German Publication on Rome I

A very interesting collection of papers held at a symposium in Bayreuth in September 2006 on the Proposal for a Regulation on the law applicable to contractual obligations ("Rome I") has recently been published: ***Ferrari/Leible*** **(eds.), Ein neues Internationales Vertragsrecht für Europa**

An English abstract has been kindly provided by the editors:

> *There is still insecurity for transborder-trade. In spite of the Brussels I-Regulation, the rules applied to a dispute within the Community cannot always be predicted. This situation is due to the fact that the national courts will determine the applicable law in different ways. They all follow the conflict rules of their forum, which can diverge. The result is that the identical claim may be submitted to a different law in Munich and in Manchester.*
>
> *To help this situation, the Member States of the EC had adopted a Convention on the law applicable to contractual obligations during a conference held in Rome in 1980. It had a considerable success in harmonizing the rules of private international law regarding contracts and contractual relationships.*
>
> *Yet the days of the so-called Rome Convention will soon be over. The Commission is planning to transform it into a regulation as part of the judicial cooperation in civil matters. It has published a "Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I)", COM (2005) 650 final, in December 2005.*
>
> *This proposal has been discussed during a conference in September 2006 in Bayreuth, Germany, which was jointly organized by Stefan Leible and Franco Ferrari. The conference united eminent specialists from Germany and other countries, as well as a representative of the Commission. Their papers, written in German, have now been published by Sellier. The collection is an indispensable tool for any lawyer working in the field of cross-border transactions.*

The collection includes the following contributions:

- *Matthias Lehmann* (University of Bayreuth) defines in his contribution key

notions regarding the scope of application, namely „contract“ and „pre-contractual relationship“ and shows that both terms – “contract” as well as “pre-contractual relationship” – have to be interpreted autonomously, which leads to the result that not all legal relationships which would be classified under German law as “pre-contractual” are exluded from the scope of the prospective Rome I Regulation.

- *Stefan Leible’s* (University of Bayreuth) contribution is dedicated to choice of law-clauses. He addresses in particular the requirements of an implicit choice of law, the question which law can be chosen as well as the rule provided for in Art.3 (5) Rome I Proposal according to which the choice of law shall be, in a case where the parties choose the law of a non-member State, without prejudice to the application of such mandatory rules of Community law as are applicable to the case.

- *Franco Ferrari* (University of Verona) attends to the law applicable in the absence of a choice of law-clause. He compares Art.4 Rome Convention with Art. 3 Rome I Proposal and examines the consequences of the new rule on particular contracts.

- *Dennis Solomon* (University of Tübingen) deals with consumer contracts and addresses in particular questions of the scope of application of Art. 5 Rome I Proposal.

- *Abbo Junker* (Zentrum für Arbeitsbeziehungen und Arbeitsrecht, Munich) addresses contracts in the field of labour law, in particular questions of the planned Regulation’s scope of application with regard to labour law, party autonomy (choice of law) as well as Art. 6 Rome I Proposal.

- *Karsten Thorn* (Bucerius Law School, Hamburg) tackles the notoriously known problem of mandatory rules. He turns in particular to the question how Art. 8 Rome I Proposal can be classified within the system of Rome I as well as to Art. 8 (3) Rome I Proposal, which is very controversial among the Member States.

- *Ulrich Spellenberg* (University of Bayreuth) attends to contracts concluded by agents. He examines the internal relationship (between the principal and the agent) as well as the external relationship (between the principal and third parties). Further, also questions of form as well as the

agent's liability for breach of warranty of authority are dealt with.

- *Eva-Maria Kieninger's* (University of Würzburg) and *Harry C. Sigman's* (Los Angeles, member of the Law Revision Committee on UCC Article 9 and member of the US delegation on the evolution of UNCITRAL recommendations on security interests) contribution is dedicated to assigment and statuatory subrogation. The first part, dealing with voluntary assignment and contractual subrogation (Art. 13) deals with Art. 13 (3) Rome I Proposal, which gives now an answer to the (so far) contentious problem which law is applicable to the question whether the assignment or subrogation may be relied on against a third party. Furthermore, it is dealt with questions such as the material scope of application of Art. 13. In the second part, the rule of Art. 14 dealing (only) with statutory subrogation is discussed, *inter alia* in view of Rome II.

- *Ulrich Magnus* (University of Hamburg) writes on multiple liability and set-off. With regard to statutory offsetting, regulated in Art. 16 Rome I Proposal, the legal situation under the Rome Convention – which does not contain a separate rule on the law applicable with regard to statutory offsetting – as well as the ECJ's case law and the scope of application of Art. 16 Rome I Proposal are illustrated. The second part deals with Art. 15 Rome I Proposal (multiple liability), in particular with questions of the provision's scope.

- *Ansgar Staudinger* (University of Bielefeld) attends to insurance contracts by describing in a first step the system of the Rome I Proposal with regard to insurance contracts which is criticised in view of the coexistence of two regimes: Rome I on the one side and directives on the other side. Thus, in a second step an alternative approach is developed according to which only the choice of law rules of the prospective Rome I Regulation should be applied.

As the contents show, the book includes contributions on the most important and most discussed issues with regard to Rome I and can therefore be highly recommended.

Further information can be found on the publisher's website, where it can also be purchased.

See also the report on the conference by *Robert Freitag* (University of Hamburg) which has been published in the latest issue of the Praxis des Internationalen Privat- und Verfahrensrecht (IPRax 2007, 269).

Norwegian Court of Appeals on the Lugano Convention Article 8 nr.2

The Norwegian Court of Appeals (Borgarting lagmannsrett) recently handed down a decision on the Lugano Convention Art 8 pursuant to the notion "insurer". The decision (Borgarting lagmannsrett (kjennelse)) is dated 2007-02-13, was published in LB-2007-8743, and is retrievable from here. Following is a brief note on the case.

Parties, facts, contentions, court instances and conclusions

The plaintiffs, Hege Skarprud and Kristine Larneng, both domiciled in Norway, served the defendants, the insurance agent Euro Accident Insurance AB, domiciled in Sweden, and the general insurance agent Pinnacle Forsäkring AB, domiciled in Sweden, with a subpoena in a Norwegian court (Oslo tingrett).

The plaintiffs' object of action was to ask the court to give a judgment on the defendants' obligation to pay compensation in accordance with an insurance against accidents, which the sports club "Bekkelaget", as policy holder, had made for its members, including the plaintiffs. Bekkelaget had entered into the insurance agreement with the insurer Pinnacle Insurance plc, domiciled in England, but the agreement was entered into through the insurance agent Euro Accident Insurance AB, whereas Pinnacle Forsäkring AB, a subsidiary of Pinnacle Insurance plc., had acted in Sweden as the general insurance agent for the insurer Pinnacle Insurance plc.

The plaintiffs asserted both the agent and general agent, first, acted under the authorization of the insurer, and, second, outward represented the insurer towards co-contractors, and, third, could establish legal obligations, rights and

responsibilities on behalf of the insurer. Therefore, both the agent and general agent must be identified with the insurer. With this in view, the plaintiffs further maintained that since the objective of the Lugano Convention Articles 7-12 is to protect the policy-holder, who is deemed as the weaker party, against the insurer, who is deemed as the stronger party, it must be possible, first, for everyone with an insurance claim to sue the insurer where the policy-holder is domiciled in accordance with Art 8 nr.2 of the Convention, and, second, to sue the agent and general agent, both of which can receive the subpoena and be sued on behalf of the insurer.

The defendants asserted the court must reject to hear the case and subsequently dismiss the case from becoming a member of the Norwegian adjudicatory law system based on lack of Norwegian adjudicatory authority, since neither the agent nor the general agent can be qualified to count as the "insurer" in accordance with the notion of "insurer" in the Lugano Convention Art 8. The notion of "insurer" cannot be given so wide an interpretation as also to encompass the agent and general agent of the insurer.

The decisions of the court of first instance (Oslo tingrett), in its decision on 13 November 2006 (TOSLO-2006-142186) (case number 06-142186TVI-OTIR/09) excluded adjudicatory authority to Norwegian courts. The Norwegian Court of Appeal agreed with the lower instances on lack of adjudicatory authority for Norwegian courts, and subsequently rejected to hear the case.

Legal basis

The relevant provision for determining the adjudicatory authority of Norwegian Court was the Lugano Convention Art 8. That provision reads:

> *An insurer domiciled in a Contracting State may be sued:*
> *2. in another Contracting State, in the courts for the place where the policy-holder is domiciled…*

In general, the legal basis for conferring, delimiting (and thus both attribute and exclude adjudicatory authority to Norwegian courts) is regulated by chapter 2 of the Norwegian Civil Procedural Law of 13 August 1915 nr. 6 (Lov om rettergangsmaaten for tvistemaal) where § 36a decides that the Norwegian Civil Procedural Law Chapter 2 is limited by "agreements with a foreign state". Such

an agreement is the Lugano Convention, which was ratified by Norway on 2 February 1993 and adopted and implemented by incorporation as law of 8 January 1993 nr. 21 (Luganoloven). The law entered into force on 1 May 1993 and regulates international civil and commercial matters between persons domiciled within EFTA-States, and between persons domiciled in an EFTA-State and an EU-State.

The decision of the Norwegian Court of Appeals

First, the Court understood the Lugano Convention Art 8 so as the insurer can be sued in the courts where the policy-holder is domiciled. Second, the Court, referring to the author Rognlien, p. 164, found no legal basis for interpreting the notion of "insurer" so wide as to encompass agents and general agents, and further that the Lugano Convention Articles 7-12 contain an exhaustive set of rules of adjudicatory jurisdiction as already stated in the judgment of the Norwegian Court of Appeals (22 August 1996 (LB-1995-2372)). Second, the Court gave emphasis to the plaintiffs´ interests, which the Lugano Convention Art 8 was meant to protect, were well attended to since the plaintiffs in the courts of their domicile, in accordance with the Lugano Convention Art 8, could sue the insurer Pinnacle Insurance plc. Hence, the Court lacked adjudicatory authority and dismissed the case.

ECJ Judgment on Art. 5 (1) (b) Brussels I Regulation – "Color Drack"

Today, the European Court of Justice pronounced its judgment in Case C-386/05 (*Color Drack GmbH v LEXX International Vertriebs GmbH*).

According to the Court, the first indent of Art. 5 (1) (b) Brussels I Regulation is applicable in cases where there are several places of delivery within a *single* Member State.

I.) Background of the Case

The case concerns a reference for a preliminary ruling from the Austrian Supreme Court (*Oberste Gerichtshof*) and relates for the first time to the interpretation of Art. 5 (1) Brussels Regulation.

The Court had to deal with the question whether the first indent of Art. 5 (1) (b) Brussels I Regulation, which provides that in disputes relating to international contracts for the sale of goods the plaintiff may sue the defendant in the court of the place where, under the contract, the goods were delivered or should have been delivered, is applicable – and if yes, in which matter – if the action relates to goods delivered in *several* places in a Member State.

The background of the case is as follows: A company the registered office of which is in Austria (*Color Drack GmbH*) purchased sunglasses from a company (*LEXX International Vertriebs GmbH*) the registered office of which is in Germany. *Color Drack GmbH* paid the sunglasses in full, but had *LEXX International Vertriebs GmbH* to deliver them directly to its customers in different places in Austria. Subsequently, *Color Drack GmbH* returned the unsold sunglasses to *LEXX International Vertriebs GmbH* and asked to repay the respective sum. Since *LEXX International Vertriebs GmbH* did not pay, *Color Drack GmbH* brought a payment action against *LEXX International Vertriebs GmbH* at the District Court in St. Johann (Austria), in the jurisdiction of which its registered office is situated.

While the District Court ruled that it had jurisdiction under Art. 5 (1) (b) Brussels I, *LEXX International Vertriebs GmbH* appealed and the Regional Court Salzburg set aside the judgment due to the fact that the District Court had lacked territorial jurisdiction. The Regional Court argued, Art. 5 (1) (b) Brussels I Regulation provided for a single place of connection for all claims arising from a sales contract. However, the autonomous determination of such a place was not possible where – as in the present case – the goods had been delivered to several customers located in *different* places in Austria. Consequently, jurisdiction could not be based on Art. 5 (1) (b) Brussels I Regulation, but rather – pursuant to Art. 5 (1) (c) – on Art. 5 (1) (a) Brussels I Regulation. According to this provision, *Color Drack GmbH* should have brought the proceedings in Nuremberg (Germany) – and not in Austria.

The Austrian Supreme Court to which *Color Drack GmbH* appealed, decided to stay the proceedings and to submit the following question to the European Court of Justice for a preliminary ruling:

> ***Is Article 5 (1) (b) of Council Regulation (EC) No 44/2001 […] to be interpreted as meaning that a seller of goods domiciled in one Member State who, as agreed, has delivered the goods to the purchaser, domiciled in another Member State, at various places within that other Member State, can be sued by the purchaser regarding a claim under the contract relating to all the (part) deliveries – if need be, at the plaintiff's choice – before the court of one of those places (of performance)?***

II.) Opinion of Advocate General Bot

On February 15th, the Advocate General delivered his Opinion and held:

> ***Where there are several places of delivery, 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 is applicable if, as agreed between the parties, the goods have been delivered in different places in a single Member State.***
>
> ***If the action relates to all the deliveries, it is for the law of the Member State in which the goods have been delivered to determine whether the plaintiff may sue the defendant in the court of the place of delivery of his choice or only in the court of one of those places. If the law of that State does not lay down rules on special jurisdiction, the plaintiff may sue the defendant in the court of the place of delivery of his choice.***

In favour of the applicability of Art. 5 (1) (b) Brussels I Regulation where there are several places of delivery within a single Member State, the Advocate General referred in particular to the Regulation's objective to ensure a high degree of predictability. Since the aim is to prevent concurrent proceedings being instituted in *several* Member States and irreconcilable judgments being given in two of those States, the objective pursued by the Regulation is – in the Advocate General's point of view – not jeopardised if there are several places of deliveries

within the same Member State: "Even supposing that several courts of the Member State concerned may have jurisdiction because of the plurality of places of delivery, it remains a fact that all of these courts are in the same Member State. There is therefore no risk that irrconcilable judgments may be given by courts in different Member States." (para. 101)

III.) The Court's Judgment

The Court (Fourth Chamber) followed in principle the Advocate General's Opinion by holding that:

> ***The first 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 must be interpreted as applying where there are several places of delivery within a single Member State. In such a case, the court having jurisdiction to hear all the actions based on the contract for the sale of goods is that in the area of the principal place of delivery, which must be determined on the basis of economic criteria. In the absence of determining factors for establishing the principal place of delivery, the plaintiff may sue the defendant in the court for the place of delivery of its choice.***

The Court's main arguments are as follows:

First of all, the Court observes that the question referred to the Court cannot be answered by a mere reference to the wording of Art. 5 (1) (b) Brussels I Regulation and that therefore the objectives of the Regulation have to be taken into consideration. (paras. 17, 18)

Thus, the Court examines whether the application of Art. 5 (1) (b) Brussels I where there are several places of delivery within a single Member State complies with the Regulation's objectives of predictability and proximity. This is answered in the affirmative by the Court. With regard to the objective of predictability it is held that the parties of the contract can easily foresee before the courts of which Member State they can bring their dispute. (para. 33) It is, according to the Court, not necessary that the defendant can foresee the particular court of the respective Member State. (para. 44) Rather, the defendant is regarded as sufficiently protected when the Member State before the courts of which he can

be sued is foreseeable. With regard to the objective of proximity, the Court holds that also this objective is met where there are several places of delivery within a *single* Member State since "it will in any event be the courts of that Member State which will have jurisdiction to hear the case". (para. 35) Consequently, the Court answers the first part of the question in the affirmative by holding that "the first indent of Article 5 (1) (b) of Regulation No 44/2201 is applicable where there are several places of delivery within a single Member State." (para. 36)

With regard to the second part of the question, namely the question whether the plaintiff may sue the defendant in the court of the place of delivery of his choice, the Court first points out – as the Advocate General did – that *one* court must have jurisdiction to hear all claims arising out of the contract. (para. 38) With regard to the question *which* court has jurisdiction in case of several places of delivery within one Member State, the Court emphasises the significance of a close linking factor between the contract and the court and holds that "place of delivery" has to be understood "as the place with the closest linking factor between the contract and the court". As a general rule, this "point of closest linking factor" will be – according to the Court – the place of the principal delivery, which shall be determined on the basis of economic criteria. (para. 40) "To that effect", the Court holds, "it is for the national court seised to determine whether it has jurisdiction in the light of the evidence sumitted to it." (para. 41) Only in cases where it is not possible to determine the principal place of delivery, the plaintiff may sue the defendant in the court of the place of delivery of his choice. (para. 42)

Thus, by establishing a criterion for determining "place of delivery" in cases where there are several places of delivery, the Court's reasoning differs from the Advocate General's Opinion who did not establish criteria for the determination of the competent court, but held that this was a matter to be determined according to national procedural law. However, the Court and the Advocate General agree insofar as the plaintiff may sue the defendant in the court of the place of delivery of its choice in the absence of a determinable court.

See also our older post on the Advocate General's Opinion which can be found here.

Maintenance Obligations: EP JURI Committee's Draft Opinion on the Commission's Proposal

On 11 April 2007 **Diana Wallis, in her capacity of draftswoman** appointed by the European Parliament's Committee on Legal Affairs (JURI) **for the maintenance obligations regulation**, has released a Draft opinion to be discussed at the committee's meeting of 2-3 May 2007.

Pursuant to Rule 47 of the European Parliament's Rules of Procedure (provisional version – January 2007), the maintenance regulation is subject to the **enhanced cooperation between committees**, since its subject matter "falls almost equally within the competence of two committees" (as determined in Annex VI to the Rules of Procedure), and it is under the primary responsibility of the Committee on Civil Liberties, Justice and Home Affairs (LIBE).

The amendments proposed by Mrs Wallis in her Draft opinion are thus intended to be incorporated, after adoption in the JURI Committee, in the Draft Report to be prepared by the rapporteur in the LIBE Committee (Genowefa Grabowska): according to Rule 47,

> *the committee responsible shall accept without a vote amendments from the committee asked for an opinion where they concern matters which the chairman of the committee responsible considers, on the basis of Annex VI, after consulting the chairman of the committee asked for an opinion, to fall under the competence of the committee asked for an opinion, and which do not contradict other elements of the report.*

Mrs Wallis has presented 37 amendments to the original Commission's proposal. Some of them will be addressed in the following, and deal with the legal basis, jurisdiction and applicable law: as stated by the draftswoman in the "short justification" that opens the Draft opinion,

> *The solutions she proposes are pragmatic and intended to be acceptable to the broadest range of Member States. They may offend purists, but in her view the interests of litigants in having a speedy resolution of a problem which causes real hardship, also and in particular to children, must outweigh all other considerations, having due regard to the needs of maintenance debtors and the rights of the defence.*

Mrs Wallis made a similar statement commenting the EP Second Reading on Rome II (see our post on the debate in the Parliament, where she called on the other institutions to bring "the subject of private international law out of the dusty cupboards in justice ministries and expert committees into the glare of public, political, transparent debate"), and some of the proposed amendments to the maintenance regulation are likely to raise a controversial debate vis-à-vis the Council's and Commission's solutions, especially if the codecision procedure will be finally established for the adoption of the act, as envisaged by the Parliament itself and the Commission (see below).

Legal basis

At present, the adoption of the maintenance regulation is subject to an unanimous vote in the Council, after the consultation of the European Parliament: the codecision procedure, ordinarily set out by the second indent of art. 67(5) of the Treaty for all measures provided for in art. 65, is in fact not applicable to measures involving "aspects relating to family law".

The situation is deemed unsatisfactory by the Commission itself, that in December 2005 presented a Communication to the Council calling on it to transfer maintenance obligations from the unanimity to the codecision procedure, using the "passerelle" provided for by art. 67(2) TEC. The Commission stressed

> *the hybrid nature of the concept of maintenance obligation – a family matter in origin but a pecuniary issue in its implementation, like any other claim.*

The same view is obviously shared by the Parliament (see the letter from the JURI Committee to the LIBE Committee of 14 February 2007) and reflected in the amendments of the legal basis of the proposed regulation (see amendments 1, 2 and 3 of the JURI Draft opinion).

Jurisdiction (artt. 3-11 of the Commission's Proposal)

The draftswoman's main concern is to ensure that any prorogation of jurisdiction has been freely and consciously agreed by the parties, being aware of its legal consequences, and that an *ex ante* choice of forum "is still relevant having regard to the situation of the parties at the time when the proceedings take place" (see amendment 6 to recital 11): it is thus proposed to confer to the court seised a discretionary power to assess the jurisdiction agreement, adding a new paragraph 2a to art. 4 ("Prorogation of jurisdiction"), according to which

> *The court seised must be satisfied that any prorogation of jurisdiction has been freely agreed after obtaining independent legal advice and that it takes account of the situation of the parties at the time of the proceedings (amendment 22).*

As regards the form of the choice-of-forum agreement, communication by electronic means is not deemed equivalent to "writing", and thus excluded from art. 4(2) (see amendment 21).

Applicable law (artt. 12-21 of the Commission's Proposal)

A number of important modifications are envisaged by the draftswoman in the provisions concerning the applicable law. The law of the country of the creditor's habitual residence is maintained as basic rule, but an almost systematic application of the law of the forum is advocated by art. 13(2) and (3), as resulting from the amendments. Moreover, the exception clause set out in art. 13(3) ("General rules") of the Commission's Proposal is given a wider scope, since it is possible to apply the law of another country with which the maintenance obligation is closely connected (such as the law of the country of the common nationality of the parties) also when "it would be inequitable or inappropriate" to apply the law of the country of the creditor's habitual residence or the *lex fori*.

According to the revised text of art. 13 (amendment 25: French and Italian versions differ from the English one, the latter showing some mistakes in the translation),

> *1. Maintenance obligations shall be governed by the law of the country in whose territory the creditor is habitually resident.*
>
> *2. The law of the forum shall apply:*

(a) where it is the law of the country of the creditor's habitual residence, or

(b) where the creditor is unable to obtain maintenance from the debtor by virtue of the law of the country of the creditor's habitual residence, or

(c) unless the creditor requests otherwise and the court is satisfied that he or she has obtained independent legal advice on the question, where it is the law of the country of the debtor's habitual residence.

3. Notwithstanding paragraph 1, the law of the forum may be applied, even where it is not the law of the country of the creditor's habitual residence, where it allows maintenance disputes to be equitably resolved in a simpler, faster and less expensive manner and there is no evidence of forum shopping.

4. Alternatively, where the law of the country of the creditor's habitual residence or the law of the forum does not enable the creditor to obtain maintenance from the debtor or where it would be inequitable or inappropriate to apply that law, the maintenance obligations shall be governed by the law of another country with which the maintenance obligation is closely connected, in particular, but not exclusively, that of the country of the common nationality of the creditor and the debtor.

The provision in art. 13(2)(a) seems not necessary; under the conditions set out in art. 13(2)(c) for the application of the law of the forum (as the law of the country of the debtor's habitual residence) it is not clear whether the creditor has a burden to expressly invoke the application of the law of the country of his habitual residence.

The preference expressed by the draftswoman for the *lex fori* is stressed by the conditions set out in art. 13(3) for this law to be discretionary applied by the court, and is clearly stated by Mrs Wallis in the justification accompanying amendment 7 to recital 14:

The Regulation's aim of enabling maintenance creditors easily to obtain a decision which will be automatically enforceable in another Member State would be frustrated if a solution were to be adopted which obliged courts to apply foreign law where the dispute could be resolved simpler, faster and more economically by applying the law of the forum.

Application of foreign law tends to prolong proceedings and lead to additional costs being incurred in procedures which often involve an element of urgency and in which litigants do not necessarily have deep pockets. Moreover, in some cases application of the law of the creditor's country of habitual residence could give rise to an undesirable result, as in the case where the creditor seeks a maintenance order in the country of which she is a national having sought refuge there after leaving the country in which she had been habitually resident with her husband who is of the same nationality, who is still resident there.

On these grounds, this amendment provides for the discretionary application of the law of the forum, whilst safeguarding against forum shopping.

As regards the choice of the applicable law by the parties, also in respect of a choice-of-law agreement a discretionary power is given to the court seised to assess whether it "has been freely agreed after obtaining independent legal advice" (see amendment 26, inserting a new para. 1a to art. 14).

Finally, the draftswoman proposes the deletion of art. 15, on the non-existence of a maintenance obligation that the debtor may oppose to the creditor's claim under a law different than the applicable one (see amendment 27: this provision is deemed "to conflict with the principle of mutual recognition and to be discriminatory").

Public policy

An important amendment is proposed as regards the *ordre public* clause provided in art. 20: in the original Commission's proposal, public policy could not operate vis-à-vis the law of a Member State. The draftswoman advocates the deletion of this intracommunity exemption, thus allowing the application of the law of a Member State to be refused on such a ground (see amendment 29).

Alternative means of enforcement

Special attention is devoted by the draftswoman to issues relating to enforcement of maintenance decisions:

The draftswoman's chief concern in preparing these amendments to the proposal for a regulation has been to ensure that decisions relating to maintenance obligations, in the broadest sense of the expression, in cross-

> *border cases are recognised and enforced across the Union in the quickest and most effective way at the lowest possible cost. […]*
>
> *While suggesting improvements to the provisions of the proposed regulation, the rapporteur takes the opportunity of calling on the Member States to consider novel forms of enforcement of maintenance decisions which have been found to be highly effective in non-EU jurisdictions.*

An example of these "novel and effective means of enforcement" is given in the justification to amendment 11 (recital 19): confiscation of driving licences.

On the other hand, a new art. 35a is proposed (see amendment 34), which allows courts to "use the full panoply of measures available to them under their national law", not being limited to the orders listed in the regulation:

> *Article 35a – Other enforcement orders*
>
> *The court seised may order all such other measures of enforcement as are provided for in its national law which it considers appropriate.*

The maintenance regulation is scheduled in the plenary session of the European Parliament on 3 September 2007 (see the OEIL page on the status of the procedure); the JHA Council agreed on some political guidelines on the matter in its recent session in Luxembourg on 19 and 20 April 2007 (see our posts here and here).

Impact of Parallel Proceedings on British Columbia Litigation

In *Lloyd's Underwriters v. Cominco Ltd.* (available here) the British Columbia Court of Appeal refused to stay local proceedings even though parallel proceedings were underway in Washington State. Counsel for the moving party

was urging the court to treat the fact of parallel proceedings as virtually conclusive on the issue of *forum non conveniens*. But the court was having none of that, correctly noting that nothing in the leading cases required such a high degree of deference to the forum where litigation was first started. Parallel proceedings were simply one of the factors to be weighed in the stay analysis.

The moving party had argued that it would be violative of comity for the court not to defer to the earlier proceedings in Washington State. The court correctly resisted this argument, noting that even with regard for comity between countries it remained open for jurisdictions to differ as to the most appropriate forum for the litigation and thus to each allow their own local action to proceed.

The decision is also interesting for its treatment of the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28. This statute codifies much of what was formerly left to the common law in British Columbia, and it does make some substantive changes. There was thus some question as to whether the new statutory provisions had changed the analysis on an application for a stay of proceedings. The court concluded that "with respect to *forum conveniens*, … the Act seems intended to codify, rather than effect substantive changes to, the previous law". The court went on to apply the orthodox principles from *Spiliada* and *Amchem* in a reasonably straightforward manner.

Court Limits Extraterritoriality of Federal Patent Law

In a case previously blogged on this site, the Supreme Court today decided to limit the extaterritorial application of the federal patent laws. The 7-1 decision authored by Justice Ginsburg started off by noting the:

> *"general rule under United States patent law that no infringement occurs when a patented product is made and sold in another country. [But,] [t]here is an exception. Section 271(f) of the Patent Act, adopted in 1984, provides that infringement does occur when one "supplies . . . from the United States," for*

> *"combination" abroad, a patented invention's "components." 35 U.S.C. 271(f)(1). This case concerns the applicability of section 271(f) to computer software first sent from the United States to a foreign manufacturer on a master disk, or by electronic transmission, then copied by the foreign recipient for installation on computers made and sold abroad."*

While this question seems to be one of interest only to patent law gurus and those extrapolating the narrow text of section 271(f), the Court's decision rests on more far-reaching grounds. Justice Ginsburg noted quite frankly that:

> *"Plausible arguments can be made for and against extending section 271(f) to the conduct charged in this case ans infringing AT&T's patent, [but] recognizing that section 271(f) is an exception to the general rule that our patent law does not apply extraterritorially, we resist giving the language which congress cast as section 271(f) an expansive interpretation."*

The decision cited to the Court's 2004 opinion limiting the extraterritorial application of the Sherman Act to foreign claims (see F. Hoffmann-LaRoche v. Empagran S.A., 542 U.S. 155 (2004)), and reaffirmed its base premise that "foreign conduct is generally the domain of foreign law." Thus, if the domestic patent-holder wishes to prevent copying in foreign countries, its remedy today (at least until Congress decides otherwise), "lies in obtaining and enforcing foreign patents."

Today's decision can be found here, and the oral argument transcript can be found here. Lots of links to other discussions of the case can be found here.

Short Article on Jurisdiction and the Internet

Prashanti Ravindra has written a short article in the April 2007 *Australian Internet Law Bulletin* (vol 10 no 1, April 2007) on recent case law (French and US) regarding jurisdiction and the internet. The

introduction reads, in part:

> *This article examines three recent cases to determine whether there are any emerging trends or principles regarding when jurisdiction can be exercised in a cross-border online dispute. It finds that the cases suggest that courts are still struggling to come to terms with the practical effect of jurisdictional issues that arise from online transactions and to develop remedies that are effective across borders.*

The article is available online to subscribers.

First Issue of 2007's Journal du Droit International

The last issue of the French *Journal du Droit International* was released a few weeks ago. It contains two articles, written in French, which deal with conflict issues.

The first is authored by Belgian Professor Nicolas Angelet and Belgian Attorney Alexandra Weerts. Its title is "*Les immunités des organisations internationales face à l'article 6 de la Convention européenne des droits de l'homme – La jurisprudence strasbourgeoise et sa prise en compte par les juridictions nationales*" (International Organisations Immunities and Article 6 of the European Convention on Human Rights – Strasbourg Case Law and How it is Taken into Account by National Courts).

The English abstract reads:

> *Many authors, as well as a number of domestic court decisions, consider that the jurisdictional immunity of international organisations is compatible with article 6 ECHR upon the condition that an alternative means, or even an alternative remedy before a fair and impartial tribunal within the meaning of article 6, is available to individuals to protect their rights. When this requirement is not met, immunity is sometimes denied in favour of the right of*

access to court. Yet, in its Waite and Kennedy and Beer and Regan judgements of 18 February 1999 the European Court did not refer to a remedy but rather to a reasonable alternative means, and described it as a material factor but not as a prerequisite for the observance of article 6. The subsequent case law of the European Court confirms this approach and identifies a series of other criteria relevant for the aprpeciation of the proportionality of a restriction imposed on the right to access to court. As for the consequences of a possible conflict, the incompatibility between an international immunity and the right to access to court does not allow to set immunity aside. Rather, domestic courts face a conflict between contradictory international obligations, unsolved by international law. Insofar as the courts cannot require the executive branch to make a political choice of which obligation to comply with to the detriment of the other, litigants may seek to bring the forum State in the proceedings to make it face responsability for the conflict. Above all, domestic courts should seek to prevent the conflict between international obligations, by adopting the balanced approach of the European Court, rather than turning the existence of an alternative remedy into a prerequisite for the observance of article 6.

The second article is authored by Etienne Cornut, who lectures in the French University of New Caledonia. Its title is "*Forum shopping et abus du choix du for en droit international privé*" (Forum Shopping and Abuse of the Choice of Venue in International Private Law).

The English abstract reads:

In spite of the harmonization of the rules dealing with conflicts of laws and conflicts of jurisdictions, especially at EU level, forum shopping endures, and this convergence of standards is not a remedy by itself, but can only alleviate the problem without eradicating it. The fight against forum shopping malus can only be considered on a case by case basis, but to that end the only exceptions are not sufficient. International private law has developed several instruments to close these loopholes, yet they all focus on the concept of fraud: fraud to the law, fraud to the sentence, fraud to the jurisdiction. In international private law, the sanction by exception of evasion of law arises when the creation or the alteration of an international situation, though objectively actual, does not fit the real intention of the subject, when it is not subjectively actual. Then, when the subject can enjoy the option of international competency, most often he is

already in an existing international situation. He has not devised or altered the situation which enables him to exert a choice. Hence, the theory of fraud cannot apply, since it does not make it possible to approach the situations resulting from a pre-existing international situation. Nevertheless, exercising an option of competence, though legal and non fraudulent, can be reprimanded. In that case, the exception of abuse of rights, despite its traditional antinomy with private international private law, should lead to questioning an abusive choice of jurisdiction.

To my knowledge, these articles cannot be downloaded.

ICLQ Articles on Harding v Wealands and the Law of Domicile

There are two short articles in the private international law current developments section of the new issue of the *International & Comaparative Law Quarterly (2007, Volume 56, Number 2).*

Charles Dougherty and Lucy Wyles (2 Temple Gardens) have written a casenote on the decision of the House of Lords in ***Harding v Wealands*** [2006] UKHL 32 (see all of our relevant posts here.) Here's the introduction:

In Harding v Wealands1 the House of Lords had to consider the vexed question of where the dividing line between substance and procedure should lie in private international law. The specific issue before their Lordships was whether matters relating to the assessment of damages in tort should be treated as matters of substance, and thus be for the applicable law, or whether they should be treated as matters of procedure, and therefore be left for the law of the forum. The decision of the House of Lords has resolved this difficult question in favour of a procedural characterization. The result of the House of Lords decision is that in all such cases, regardless of the foreign law element, the assessment of damages will be conducted in accordance with English

(Northern Irish or Scottish) law, as the law of the forum. Nonetheless, some reservations do exist as to the justification for the decision and as to how likely it is to remain the last word on the subject.

In addition, the decision of the Court of Appeal remains of some importance in relation to the determination of the law applicable to a foreign tort. In the light of their decision on the difference between substance and procedure, the House of Lords found it unnecessary to interfere with the decision of the Court of Appeal in this regard.

There is also a piece on **Regression and Reform in the Law of Domicile** by Peter McEleavy. Here's a taster:

In the United Kingdom the law pertaining to domicile has the rather dubious distinction that, although subjected to concerted criticism from commentators and law reformers alike for over half a century, it has largely remained unchanged. Common law jurisdictions around the world have succeeded in passing legislation which, to varying degrees, has modernized the concept, yet in Britain a series of initiatives have either failed to complete the legislative process or not even made it to Parliament.3 The reason in each instance was less the substance of the proposals, but rather political expediency in the face of pressure from the overseas business community resident in the United Kingdom, who feared extended fiscal liability if the connecting factors were attributed with a less legalistic interpretation.

The consequence is that 19th and early 20th century values continue to apply, but they do so in a world where, inter alia, individual mobility is taken for granted, migration has reached unprecedented levels6 and there is a greater awareness of and respect for other legal traditions. Trends in case law appear to suggest new approaches have emerged but have failed to take hold. To a certain degree this is not surprising as domicile, like habitual residence, applies in a variety of distinctive areas and is therefore prey to contrasting policy considerations,10 with result selection long regarded as playing an implicit role in many cases.11 However, in contrast to habitual residence domicile faces the added burden, at least formally, of remaining a unitary concept with a single meaning whatever the area of law in which it might apply.

Links to both pieces, and the rest of the issue, can be found on the ICLQ homepage (for those with online access.)

Jersey's New Private International Law Rules for Trusts

Professor Jonathan Harris has written an article in the *Jersey Law Review* entitled, "**Jersey's new private international law rules for trusts – a retrograde step?**" (Jersey L.R. 2007, 11(1), 9-19). Here's the abstract:

> *Discusses amendments made by the Trusts (Amendment No.4) (Jersey) Law 2006 to the Trusts (Jersey) Law 1984. Criticises difficulties with the amendments on the scope of application of matters which are to be determined exclusively by the law of Jersey and the non recognition of foreign judgments.*

In the same issue, Daniel Hochberg defends the amendments with a rejoinder to Professor Harris' article: "**Jersey's new private international law rules for trusts – a response**." (Jersey L.R. 2007, 11(1), 20-27).

Access to the *Jersey L.R.* is for those with a subscription.