far. Further, with Art. 5 (1) Brussels I Regulation, the case concerns the interpretation of a provision which has been highly discussed in the course of the transformation of the Brussels Convention to the Regulation.

I. Background

The case concerns – briefly worded – proceedings between two plaintiffs, the first being a foundation managing the intellectual property rights of the late Austrian singer "Falco" established in Vienna (Austria), the second being a natural person domiciled in Vienna as well and a defendant domiciled in Munich (Germany) who are arguing about royalties regarding DVDs and CDs of one of the late singer's concerts: While a licence agreement was concluded between the plaintiffs and the defendant concerning the distribution of the DVDs in Austria, Germany and Switzerland, the distribution of the CDs was not included by this agreement. In the following, the plaintiffs sued the defendant for payment – based, with regard to the DVDs, on the licence agreement and with regard to the CDs on the infringement of their intellectual property rights.

The first instance court in Austria (*Handelsgericht Wien*) assumed its international jurisdiction according to Art. 5 (3) Brussels I Regulation arguing that it had jurisdiction with regard to the infringement of intellectual property rights since the respective CDs were sold inter alia in Austria. Due to the close connection between the claim based on the licence agreement and the claim based on the infringement of intellectual property rights, the court assumed jurisdiction for the contractual claim as well.

The court of second instance *(Oberlandesgericht Wien*), however, held that it had no jurisdiction with regard to the claim based on the licence agreement arguing Art. 5 (1) (a) Brussels I Regulation was applicable. Since the principal contractual obligation was a debt of money, which had to be fulfilled under German law as well as under Austrian law at the debtor's domicile (Munich), German (and not Austrian) courts had jurisdiction. According to the *Oberlandesgericht Wien*, jurisdiction could not be based on Art. 5 (1) (b) Brussels I Regulation either, since the licence agreement did not involve the "provision of services" in terms of the Regulation.

Subsequently, the plaintiffs appealed to the Austrian Supreme Court of Justice (*Oberster Gerichtshof*).

II. Reference for a Preliminary Ruling

Since the *Oberste Gerichtshof* had doubts on the interpretation of Art. 5 (1) Brussels I, it referred the following **questions** to the ECJ for a preliminary ruling:

> *1. Is a contract under which the owner of an incorporeal right grants the other contracting party the right to use that right (a licence agreement) a contract regarding 'the provision of services' within the meaning of Article 5(1)(b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Brussels I Regulation)?*
>
> *2. If Question 1 is answered in the affirmative:*
>
> *2.1. Is the service provided at each place in a Member State where use of the right is allowed under the contract and also actually occurs?*
>
> *2.2. Or is the service provided where the licensor is domiciled or, as the case may be, at the place of the licensor's central administration?*
>
> *2.3. If Question 2.1 or Question 2.2 is answered in the affirmative, does the court which thereby has jurisdiction also have the power to rule on royalties which result from use of the right in another Member State or in a third country?*
>
> *3. If Question 1 or Questions 2.1 and 2.2 are answered in the negative: Is jurisdiction as regards payment of royalties under Article 5(1)(a) and (c) of the Brussels I Regulation still to be determined in accordance with 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 (the Brussels Convention)?*

III. Opinion

1. First Question

In her extensive opinion, AG *Trstenjak* first clarifies that the referring court

basically aims to know with regard to the first question whether Art. 5 (1) (b) second indent Brussels I Regulation has to be interpreted to that effect that a contract under which the owner of an incorporeal right grants the other contracting party the right to use that right (a licence agreement) constitutes a contract regarding the "provision of services" within the meaning of this provision – and thus whether a licence agreement can be regarded as a contract on the provision of services in terms of Art. 5 (1) (b) second indent Brussels I Regulation (para. 46).

With regard to this question, the AG states in a first step, that "licence agreement" has to be understood in this context as a contract under which the owner of an incorporeal right grants the other contracting party the right to use that right (para. 48 et seq.).

In a second step, the AG turns to the notion of "services" in Art. 5 (1) (b) second indent Brussels I which does not provide for an explicit definition of this term (para. 53 et seq.). Here, the AG stresses that – due to the lack of an express definition and the fact that the ECJ has not interpreted the meaning of services in the context of the Brussels I Regulation so far – starting point for an interpretation has to be on the one side the general meaning of this term while on the other side, an analogy to other legal sources might be taken into consideration. With regard to an abstract definition of "services", the AG regards two elements to be of particular significance: First, the term of "services" requires some kind of activity or action by the one providing the services. Secondly, the AG regards it as crucial that the services are provided for remuneration (para. 57).

On the basis of this general definition, the AG holds that a licence agreement cannot be regarded as a contract having as its object the provision of services in terms of Art. 5 (1) (b) second indent Brussels I Regulation (para. 58) since the licensor does not perform any activity by granting the licence. The lincensor's only activity constitutes the signing of the licence agreement and the ceding of the licence's object for use. This, however, cannot, in the AG's view, be regarded as "service" in terms of this provision.

In the following, the AG also turns to primary law in order to examine whether the term of "service" used in primary law can be transferred to the Brussels I Regulation (para. 60 et seq.). This, however, does not lead to a different

assessment since, according to the AG, the definition of "services" cannot be transferred to the Brussels I Regulation without restrictions due to the fact that the objectives of the Regulation have to be taken into account – and they differ significantly from the purposes underlying the broad interpretation of "services" in terms of Art. 50 EC aiming at establishing a common market (para. 63).

Of particular interest is the AG's reference to Regulation (EC) No. 593/2008 (Rome I Regulation) (para. 67 et seq.) which is used as an additional argument supporting her opinion: She stresses that – by interpreting the notion of "services" – also the Rome I Regulation has to be taken into consideration in order to prevent an interpretation being contrary to the aims of Rome I since Recital No. 7 of the Rome I Regulation states: "The substantive scope and the provisions of this Regulation should be consistent with Council Regulation (EC) No 44/2001 […]". Here, the AG shows with a view to the origin of the Rome I Regulation that an interpretation including licence agreements into the notion of "services" would run counter to the aims of Rome I (para. 69).

2. Third Question

Due to the fact that the AG answers the first question in the negative, she does not deal with the second question, but turns directly to the third question by which the Austrian court basically aims to know whether Art. 5 (1) (a) Brussels I *Regulation* has to be interpreted in continuity with Art. 5 (1) Brussels *Convention* (para. 78 et seq.).

With regard to this question, the AG argues – after explaining in detail the changes Art. 5 has passed through from the Convention to the Regulation (para. 80 et seq.) – that Art. 5 (1) (a) Brussels I Regulation has to be – in view of Recital No. 19 of the Brussels I Regulation according to which "[c]ontinuity between the Brussels Convention and [the Brussels I] Regulation should be ensured […]" – interpreted in the same way as Art. 5 (1) Brussels Convention (para. 87). This approach is supported by the identical wording of both provisions as well as historical arguments (para. 94). Here, the AG pays particular attention to the fact that by means of Art. 5 (1) (b) Brussels I *Regulation* a special provision with regard to contracts concerning the sale of goods and the provision of services was established, while with regard to all other contracts the wording of the first part of Art. 5 (1) Brussels *Convention* was maintained in Art. 5 (1) (a) Brussels I

Regulation (para. 85).

3. The Advocate General's Conclusion

Thus, AG *Trstenjak* suggests that the Court should answer the questions referred for a preliminary ruling as follows:

1. With regard to the first question, the AG suggests that Art. 5 (1) (b) second indent Brussels I Regulation has to be interpreted as meaning that a contract under which the owner of an incorporeal right grants the other contracting party the right to use that right (licence agreement) does not constitute a contract regarding 'the provision of services' in terms of this provision.

2. With regard to the third question, the AG suggests that Art. 5 (1) (a) and (c) Brussels I Regulation has to be interpreted to the effect that jurisdiction for proceedings related to licence agreements has to be determined in accordance with the principles which result from the ECJ's case law regarding Art. 5 (1) Brussels Convention.

(Approximate translation of the German version of the AG's opinion.)

AG Trstenjak's opinion can be found (in German, French, Italian and Slovene) at the ECJ's website. The referring decision of the Austrian Supreme Court of Justice of 13 November 2007 can be found here under 4Ob165/07d (in German).

Publication: "Studi in onore di Vincenzo Starace"

The Italian publisher *Editoriale Scientifica* (Naples) has recently published a very rich collection of essays in honor of *Vincenzo Starace*, late Professor in the University of Bari, one of Italian leading academics in the field of Public International Law and Private International Law, who passed away in 2006.

The collection, **Studi in onore di Vincenzo Starace**, is divided in three volumes, devoted respectively to Public International Law (I), EU Law and Private International Law (II), and a miscellany of essays on different subjects (III).

The second volume includes the following contributions in the field of conflict of laws and jurisdictions:

- *Tito Ballarino*, Eutanasia e testamento biologico nel conflitto di leggi;
- *Stefania Bariatti* and *Ilaria Viarengo*, I rapporti patrimoniali tra coniugi nel diritto internazionale privato comunitario;
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Abbott v. Abbott: An Update

As previously mentioned on this site, the case of Abbott v. Abbott continues to look like the U.S. Supreme Court's first attempt to clarify the operation of the Hague Abduction Convention. Last week, the Court invited the views of the new Solicitor General on whether the case should be accepted. While there is no way to tell whether the SG will urge granting the Petition, or whether the Court will follow that advice, this at least seems to mean that someone at One First Street wants to take a closer look at the Convention.

The briefs in that case, including an amicus brief by the Permanent Bureau urging a grant of the petition, is available at the SCOTUSBlog.