When the Forum Conveniens Can Be "Convinced" to Refuse the Case

Roger Alford at *Opinio juris* has an interesting post on a recent American case where an American court declined jurisdiction based on *forum non conveniens*, but found out during the appeal that the foreign court had itself declined jurisdiction. As a consequence, the alternative available forum had disappeared, and it seemed like the American court would have to finally take jurisdiction. The question arose, however, whether the foreign decision had been obtained fraudulently, that is by corrupting the foreign judges, and how this should influence the American decision on jurisdiction.

The case was one of many suits filed in American courts against Ford and Bridgestone after some Bridgestones tires installed on Ford Explorers exploded. Many of these accidents had occurred in the United States, but four occurred in Mexico. Three of them involved U.S. residents, but one involved José Samuel Manez-Reyes, a "*Mexican soccer professional of some note*", as the U.S. Court of Appeals put it.

The 700 actions were transferred to a single district court in Indiana. The defendants sought a dismissal of the four cases connected to Mexico on the ground of *forum non conveniens*. The court granted the motion only for Manez-Reyes (that is, for the family, the player died in the accident).

The Manez-Reyes family appealed before the U.S. Court of appeals for the 7th Circuit. But before the case was heard, they also sued Ford and Bridgestone in Mexico, where a first instance court of the state of Morelos declined jurisdiction. The Mexican judgment was shortly after confirmed by an Auxiliary Chamber of the Supreme Court of the State of Morelos. So, when the U.S. Court appeals made its decision, the circumstances had changed. The theoretical availability of the forum conveniens had turned into an actual unavailability.

The availability of the alternative forum is a condition of the U.S. doctrine of *forum non conveniens*. Here, it seemed that it was not the case anymore. However, the U.S. Court of appeals agreed with the defendants that there were reasons to be suspicious about what had happened in Mexico. First,

the plaintiffs had not petitioned the court of the place of accident (Veracruz), but another Mexican court, which was the court of the domicile of the plaintiffs. Second, the defendants had not been informed of the proceedings and had not been heard by the Mexican court. Moreover, it seems that the Mexican court had not been informed of the on-going U.S. proceedings. In a judgment of 24 August 2005, the U.S. Court of appeals remanded the case to the U.S. first instance court so that it could investigate the circumstances of the Mexican proceedings.

The District Court found that the Mexican judgment has been procured in bad faith. The Mexican lawyer of the plaintiff had used family connections and had ex parte contacts with the Mexican judge in order to ensure that the Mexican court would decline jurisdiction. The U.S. Court held that, as a consequence, the Mexican judgment declining jurisdiction should not be recognized, and confirmed its first judgment to dismiss the Manez-Reyes litigation on the ground of *forum non conveniens*. The Court then moved on to sanction the plaintiff's lawyers.

One could argue that the jurisdictional sanction of the parties' behaviour was a bit harsh. What they did in Mexico was certainly not right, but this does not change the fact that the tire of the car had exploded, and that the victim died as a result. The U.S. District Court dealt with the issue by leaving its doors open. It reaffirmed its decision to dismiss the case on the ground of *forum non conveniens* "without prejudice". As the Court of appeals explained in its judgment of 11 July 2008, this means that although the U.S. Court dismissed the case, the plaintiffs are free to refile if they so wish, including in a U.S. Court and as the case may be, before the same court. In other words, should a Mexican court decline jurisdiction after proceedings in good faith, the plaintiffs could come back to the a U.S. court and argue that it should reexamine its jurisdiction in the light of the new circumstances.

New Reference for Preliminary Ruling on Brussels I

A new reference regarding the Brussels I Regulation is pending at the ECJ. The *Bundesgerichtshof* (Germany) has referred the following questions for a preliminary ruling:

> *Is the second indent 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 to be interpreted as meaning that in the case of journeys by air from one Member State to another the single place of performance for all contractual obligations must be taken to be the place of the main provision of services, determined according to economic criteria?*
>
> *Where a single place of performance is to be determined: What criteria are relevant for its determination; is the single place of performance determined, in particular, by the place of departure or the place of arrival?*

The case is pending as *Peter Rehder v Air Baltic Corporation* (Case C-204/08).

The referring decision of 22 April 2008 (X ZR 76/07) can be found at the website of the *Bundesgerichtshof*.

Publication: European Enforcement Order for Uncontested Claims

David-Christoph Bittmann: **"Vom Exequatur zum qualifizierten Klauselerteilungsverfahren"**

This new German publication analyses from a comparative perspective as to whether the new procedure introduced by Regulation (EC) No 805/2004 creating a European Enforcement Order for Uncontested Claims actually constitutes an advancement for the creditor without disregarding the debtor's rights in comparison with the previous exequatur proceedings. Further, the Regulation creating an Enforcement Order for Uncontested Claims is compared with Regulation (EC) No 1896/2000 creating a European Order for Payment Procedure, Regulation (EC) No 861/2007 establishing a European Small Claims Procedure as well as the future Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

More information on this book can be found at the publisher's website.

Arbitral Awards Violating European Antitrust Laws: French Courts Cannot Help

Are French courts willing to review arbitral awards on the ground that arbitrators violated European antitrust laws? As a matter of principle, French courts are extremely reluctant to review arbitral awards on the merits. In theory, an exception remains when the award violates French international public policy, but actual instances where French courts have found such violations are very few.

Now, on June 1999, the European Court of Justice held in *EcoSwissChina* that member states ought to consider that article 81 of the EC Treaty belongs to their public policy for the purpose of reviewing arbitral awards. In that case, however, Dutch courts had been unable to review the compatibility of the award with EU antitrust law because the plaintiff had failed to challenge the award in a timely fashion. The ECJ held that it did not intend to change the procedural laws of the member states and that the obligation under Dutch law to initiate the

challenge proceedings within 3 months was such procedural rule which could prevent an actual verification of the proper application of antitrust laws.

Is that changing anything to the French position? Not if the reluctance to review awards can be presented as the consequence of the application of a French procedural rule. Question: could that be a procedural rule which prevents review not only in some cases (say when the plaintiff did not act in a timely fashion), but in all cases? For instance, what about a local rule of procedure providing that courts only review the most obvious violations of public policy rules?

In November 2004, the Paris Court of Appeal had ruled in *Thales Air Defense v. GIE Euromissiles* that there was such a procedural rule in France. The French rule was that only violations of French public policy which were "obvious, actual and concrete" (*flagrante, effective et concrete*) would be sanctioned. As a consequence, in *Thalès*, the Court had dismissed a challenge in a case where the parties had arguably shared the relevant European market. The issue of the validity of the contract had not been raised during the arbitration.

SNF vs CYTEC

In a judgement of June 4, 2008, the French Supreme Court for private matters (*Cour de cassation*) addressed the issue for the first time.

The parties were two European chemical companies, Dutch Company CYTEC and French company SNF. The business of SNF was to sell a given chemical product, PMD, which could only be produced by using another chemical product, AMD. CYTEC was one of the sole producer in Europe of AMD, so SNF had to get it from CYTEC. In the early 1990s, the parties concluded successive exclusive purchase agreements (one in 1991, one in 1993) whereby SNF undertook to purchase AMD exclusively from CYTEC for 8 years. The contract provided for ICC arbitration in Brussels, Belgium, in case of dispute.

In January 2000, SNF stopped purchasing from CYTEC arguing that the contract violated European antitrust laws (Art 81 and 82 of the European Treaty). In May 2000, CYTEC initiated arbitral proceedings seeking compensation for breach of contract. In a counterclaim, SNF argued that the contract was contrary to European antitrust laws and as such ought to be set aside.

In a first award rendered on 5 November 2002, the tribunal found that the

contract did violate article 81 of the European Treaty, as by obliging SNF to purchase exclusively from CYTEC, the exclusive purchase agreement prevented SNF from accessing the market of AMD. The tribunal set aside the contract and held that the parties were equally liable for it. In a second award made on 28 July 2004, the tribunal ruled on the financial consequences of the nullification of the contract but ordered solely SNF to compensate CYTEC.

In that case, competition law issues had been discussed before the arbitrators, so much so that the contract had been annuled on the ground that it violated it. This was not, however, the end of the story. SNF argued that, by compensating CYTEC only, the tribunal had managed to have the contract indirectly produce effect, and had thus violated antitrust laws anyway. It thus challenged the validity of the award before Belgian courts (as the seat of the arbitration was Brussels). On 8 March 2007, the Brussels first instance court accepted the argument and set aside the arbitral awards on that ground (SNF went on to sue the ICC in Paris for failing to verify whether the arbitrators had properly complied with public policy. The French judgement dismissing the action can be found here (in French, at p. 30)).

Meanwhile, however, CYTEC had sought enforcement of the awards in France, where they were declared enforceable in 2004. One after the other, all French courts found that the awards were not contrary to French public policy, as the violations were not obvious. The *Cour de cassation* confirmed last the position of French courts by ruling that no evidence of an "obvious, actual and concrete" violation of public policy had been provided. Note that, from a French point of view, the fact that the awards were eventually set aside by Belgian courts is irrelevant, as the French doctrine is that international arbitration is delocalized.

Interim conclusion: do not provide for arbitration in Brussels for disputes arising out of this kind of contract. Also, avoid rue de la Loi or rue Joseph II.

A critical difference between the *Thales* case and the *CYTEC* case is obviously that, in the *CYTEC* case, EU competition law had been applied. The judgment of the *Cour de cassation* puts this forward as one of the reasons for its decision. Remarkably, the judgment also says that the amount of compensation falls outside of the scope of the public policy ground for review. French judgments are always very short and subject to interpretation, but it seems that the Court rules that it will never find a violation of EU antitrust laws where a party was denied damages

as a consequence of an antitrust violation. So, in this case, there was no chance whatsoever it would deny recognition to the awards. Why should compensation be excluded from public policy? The court does not say.

Final conclusion: one wonders what European institutions will think of all these subtle distinctions.

Judgment in Case "Inga Rinau" – Urgent Preliminary Ruling Procedure

Today, the ECJ delivered its judgment in case *Inga Rinau* (C-195/08 PPU) which seems to be the first case under the urgent preliminary ruling procedure.

The judgment is not available in English yet, however in French, Italian, German and several other languages.

The Court held:

> *1) Une fois une décision de non-retour prise et portée à la connaissance de la juridiction d'origine, il est sans incidence, aux fins de la délivrance du certificat prévu à l'article 42 du règlement (CE) n° 2201/2003 du Conseil, du 27 novembre 2003, relatif à la compétence, la reconnaissance et l'exécution des décisions en matière matrimoniale et en matière de responsabilité parentale abrogeant le règlement (CE) n° 1347/2000, que cette décision ait été suspendue, réformée, annulée ou, en tout état de cause, ne soit pas passée en force de chose jugée ou ait été remplacée par une décision de retour, pour autant que le retour de l'enfant n'a pas effectivement eu lieu. Aucun doute n'ayant été émis en ce qui concerne l'authenticité de ce certificat et celui-ci ayant été établi conformément au formulaire dont le modèle figure à l'annexe IV dudit règlement, l'opposition à la reconnaissance de la décision de retour est interdite et il n'incombe à la juridiction requise que de constater la force*

exécutoire de la décision certifiée et de faire droit au retour immédiat de l'enfant.

2) Hormis les cas où la procédure vise une décision certifiée en application des articles 11, paragraphe 8, et 40 à 42 du règlement n° 2201/2003, toute partie intéressée peut demander la non?reconnaissance d'une décision juridictionnelle, même si une demande de reconnaissance de la décision n'a pas été déposée préalablement.

3) L'article 31, paragraphe 1, du règlement n° 2201/2003, en ce qu'il prévoit que ni la personne contre laquelle l'exécution est demandée ni l'enfant ne peuvent, à ce stade de la procédure, présenter d'observations, n'est pas applicable à une procédure de non?reconnaissance d'une décision juridictionnelle, formée sans qu'une demande de reconnaissance ait été préalablement introduite à l'égard de la même décision. Dans une telle situation, la partie défenderesse, prétendant à la reconnaissance, peut présenter des observations.

See for the full judgment the website of the ECJ and for more information on the case as well as the urgent preliminary ruling procedure also our previous post which can be found here.

Many thanks again to Jens Karsten for drawing our attention to this reference.

Article on the Interaction of Choice of Law Rules and the Australian Constitution

Christopher Kourakis, the Solicitor-General for the State of South Australia, has an interesting article on the interaction of choice of law rules and the Australian Constitution in cases of conflict between state laws in volume 28 of the *Adelaide*

Law Review. The article discusses the decision of the High Court in *Sweedman v Transport Accident Commission* (2006) 226 CLR 362; [2006] HCA 8, which concerned whether a Victorian statutory motor vehicle insurer, which paid compensation to Victorians injured in a car accident in New South Wales, could recover under the Victorian statute from the New South Wales driver who caused the accident. The article considers the common law choice of law rule applicable to claims for statutory indemnification, and then considers the possible ways in which it has been suggested by judges and commentators (including the newly appointed Solicitor-General for the Commonwealth) that the Australian Constitution might provide an alternative approach.

See Christopher Kourakis, '*Sweedman v Transport Accident Commission*: A Simple Crash and Bang?' (2007) 28 *Adelaide Law Review* 23.

Kozyris on Rome II: Tort Conflicts on the Right Track! A Postscript to Symeon Symeonides' "Missed Opportunity"

Prof. John Phaedon Kozyris (Universities of Thessaloniki and Ohio State) has published a very interesting article on Rome II in the latest issue of the American Journal of Comparative Law (Vol. 56(2), 2008): **Rome II: Tort Conflicts on the Right Track! A Postscript to Symeon Symeonides' "Missed Opportunity"** (*56 Am. J. Comp. L. 471*). As the title explains, the article discusses the new European conflict regime on torts, in the light of the assessment made by *Prof. Symeonides* in his recent works (see in particular "Rome II and Tort Conflicts: A Missed Opportunity", and the other articles cited in our related post, and "The American Revolution and the European Evolution in Choice of Law: Reciprocal Lessons"). While rejecting some of the critiques addressed by Symeonides to the final text of Rome II, Kozyris commends the EC co-legislators for adopting a

"traditional" European approach:

> *Rome II must be praised for eschewing the "revolutionary" methodologies, especially of the American variety, and for employing definitive, recognizable, and practical connecting factors to determine the applicable law.*

In analysing the conflict rules, special attention is given by the author to the provision on product liability (or, as the author deems it more appropriate, "producer liability").

The abstract reads as follows:

> *Regulation 864/2007, covering tort conflicts, concludes a long process that had started in the late 1960s to cover the entire field of obligations in the European Community. The author expresses his satisfaction that the final text, with its emphasis on the lex loci damni, with some habitual residence exceptions, escaped the shoals of the so-called "American conflicts revolution" with its parochial and pro-forum implications and its uncertainties. Further, he comments favorably on the particularized treatment of certain areas such as producer liability and environmental protection and on the inclusion of the in-between topics of unjust enrichment, negotiorum gestio and culpa in contrahendo. However, a closer and more detailed study of the key field of producer liability leads him to considerable reservations on the contacts selected and their prioritization.*

New References on Brussels I Regulation

Two new references for preliminary rulings on the Brussels I Regulation have been referred to the ECJ:

1. The ***Hof van Cassatie van België*** has referred the following question to the

ECJ:

> *Is a creditor who pursues a claim in the name and for the account of his debtor a party within the meaning of Article 43(1) of Regulation No 44/2001, that is, a party who can lodge an appeal against a decision on the request for declaration of enforceability, even if he has not formally appeared as a party in the proceedings in which another creditor of that debtor applied for that declaration?*

(The case is pending as: Draka NK Cables Ltd, AB Sandvik International, VO Sembodja BV and Parc Healthcare International Limited v Omnipol Ltd (Case C-167/08)

2. The ***Hoge Raad der Nederlanden*** has referred the following questions:

> *a) Which harm is, in the case of unlawful conduct such as that which forms the basis for Zuid-Chemie's claim, to be treated as the initial harm resulting from that conduct: the harm which arises by virtue of the delivery of the defective product or the harm which arises when normal use is made of the product for the purpose for which it was intended?*
>
> *(b) If the latter is the case, can then the place where that harm arose be treated as 'the place where the harmful event occurred' within the meaning of Article 5(3) 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 only if that harm consists of physical harm to persons or goods, or is this also possible if (initially) only financial harm has been incurred?*

(*The case is pending as: Zuid-Chemie B.V. v Philippo's Mineralenfabriek N.V./S.A., at present PMF Productions (Case C-189/08)*)

(Many thanks to Jens Karsten for the tip-off!)

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (4/2008)

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

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

- ***Burkhard Hess/David Bittmann***: "Die Verordnungen zur Einführung eines Europäischen Mahnverfahrens und eines Europäischen Verfahrens für geringfügige Forderungen – ein substantieller Integrationsschritt im Europäischen Zivilprozessrecht" – the English abstract reads as follows:

Two new European instruments, Regulation (EC) No. 1896/2006 concerning the creation of a European Payment Order and Regulation (EC) No. 861/2007 establishing a European Procedure for Small Claims, will enter into force on the 9th of December 2008 and the 1st of January 2009, respectively. Both constitute a new step in the integration of European Civil Procedural Law, introducing a genuine European title and creating genuine European civil procedures in specific areas. The following article presents and analyses these new instruments. Furthermore, it scrutinizes the German implementation rules, which are currently still at a draft stage. Finally, the article assesses the interplay between the new parallel regulations and examines their implications for European as well as national procedural laws. In the long run, the vast number of different regulations on the cross-border recovery of debts may entail the fragmentation of European Civil Procedural Law.

- ***Rolf Wagner***: "Änderungsbedarf im autonomen deutschen internationalen Privatrecht aufgrund der Rom II-Verordnung? – Ein Überblick über den Regierungsentwurf eines Gesetzes zur Anpassung der Vorschriften des Internationalen Privatrechts an die Rom II Verordnung" – the English abstract reads as follows:

Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II Regulation) will enter into force in the EU member states (except for Denmark) as from 11 January 2009. The following observations examine whether national German law has to be changed as a consequence of the Rome II Regulation. In particular, the question arises as to whether the rules on non-contractual obligations in Articles 38 seqq. of the German Introductory Act to the Civil Code may be deleted, and whether further changes are necessary in order to give full effect to the Rome II Regulation.

- ***Sven Rugullis*** on anticipated choice of law by the parties with regard to non-contractual obligations: "Die antizipierte Rechtswahl in außervertraglichen Schuldverhältnissen"
- ***David Einhaus*** on the Regulation creating a European Order for Payment Procedure: "Qual der Wahl: Europäisches oder internationales deutsches Mahnverfahren?"
- ***Sascha Reichardt*** on a judgment of the Federal Supreme Court of 28 June 2007 (I ZR 49/04) dealing with the question of international jurisdiction regarding intellectual property rights: "Internationale Zuständigkeit deutscher Gerichte bei immaterialgüterrechtlichen Klagen"
- ***Peter Mankowski*** on a judgment of the Higher Regional Court Karlsruhe of 24 August 2007 (14 U 72/06) on Art. 15 (1) lit. c Brussels I Regulation: "Muss zwischen ausgerichteter Tätigkeit und konkretem Vertrag bei Art. 15 Abs. 1 lit. c EuGVVO ein Zusammenhang bestehen?"
- ***Rolf Stürner/Therese Müller*** show developments of the German-American mutual judicial assistance by analysing two recent decisions of the Federal Supreme Court (28 March 2007 – IV AR (VZ) 2/07) and the Higher Regional Court Celle (6 July 2007 – 16 VA 5/07) dealing respectively with the question of service of American class actions in Germany and the granting of assistance by German courts to obtain evidence for US-American pre-trial discovery-proceedings: "Aktuelle Entwicklungstendenzen im deutsch-amerikanischen Rechtshilfeverkehr"
- ***Fügen Sargin***: "A Critical Analysis of the Requirements of Recognition and Enforcement of Foreign Judgments under Turkish Law"
- ***Zeynep Derya Tarman*** on the acquisition of real estate by foreigners in Turkey and its restrictions: "Grundsätze und Beschränkungen beim Erweb

von Grundstücken durch Ausländer in der Türkei”
- ***Torstein Frantzen*** on the recognition of foreign divorces in Norway: “Anerkennung ausländischer Ehen in Norwegen”

Further, this issue contains the following **materials**:

- Draft statute of the Federal Government for the adaptation of the German PIL rules (EGBGB) to the Rome II Regulation: Gesetzentwurf der Bundesregierung (2008) für ein Gesetz zur Anpassung der Vorschriften des Internationalen Privatrechts an die Verordnung (EG) Nr. 864/2007
- ***Peter Kindler/Karla Klemann***: Synopsis of the German PIL rules, Rome I and Rome II: “Synopse zum Inkrafttreten der Verordnungen Rom I und Rom II”

As well as the following **information**:

- ***Michael Stürner/Moritz Brinkmann*** on the conference of the Academy of European Law in Trier on the Draft Common Frame of Reference which has taken place in March 2008: “The Draft Common Frame of Reference – Tagung der Europäischen Rechtsakademie am 6. und 7.3.2008 in Trier”
- ***Erik Jayme/Carl Friedrich Nordmeier*** on seminars having taken place in Thrace (Greece) in April 2008 on private international law of family and succession law and in particular on legal questions of Muslim Greek nationals: “Griechische Muslime in Thrazien: Internationales Familien- und Erbrecht in europäischer Perspektive”

Rome I Regulation Published in the Official Journal

The Rome I Regulation (see the dedicated section of our site, and the programme of the forthcoming conference organized by the Journal of Private International Law) has been published in the Official Journal of the European Union n. L 177 of

4 July 2008. The official reference is the following:

Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ no. L 177, p. 6 ff.). Pursuant to its Articles 28 and 29, **the regulation will apply from 17 December 2009, to contracts concluded after the same date**. As it is widely known, Denmark and the United Kingdom did not take part in the adoption of the regulation and are not bound by it (see Recitals no. 45 and 46): however, the position of the latter State is currently being evaluated in the frame of the public consultation launched by the British Ministry of Justice. The responses to the consultation paper and the final decision of the UK government will be posted as soon as they are available.