German Federal Constitutional Court on the Service of Statements of Claim in American Class Actions

With order of 14 June 2007 the **German Federal Constitutional Court** (*Bundesverfassungsgericht*) decided not to admit constitutional complaints concerning the **service of statements of claim** in **American class actions** pursuant to the **Hague Service Convention**.

The facts of the case are as follows:

Against the complainant, an automobile manufacturer with its registered office in Germany, lawsuits were brought on the basis of the allegation that they had made agreements in violation of competition law preventing the import of motor vehicles from Canada to the US in order to keep the price level in the US market high. Based on the alleged violations of competition law, several class-action lawsuits were filed in the US. In three of these actions, the plaintiffs requested the President of the competent German court as the central authority pursuant to Art. 2 Hague Service Convention to serve the statements of claim on the complainant according to Art. 5 Hague Service Convention.

After the orders for service had been made, the complainant asserted that the service of the statements of claim should not have been ordered because the objectives of the class actions violated the essential principles of a free state governed by the rule of law. Consequently, service should have been refused according to Art.13 (1) Hague Service Convention (para. 5). After legal remedies had failed before the Higher Regional Court (*Oberlandesgericht*) and the Federal Supreme Court (*Bundesgerichtshof*), the complainant filed constitutional complaints (that were consolidated for joint adjudication) alleging a violation of Art. 2 (1) Basic Law (*Grundgesetz*) in conjunction with the rule of law based on the assertion that the subject-matter of the domestic service are statements of claims in actions which were brought before the American courts without any basis and only for non-legal purposes. Thus, the service of such statements of claim should be rejected on the basis of Art. 13 Hague Service Convention for constitutional reasons. Further, the complainant asserts a violation of Art. 14

Basic Law (guarantee of property) since the service of a statement of claim was an encroachment on the asset base of the company due to the burden of costs associated with proceedings. In addition, a violation of Art. 12 (1) Basic Law (occupational freedom) is alleged since also the complainant's gainful activity were affected. Finally, the complainant argues that also its right to a hearing in court (Art. 103 (1) Basic Law) had been violated

The Federal Constitutional Court **did not admit** the constitutional claims for decision and held that

> *[t]he decisions of German state bodies which effectuate domestic service of foreign statements of claim may violate Article 2.1 of the Basic Law in conjunction with the rule of law principle if the objective pursued by the statement of claims violates essential principles of a free state governed by the rule of law. However, the class actions in this case do not satisfy this requirement. (para.13)*

The Court went on by stating that service may only be refused on the basis of Art. 13 Hague Service Convention under narrow circumstances.

> *According to the case-law of the Federal Constitutional Court, a limit might be reached where the objective pursued by the action "obviously violates essential principles of a free state governed by the rule of law" (BVerfGE 91, 335 (343); 108, 238 (247)). It is true that the First Senate of the Federal Constitutional Court has decided that the mere possibility of imposing punitive damages does not amount to a violation of essential rule of law principles (BVerfGE 91, 335 (343-344)). If, however, damages claims appear from the outset to violate the abuse of law principle, the possibility that the service of a statement of claim may be incompatible with the essential principles of a free state governed by the rule of law is no longer excluded. In such a case, it is possible that a German state body could through its application and interpretation of the reservation clause in Article 13.1 of the Hague Service Convention fundamentally misjudge and disproportionately limit the rights of a complainant. The standard which applies in this case is Article 2.1 of the Basic Law in conjunction with the rule of law. However, the Federal Constitutional Court has not yet conclusively determined whether the responsible state body may for constitutional reasons refuse service of a statement of claim whose*

> *purpose conflicts with essential principles of a free state governed by the rule of law (see BVerfGE 91, 335 (343); 108, 238 (248-249)). (para. 19)*

The Court held that in the present case this question had not to be answered since there was no violation of essential principles of a free state governed by the rule of law.

> *It is indeed true from the point of view of the German legal system that a defendant is subject to added burdens in an American class-action lawsuit. If, however, from the German perspective a plaintiff exploits the weaker position of a defendant to enforce his or her own rights, this alone will not be sufficient to substantiate an allegation that the plaintiff has committed an abuse of law; instead the objective and the specific circumstances of the legal action must indicate that there has been an obvious abuse of law – this is missing in the present case. (para. 20).*

The order of the First Chamber of the Second Senate (2 BvR 2247-2249/06) is available in English at the website of the Federal Constitutional Court.

(Many thanks to Prof. Jan von Hein (Trier) for the tip-off.)

A New Mandatory Rule in the French Law of Torts

The French Supreme Court for private and criminal matters (*Cour de cassation*) has recognised a new mandatory rule in the French law of torts. As a consequence, the Court held that it applied necessarily, and that it was an exception to the applicable choice of law rule, i.e. the law of the place were the tort was committed.

Background

This new mandatory rule is in fact an entire scheme allowing victims of certain criminal offences (basically those resulting in personal injury) to claim compensation from a public fund. The fund compensates victims irrespective of any negligence committed by the tortfeasor. After payment, the fund is subrogated in the rights of the victim and may sue the torfeasor to recover the monies paid to the victim, but on condition that the torfeasor was liable to the victim in the first place.

The fund is obviously a French public fund. But it does not only protect French victims. It also protect foreigners when the offence was committed in France. For French victims, however, the statute does not lay down any territorial condition. It seems to follow that French nationals are eligible even when the offence was committed abroad.

The translation of the provisions of the French Code of Criminal Procedure which govern the scheme can be found here.

The case

In this case, the plaintiff was a French national who had suffered a loss in the United States. While jet-skiing, he was hurt by another jet-ski from behind. He sought recovery in France before the special body set up in each first instance court to rule on the eligibility of plaintiffs. What happened before this body is not known, but the Versailles court of appeal denied compensation. It held that the plaintiff had not demonstrated that the conduct which caused him harm could be characterised as a criminal offence under American law. In a judgment of 22 January 2007, the *Cour de cassation* reversed. It ruled that the content of American law was irrelevant, as the French rule was "of necessary application" (*loi d'application nécessaire*) and thus governed.

French conflict lawyers have traditionnally used several terms to refer to mandatory rules. The most famous internationally is certainly *lois de police*, but they have also been called rules of necessary application, or of immediate application. The concept, however, has always been the same. *Lois de police* are applied necessarily and immediately, as opposed to after determining whether the applicable choice of law rule provides for the application of French law. *Lois de police* are thus exceptions to the normal operation of the traditional choice of law rule, here the *lex loci delicti*.

The judgment justifies the characterization of the French scheme by stating that the rationale of the scheme is to establish a mechanism of national solidarity for victims of criminal offences, which compensates victims because of the existence of a specific social risk (criminality).

Comment

The characterization of the scheme as a mandatory set of rules is only partly convincing. Under the French theory of mandatory rules, a rule is considered mandatory when it is so important that the French legal order could not tolerate the application of any other rule. Here, it seems that the reason why French law must govern is different. The scheme does not really belong to the law of torts. It is a public scheme playing with French money. As with any public law, it is only for the State which instituted such fund to determine the conditions of its application. The application of French law is no exception to the choice of law rule governing torts. The issue of whether a French public fund should compensate a victim is not an issue of tort in the first place, but rather an issue of public law.

Norwegian Court of Appeal on Choice of Law

The Norwegian Court of Appeal (Borgarting lagmannsrett) recently handed down a decision on the question of Choice of law regarding the limitation period for money claims. The decision (Borgarting lagmannsrett (kjennelse)) is dated 2007-05-28, published in LH-2007-75346, and is retrievable from here.

Parties, facts and contentions

The plaintiff and distrainer, Østjydske Bank AS, domiciled in Denmark, served the defendant and distrainee, Joan Anni Myhre, domiciled in Norway, with a subpoena in a Norwegian Court of First Instance (Oslo byfogdembete), with the object of action to ask the court to force the defendant, by the seizure and detention of personal property, to perform an obligation to pay overdue loan of money, where

upon the Court issued a distress warrant. Before the seizure was carried out, the defendant claimed the loan of money had been repaid so there subsequently was nothing to seize, where upon the Norwegian Court of First Instance reversed its first ruling. In response, the plaintiff appealed to the Court of Appeal and contended, in response to the defendant´s secondary argument, that the Danish law, on the limitation period for money claims with a limitation period of 5 years, was applicable, and, that in accordance with that law, the plaintiff still had the right to demand performance of payment since the limitation period to demand such performance was not exceeded. By contrast, the defendant contended in her secondary argument that Norwegian law, on the limitation period for money claims with a limitation period of 3 years, was applicable, and, that in accordance with that law, the plaintiff no longer had the right to demand performance of payment since the limitation period to demand such performance had been exceeded. This case note will solely venture into the question of the limitation period for money claims since only that question involved an issue of private international law.

Ratio decidendi of the Norwegian Court of Appeal

The Norwegian Court of Appeal, succinct in its ruling, stated that in an international contractual legal relationship, the starting point for the parties to resolve the question of choice of law, is the party autonomy. Since neither of the disputing parties contended the parties had made a choice of law in accordance with the rules of private international law and its rules for the party autonomy, the question of choice of law had to be answered in accordance with the Norwegian private international law and its individualising method after which the applicable law is designated in accordance with the State to which the contractual relationship has the most significant or strongest connection. Considering that the case at hand involved a loan from a Danish Bank to a person domiciled in Denmark at the time when the loan was granted, it followed from the individualising method that Danish law was applicable.

New Service Regulation Repealing Reg. 1348/2000 to Be Adopted by EP in Its Forthcoming Plenary Session

In its last meeting, on 4 October 2007, the EP's JURI Committee adopted a Recommendation for Second Reading, calling on the European Parliament to approve the Council's common position on a **new service Regulation that should replace Reg. No. 1348/2000**.

The codecision procedure leading to a new European instrument on service of documents started in July 2005, following the Report prepared in 2004 by the Commission and an external study on the application of Reg. 1348/2000. The procedure is summarized as follows by the EP Rapporteur *Jean-Paul Gauzès* in the Explanatory Statement accompanying the Recommendation for Second Reading (*links added*):

> *In July 2005, the Commission presented a draft European Parliament and Council regulation amending Council Regulation (EC) No 1348/2000.*
>
> *Following an agreement reached with the Council under the Austrian Presidency, Parliament adopted a certain number of amendments in July 2006, corresponding to the changes agreed with the Council, and officially invited the Commission to submit a codified version of Regulation No 1348/2000 in the form of an amended proposal.*
>
> *In December 2006, the Commission submitted an amended proposal for a regulation embodying the amendments to Regulation No 1348/2000 adopted by the European Parliament and the Council, and repealing the aforesaid Regulation.*
>
> *A likely modified version of this text was unanimously adopted at the Council meeting of 19 and 20 April 2007, which then drew up a joint position. The official adoption by the Council on 28 June 2007 was unanimous.*

According to current forecasts, the EP's vote on the Recommendation for Second Reading should take place in the plenary session of 24 October 2007 (see the EP OEIL page), ending the codecision procedure with the adoption of the act, in the **text of the Council's Common Position**.

Further documentation on the service of documents in the EU is also available on the related page of the DG Freedom, Security and Justice.

Norwegian Court of Appeals on the Lugano Convention Article 5 nr. 1

The Norwegian Court of Appeal (Haalogaland lagmannsrett) recently handed down a decision on the Lugano Convention Article 5 nr. 1 on the interpretation of the notions "contract", "obligation" and "the place of performance" of the obligation. The decision (Haalogaland lagmannsrett (kjennelse)) is dated 2007-05-16, published in LH-2007-70583, and is retrievable from here.

Parties, facts and contentions

The plaintiffs, A and B, domiciled in Norway, served the defendant, C, domiciled in Spain, with a subpoena in a Norwegian Court of First Instance (Salten tingrett), with the object of action to ask the court to force the defendant C to repay A 265.000 NOK and B 238.550 NOK (and in addition interests for delayed payment) paid to the natural person C, via an account in Norway belonging to a Spanish registered legal person D, for a real estate project to be developed and realized in Spain for further sale with profit. Both parties agreed the legal relationship was contractual. However, the parties disagreed on the question which contract was the contract from which the claim for repayment derived.

The plaintiffs, A and B, contended adjudicatory authority could be attributed to Norwegian courts based on the Lugano Convention Article 5 nr.1, since the place of performance of the obligation in question was in Norway, based on to alternative arguments. The first alternative argument was that C, having admitted

to A and B to have breached the conditions of the original agreement of the real estate project, had entered into a new agreement with A and B, which, first, disregarded the claim for compensation derived from the breach of contractual obligations in the original agreement, and, second, obliged C to repay the said sums to A and B in accordance with the new agreement. In accordance with the Norwegian monetary law on promissory notes (law of 1939-02-17, paragraph 3), the place of payment is the place of the domicile or place of business of the creditor, which in this case was Norway. Hence, within the meaning of the Lugano Convention Article 5 nr.1, the "obligation in question" was C´s obligation to pay A and B the said sums in accordance with the new agreement, and "the place of performance" for that obligation was in Norway. Provided the court did not accept the new agreement as the relevant contract within the meaning of the Lugano Convention Article 5 nr.1, the second alternative argument was that for the original agreement, the "obligation in question" was C´s obligation to pay A and B due to breach of the original agreement, and "the place of performance" for that obligation was not in Spain, but on C´s account in Norway.

The defendant C contended Norwegian courts lacked adjudicatory authority since the place of performance of the obligation in question for the original agreement was in Spain, and argued that C never had entered into a new agreement obliging C to pay the said sums to A and B.

Both the Norwegian Court of First Instance (Salten tingrett) as well as the Norwegian Appeal Court (Haalogaland lagmannsrett) rejected and dismissed the case from becoming a member of the Norwegian adjudicatory law system based on lack of Norwegian adjudicatory authority in accordance with the Lugano Convention Article 5 nr.1.

Ratio decidendi of the Norwegian Court of Appeal

First, in determining its adjudicatory in/competence, the Norwegian Court of Appeal introduced the Lugano Convention, and, first, its main rule of jurisdiction contained in Article 2, where the plaintiff may sue the defendant at the place of the defendant's domicile, provided the defendant is domiciled in a Contracting State, and, second, its exceptions to the main rule contained in Article 5 in general and Article 5 nr.1 in particular, where upon the plaintiff, as an alternative to Article 2, may sue the defendant in matters relating to a contract, in the courts for the place of performance of the obligation in question. On establishing

whether Article 5 nr.1 was applicable, the Norwegian Court of Appeal asked 1) which legal relationship at hand in the case was a "contract" within the meaning of Article 5 nr.1, 2) which "obligation" the dispute concerned, and 3) where the place of "performance" of the obligation was.

Second, the Norwegian Court of Appeal went on to determine which legal relationship at hand in the case was a "contract" within the meaning of Article 5 nr.1. The Court did not test the reality of the plaintiffs´ argument that they had entered into a new agreement with the defendant C (see above), but emphasized that significant for the question of adjudicatory authority was whether the plaintiffs´ pretensions about such a new agreement form the basis for the cause and object of the action and court litigation. The Court stated that since, first, the plaintiffs´ first argument – that the parties had entered into a new agreement obliging C to pay the said sums to A and B – had not been introduced in the subpoena to and arguments before the Court of First Instance, and, second, that the subpoena to and arguments before the Court of First Instance had contained references to the original contract for a real estate project to be developed and realized in Spain, that latter contract was the relevant "contract" within the meaning of the Lugano Convention Article 5 nr.1 from which the "obligation" derived and the "the place of performance" for that obligation is attributed adjudicatory authority.

Third, having identified the relevant contract, the Norwegian Court of Appeal interpreted the notion "obligation" within the meaning of the Lugano Convention Article 5 nr.1, which must be understood as encompassing primary obligations born by each party and not obligations derived from non or wrong fulfilled obligations (the content of this rule is parallel to the rule in paragraph 25 of the Norwegian Civil Procedural Law of 13 August 1915 nr. 6 (Lov om rettergangsmaaten for tvistemaal, which outside the scope of application of the Lugano Convention determines the adjudicatory authority of Norwegian courts). The Court found, like the Court of First Instance, that, for C, the primary "obligation" of the contract was to carry out the development of the real estate project and accordingly administer the sums A and B had paid, and the cause of the plaintiffs´ action was C´s breach of that obligation, subsequently leading the plaintiffs to their object of action which was their claim for repayment, compensation, annulment of contract or some other claim. Hence, the Court dismissed the plaintiffs´ second alternative argument (see above) since "the

obligation in question" did not encompass C´s obligation to pay A and B derived from C´s non-fulfilled primary obligation to develop the real estate project.

Fourth, having identified the disputed "obligation in question" born by C, the Norwegian Court of Appeal interpreted the notion "place of performance" of that obligation within the meaning of the Lugano Convention Article 5 nr.1. That notion needed no further interpretation as the Court found it clear that Spain was the place of performance of the obligation born by C since, in accordance with the original agreement, C was to buy, develop and sell real estate in Spain. Subsequently, the Court concluded that the Norwegian courts lacked adjudicatory authority where upon the Court dismissed the case.

Link Directory for Comparative Law and PIL – "Der virtuelle Rechtsvergleicher"

The Chair for Civil Law, Private International Law and Comparative Law at the *Europa-Universität Viadrina Frankfurt (Oder)* has created under the direction of *Prof. Dr. Dieter Martiny* a very useful website (in German/English) which contains links on comparative law, private international law, uniform law as well as European Union institutions, case law and Community legislation. Further, it contains links to institutions, case law, legislation, universities, legal journals, lawyers, legal organisations and libraries of most Member States as well as the US, Australia, Israel, Norway, Switzerland and the Ukraine.

The link directory can be found here.

(Many thanks to Dr. Oliver L. Knöfel (Hamburg) for the tip-off.)

Swedish Supreme Court on Legal Basis for Jurisdiction

The Swedish Supreme Court (Högsta Domstolen) recently rendered a decision on the legal basis for its international adjudicatory authority in civil matters when the Council Regulation no 44/2001 of 22 December 2000 (hereinafter "the Brussels I Regulation") is inapplicable. The decision rendered 15 June 2007 with case no. Ö 494-06 can be retrieved here.

Parties, facts, contentions before the court

The plaintiff, BIG, a company domiciled in Sweden, served the defendant, Isle of Man Assurance Limited (IOMA), an insurance company domiciled in Isle of Man, with a subpoena in a Swedish court, asking that court to force IOMA to pay BIG 48 million Swedish Kroner on the basis of BIG having acquired the rights and obligations of the original policyholders´ insurance agreement with IOMA entered into in November 1991. The background for that agreement was allegedly that BIG in 1991-92 had offered goods to customers while issuing certificates promising to repay customers the sum of the purchase price 10 years after purchase. BIG contended IOMA in accordance with an insurance agreement had promised to recompense BIG for the sum equivalent to that of the sum claimed in accordance with the said certificates. The judgment of the First Instance was appealed to the Swedish Court of Second Instance (Hovrätten för Övre Norrland) whose judgment was appealed to the Swedish Supreme Court.

Ratio decidendi of the Swedish Supreme Court

First, the Swedish Supreme Court questioned whether there was legal basis for attributing adjudicatory authority to Swedish courts.

Second, the Swedish Supreme Court stated that Swedish law did not have any general rules for determining Swedish adjudicatory authority in international civil and commercial disputes, which, by contrast exist in the Brussels I Regulation and the Lugano Convention. The former is, within its scope of application, directly applicable in Sweden and is applicable in disputes involving parties domiciled in the EU, whereas the latter is adopted and implemented by incorporation as law in Sweden and is applicable in international civil and commercial matters between

persons domiciled within EFTA-States, and between persons domiciled in an EFTA-State and an EU-State.

Third, the Swedish Supreme Court asserted that in accordance with the Brussels I Regulation and the Lugano Convention, when the defendant is domiciled in a Member State or Contracting State, the plaintiff may, in accordance with the main rule of jurisdiction in Article 2, sue the defendant at the place of the defendant's domicile. By contrast, if the defendant is not domiciled in a Member State or Contracting State, the international adjudicatory authority is as a main rule to be determined by national law, including also disputes relating to insurance. Since the defendant, IOMA, was domiciled in Isle of Man where IOMA pursued its business activities, and Isle of Man neither is a Member of the EU nor is a contracting State to the Lugano Convention, it follows that the question of international adjudicatory of Swedish courts must be determined by national Swedish rules.

Fourth, the Swedish Supreme Court stated there did not exist any particular rules in Swedish national law determining international adjudicatory authority of Swedish courts. Under such circumstances, the Court reasoned, this question is to begin with determined by analogical application of the forum-rules in Chapter 10 of "Rättegångsbalken", which in this case did not support the attribution of adjudicatory authority to Swedish courts.

Fifth, BIG contended that Swedish courts were competent to adjudicate, insisting, first, that the insurer, in accordance with Brussels I Regulation (and the relevant provisions in the Lugano Convention) may be sued not only in the courts of the State where the insurer is domiciled (Article 9.1.a), but also, in case of actions brought by the policyholder, the insured or a beneficiary, in the courts for the place where the plaintiff is domiciled (Article 9.1.b), and, second, that the insurer, in accordance with Brussels I Regulation Article 10 (and the relevant provisions in the Lugano Convention) may be sued in the courts for the place where the harmful event occurred. Further, BIG contended – with reference to the Swedish Supreme Court decision in NJA 1994 p. 81, where the Court had stated that "the Lugano Convention must be seen as expressing international accepted principles on conflicts of competence between courts of different States" – that the rules of the Brussels I Regulation and the Lugano Convention should be applicable in order to attribute adjudicatory authority to Swedish courts regardless of the said regulations not being directly applicable. In answering those contentions, the

Swedish Supreme Court pointed out, first, that the Court had stated that cited phrase in a dispute between two Swedes in relation to a better right to foreign patent claims, and, second, that the cited phrase was occasioned by the circumstance that the Lugano Convention on exclusive jurisdiction in proceedings concerned with certain patent claims did not give better rights for the seeking of a patent invention, and by consequence was not an argument for the lack of Swedish adjudicatory authority. Further, the Swedish Supreme Court pointed out that the reasoning in NJA 1994 p. 81 – that Swedish courts in that case had adjudicatory authority in accordance with the main principle that defendants shall be sued in the courts of the State where they are domiciled – was not to be conceived as an expression of a general principle so that the rules of the Brussels I Regulation (and the Lugano Convention) were applicable by analogy in cases where the question of adjudicatory authority is to be determined in accordance with national law. Furthermore, in support of such lack of a general principle, the Swedish Supreme Court referred to NJA 2001 p. 800.

Sixth, having concluded that the Brussels I Regulation and the Lugano Convention neither were expressions of general principles, nor were applicable by analogy, the Swedish Supreme Court emphasized that those regulations nevertheless could serve as an important basis for the assessment of whether there should be sufficient ground to attribute adjudicatory authority to Swedish courts even in situations when these regulations were not directly applicable.

Seventh, in recognizing that the Brussels I Regulation and the Lugano Convention expressly are based on the main principle that defendants shall be sued in the courts of the State where they are domiciled, the Swedish Supreme Court stated that one consequence thereof is that exceptions to the main rule are to be interpreted restrictively, also including the rules of jurisdiction in matters of insurance. Further, the Court stated that if the Brussels I Regulation and the Lugano Convention were to serve as legal basis for adjudicatory authority in accordance with Swedish law, it had to be required that adjudicatory authority could have been attributed to Swedish courts if the Brussels I Regulation and the Lugano Convention were applicable.

Eighth, responding to BIG´s contention that Article 10 of the Brussels I Regulation attributed adjudicatory authority to Swedish courts, the Swedish Supreme Court stated, first, that liability insurance is in general considered as an insurance covering responsibility of damage in relation to a third party, and,

second, that the insurance at hand in this case could not be qualified to count as liability insurance. Consequently, the Court reasoned, the Brussels I Regulation Article 10 is inapplicable and could therefore not serve as legal basis for attributing adjudicatory authority to Swedish courts.

Ninth, responding to BIG´s contention that Article 9.1.b of the Brussels I Regulation attributed adjudicatory authority to Swedish courts, the Swedish Supreme Court stated, first, that Article 9.1.b presupposes either the policyholder, the insured or a beneficiary to serve the defendant with a subpoena and start court proceedings, which was not the circumstances of the case since the insurance agreement was not entered into between the plaintiff, BIG, and the defendant, IOMA, but was rather an insurance agreement where BIG had acquired the rights and obligations of the original policyholders. Therefore, the Swedish Supreme Court doubted that BIG could be qualified to count as "insurer" within the meaning of Article 9.1.b of the Brussels I Regulation. Having regard to the purpose of that Article, which is to protect the weaker party to the agreement (referring to point 13 of the Preamble of the Brussels I Regulation), its primary purpose is usual standard types of insurance agreements, which in the case at hand deviated there from. Against this background, the Swedish Supreme Court concluded that the Brussels I Regulation Article 9.1.b would not be a strong argument for attributing adjudicatory authority to Swedish courts (referring in parenthesis to the European Court of Justice, Judgment of 13 July 2000, Group Josi Reinsurance Company vs Universal Insurance Company).

Tenth, the Swedish Supreme Court went on to comment, that in determining how and to what extent the Brussels I Regulation and the Lugano Convention should and could be legal basis for attributing adjudicatory authority to Swedish courts in accordance with Swedish national law, the Court stated that both regulations also contain rules on recognition and enforcement of judgements, and that the rules on jurisdiction had been formed in relation to the obligations following from the rules on recognition and enforcement of judgements (and with a view to a common legal market), which especially was the case with insurance disputes.

Eleventh, having regard to the foregoing considerations, the Swedish Supreme Court concluded that without legal support in Swedish law in general, it was out of the question to attribute adjudicatory authority to Swedish courts in insurance disputes as the Brussels I Regulation, independent of the object of the insurance agreement, who the policyholder or insured is, or where the insurer is domiciled

or has his place of business. Such special circumstances, which could occasion the attribution of adjudicatory authority to Swedish courts in the present case had not been presented to the Court. Hence, the Swedish Supreme Court concluded that Swedish courts lacked adjudicatory authority.

Third Issue of 2007's Journal du Droit International

The last issue of the *Journal du Droit International* contains three articles dealing with conflict issues. They are all written in French.

The first is authored by Cecile Legros, who lectures at the Faculty of Law of Rouen. It deals with Conflicts of Norms in the Field of International Contracts for Carriage of Goods ("*Les conflits de normes en matière de contrats de transport internationaux de marchandises*"). The English abstract reads:

> *The originality of the international conventions in the field of international transport contracts comes from their comprising, in addition to rules regarding the international transport contract concerned, provisions on jurisdictional competence, arbitration, and sometimes even on recognition and enforcement. The present study aims at analysing these original provisions as well as their links with other international instruments. Could the existence of competence, enforcement and arbitration rules in different sources turn to a conflict of regulations or can such rules coexist? Such are the questions discussed in this study.*
>
> *The first part of this essay will analyse these orginal rules on competence and enforcement, in order to afterwards be able to consider their relation to European Union instruments. The second part of this article will be published in the next issue of the Journal.*

The second article with conflict implications is authored by Professor Manlio

Frigo, who teaches at the University of Milan. The article studies The Role of Rules of Conduct Between Art Law and Regulation ("*Le role des règles de déontologie entre droit de l'art et régulation du marché*"). The English abstract reads:

> *In the field of international protection of cultural property, and of rules applicable to art work trading, beside the norms contained in international agreements, in the last years one can witness a proliferation of spontaneous or quasi-spontaneous rules that may be approximately classified in the category of rules of conduct. Whether we are dealing with rules capable of creating obligations at least of contractual nature, or with rules lacking true binding nature, we can nonetheless acknowledge a meaningfull likeness with the rules having developed in the commercial domain also by means of the lex mercatoria. In both cases indeed we are faced with a group of rules of conduct created by the same subjects to which they are addressed, functionning as instruments by which professionals milieux and categories involved self-regulate themselves. This study takes into account the main codes of conduct drafted by international organisations, international institutions and national institutions, both public and private, federations and associations, in order to attempt a first survey of their influence on international commerce as instruments of art market regulation.*

Finally, Professor Yasuhiro Okuda, of Chuo University in Tokyo, offers a survey of the recent reform of international private law in Japan ("*Aspects de la réforme du droit international privé au Japon*"). The English abstract reads:

> *The Japanese statute on private international law that was well known as the Horei has been largely revised in 2006 and newly retitled as Act on the general rules on the application of laws. The new Act came into force on January 1st, 2007 and brings major changes in the field of contractual and non contractual obligations. This article deals with the comparison of these revised provisions and European laws, as well as the interpretation to be discussed before Japanese courts in the future. The text of this Act is translated in French as an appendix to this article.*

An English translation of the Act by Professor Okuda can be found here.

Articles appearing in the *Journal du droit international* cannot be downloaded.

Proskauer on International Litigation and Arbitration: A Review

Proskauer Rose LLP has just announced the release of its new E-Guide: "Proskauer on International Litigation and Arbitration: Managing, Resolving and Avoiding Cross-Border Business and Regulatory Disputes." It is a welcome compendium of information for all sorts of practitioners – both litigation-centered and transactional – and brings together a wide array of topics under the common heading of cross-border legal issues.

To cover these issues, the E-Guide is divided into three sections dedicated to "International Litigation," "International Arbitration," and "International Issues in Select Substantive Areas." The litigation section is broad and comprehensive, tackling matters that arise at the outset of a suit (e.g., securing U.S jurisdiction, venue and service outside the U.S.), and during the prosecution of a suit (e.g., choice of law, discovery, and trial), but also issues that are not commonly discussed in the traditional model if private international law texts. The chapters on government investigations and government immunity, U.S. abstention doctrine, the role of comity in U.S. courts, and anti-suit injunctions are particularly helpful to the practitioner aiming, in the authors' words, to "present clients with strategic choices." Later chapters on litigation ancillary to arbitration, and fighting to compel *or* avoid arbitration, have a similar practical focus.

The text of the E-guide is presented simply and and effectively, grazing the surface to focus more detailed research when necessary, and providing necessary details itself when appropriate. The authors believe that Proskauer on International Litigation and Arbitration is a "useful tool in . . . efforts to confront,

resolve, and even avoid the issues that arise when a commercial or regulatory dispute jumps – or should jump – national borders." A useful tool it certainly is.

It is available in its entirety here.

General Motors Corp v Royal & Sun Alliance Insurance Group

General Motors Corporation v Royal & Sun Alliance Insurance (2007) EWHC 2206 (Comm) is a rather convoluted case on whether a consent order, in the circumstances of the case, amounted to an exclusive jurisdiction agreement in favour of the English courts, and whether an application for an anti-suit injunction could therefore be granted. Here's the Lawtel summary for the details:

The applicant insurers (R) applied for an anti-suit injunction to restrain the respondent Delaware corporation (G) from pursuing proceedings in Delaware. A large number of claims for alleged asbestos related injury and environmental liability had been made against G in the United States. G contended that its liability for claims and defence costs was covered by insurance policies issued by a US insurer (U), formerly a subsidiary of R, and that R were also liable as the alter ego of U or because R had tortiously interfered with the contracts between U and G. G commenced proceedings in Michigan, where its principal place of business was, against U and R. The Michigan proceedings were then split with the coverage issues to be decided first. G also commenced English proceedings against R. By a consent order the English proceedings were stayed pending the outcome of the coverage claims in Michigan. R then withdrew its motion to dismiss the Michigan proceedings on grounds of forum non conveniens and G's claim in those proceedings was voluntarily dismissed as against R in favour of the English action. U then obtained summary disposition in the Michigan proceedings on grounds that the claims were time-barred. In the meantime R had proposed withdrawing from US business and had sold U. G then commenced proceedings against R in Delaware. R submitted that the consent order properly construed

reflected the parties' intention to confer exclusive jurisdiction on the English courts to determine the claims against R.

David Steel J. held, (1) In construing the consent order, the background was very important. The Michigan proceedings had been split with the claims against R being postponed and stayed and with R being given leave to renew its motion to dismiss on forum grounds if the stay was discharged. That had prompted G to commence the English proceedings. There were the added advantages from G's perspective that the claim would thereby proceed in the forum where execution could be readily achieved and further that the issue of limitation would not be exacerbated by any further delay in the US. By the same token it was advantageous to R both to obtain its release from the Michigan proceedings and to obtain G's participation in proceedings in the English courts. In the circumstances the consent order reflected a package whereby the parties intended to settle on proceedings in England as regards the claims against R in due course but to await the outcome of the Michigan proceedings and to be bound thereby. There was no apparent purpose in agreeing to be bound by the outcome of the Michigan proceedings in respect of coverage, together with withdrawal of the claims against R, save on the basis that the English courts should have exclusive jurisdiction. In the circumstances the consent order had the effect of constituting an exclusive jurisdiction agreement. (2) On the basis that there was an exclusive jurisdiction agreement G failed to show any strong reason for not restraining its Delaware proceedings and R was entitled to an anti-suit injunction, *Trafigura Beheer BV v Kookmin Bank Co* (2006) EWHC 1921 (Comm) applied. Application granted.

The full judgment is available to Lawtel subscribers.