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.

Study on the Application of

Brussels I in the Member States Completed

The Study on the Application of the Brussels I Regulation in the Member States which has been carried out by the Institute for Private International Law at the University of Heidelberg under the direction of *Prof. Dr. Burkhard Hess, Prof. Dr. Thomas Pfeiffer* (both Heidelberg) and *Prof. Dr. Peter Schlosser* (Munich) on behalf of the European Commission has been completed now.

The aim of the study has been to prepare a report of the Commission according to Art. 73 Brussels I. For this purpose, for the first time since the entry into force of the Brussels I Regulation, statistical, empirical and legal data on the application of the Regulation has been collected in all former 25 Member States (with the exception of Denmark). The comprehensive survey has been executed with the assistance of national reporters from the respective Member States by means of numerous personal interviews with lawyers, judges and other legal practitioners, written consultations as well as an extensive evaluation of case law on the basis of questionnaires elaborated by the general reporters.

Based on the information submitted by the national reporters, a report has been drawn up by the general reporters which gives an overview of the experiences made with the Regulation in the Member States, examines problems and contains several suggestions for future amendments of the Regulation.

This general report has now been published on the website of the European Commission. The individual national reports will be publicly available in the near future as well.

See regarding the study also our previous post which can be found here.

Swedish Supreme Court on Jurisdiction and Trademark Infringements

The Swedish Supreme Court (Högsta Domstolen) recently rendered a decision on rejection to refer a case to the ECJ for a preliminary ruling on the proper interpretation of Article 5.3 of the Council Regulation no 44/2001 of 22 December 2000 (hereinafter "the Brussels I Regulation"). The decision rendered 27 April 2007 with case no. Ö 210-07 can be retrieved here.

Parties, facts, conclusions, legal basis for appeal, contentions before the court

The plaintiff, Aredal Foam Systems HB, a company domiciled in Sweden, served the defendant, MSR Dosiertechnik GmbH, a company domiciled in Germany, with a subpoena in a Swedish court of First Instance (tingsrätten), asking that Court to force the defendant to discontinue infringing the plaintiff´s trademark "FireDos" in Sweden, Spain, Great Britain, the Benelux-countries and France, where the plaintiff had the exclusive right to that trademark, and furthermore, to recompense the economic loss occurred in those States. The judgment of the First Instance was appealed to the Swedish Court of Second Instance (Svea Hovrätt), who attributed adjudicatory authority to Swedish courts, but only to the extent the defendant had infringed the plaintiff´s Swedish trademark. The judgement of the Court of Second Instance prompted the plaintiff to appeal to the Swedish Supreme Court (Högsta Domstolen). Before the Swedish Supreme Court, the plaintiff´s object of action was to ask that Court, first, to refer the case to a new trial before the Court of First Instance based on the contention that Swedish courts were competent to adjudicate claims of the plaintiff relating to infringement and economic loss in all the said States, second, to refer the case to the ECJ for a preliminary ruling on the proper interpretation of Article 5.3 of the Brussels I Regulation, and, third, to render a decision that the defendant pay the plaintiff´s procedural costs before the Swedish Supreme Court. This case note will solely venture into the question of adjudicatory authority.

Ratio decidendi of the Swedish Supreme Court

First, the Swedish Supreme Court identified the legal basis for conferring, delimiting and thus both attribute and exclude adjudicatory authority to Swedish courts. Since the defendant was domiciled in an EU State, the legal basis for determining the attribution of jurisdiction to Swedish courts was the Brussels I Regulation.

Second, the Swedish Supreme Court identified the relevant provisions for the case, which were the main rule of jurisdiction in Article 2 and the exception to the main rule contained in Article 5.3 of the Brussels I Regulation.

Third, the Swedish Supreme Court identified the legal question in issue. With reference to the wording of the Brussels I Regulation Article 5.3, the Swedish Supreme Court stated that the plaintiff can sue the defendant "at the place where the harmful event occurred or may occur". That wording was according to the Swedish Supreme Court, with reference to the case law of the ECJ, to be understood as meaning the place giving rise to the damage as well as the place where the damage occurred, where upon the place where the damage occurred does not encompass the place where the plaintiff alleges to have suffered an economic loss as a consequence of a direct damage initially suffered and occurred in another Member State. Therefore, the Swedish Supreme Court reasoned, the legal question in issue was where the place of the event initially causing tortious, delictual or quasi-delictual liability to incurr directly produced its harmful effects upon the person who is the victim of that event.

Fourth, in answering that question, the Swedish Supreme Court stated, with reference to legal theory, when a trademark is infringed, the direct damage occurs (beyond doubt) in the State where the trademark is registered or incorporated (lex loci protectionis). Against this background, and with the legal relationship not involving claims that MSR in Sweden had acted so that the foreign trademarks of Aredal had been infringed, the Swedish Supreme Court concluded it could not attribute and extend the adjudicatory authority of Swedish courts more than the Swedish Court of Second Instance could ground Swedish jurisdiction in accordance with the Brussels I Regulation Article 5.3. By consequence, the Swedish Supreme Court established there was no legal ground to send the case to the ECJ for a preliminary ruling on the proper interpretation of the Brussels I Regulation Article 5.3.

Christian Schulze, ‘The 2005 Hague Convention on Choice of Court Agreements’, (2007) 19 SA Merc LJ 140-150

The article discusses the 2005 Hague Convention’s rules on jurisdiction (of the chosen and not-chosen courts) and the recognition and enforcement of resulting judgments. It then goes on to examine the role of the new convention in comparison to other conventions and to the Brussels I Regulation. Reference is made to the different objectives of these international instruments and to the more limited scope of the Hague Convention. The article also discusses jurisdiction agreements in general, pointing out that they are common in international commercial contracts and may be regarded as a prudent step for parties to take. The author describes the distinction between exclusive and non-exclusive choice of court agreements. He concludes by stating that this convention makes litigation a more viable alternative to arbitration since it ensures the enforcement of choice of court agreements in the same fashion as the New York Convention (1958) does for arbitration agreements. He then expresses the hope that the new convention would draw as much interest as the New York Convention.