A "Major" Federal Copyright Decision on Enforcing Foreign Judgments

Continuing the trend of interesting private international cases coming out of the patent and copyright fields (see previous posts here and here), the Second circuit recently decided a case involving the enforcement of a French judgment involving copyrighted dress designs.

In *Sarl Louis Feraud International v. Viewfinder, Inc.*, 2007 WL 1598057 (2d Cir. June 5, 2007), a French court held, by default judgment, that Plaintiff's copyright in the actual design of dresses was infringed by Defendant's taking photographs of them and placing them on a website. Enforcement was sought in the U.S. under New York State law. Judge Lynch refused to enforce the French judgment on the grounds that it would be repugnant to the public policy of New York as it would violate Defendant's First Amendment rights. 406 F. Supp. 2d 274 (S.D.N.Y. 2005). Lynch said it was obvious that Defendant's activities fall within the protections of the First Amendment, because they are "matter[s] of great public interest, for artistic as well as commercial purposes. . . . [T]he extensive coverage given to such events in various mass media makes clear that there is widespread public interest in these matters."

Judge Lynch said a conflict arises when U.S. courts are asked to enforce judgments from countries that do not have First Amendment protections.

> *"Many democratic countries, which share our general commitment to human rights and maintain free and open societies in which freedom of speech and thought is fully respected, differ from us in the resolution of certain questions involving the balance between freedom of expression and the maintenance of ordered liberty, particularly in areas where freedom of expression may be in tension with the protection of other human rights, such as equality or human dignity. . . . Even in those areas, however, where reasonable people and decent societies may reasonably disagree, American courts have recognized that foreign judgments that run afoul of First Amendment values are inconsistent with our notions of what is fair and just, and conflict with the strong public*

policy of our state."

The judge noted that the First Amendment protects speech that can be banned in other democratic countries, and courts in the United States have refused to enforce foreign judgments such as one that restricted access to Nazi propaganda in France. American courts also have refused to recognize English libel judgments that would be inconsistent with the U.S. Constitution or the laws of the states.

The Second Circuit just reversed, 2007 WL 1598057 (2d Cir. June 5, 2007). The court began by noting the rule of comity inhering to default foreign judgment, and held that, "for the purposes of this action, we must accept that Viewfinder's conduct constitutes an unauthorized reproduction or performance of plaintiffs' copyrighted work infringing on plaintiffs' intellectual property rights, and the only question to consider is whether a law that sanctions such conduct is repugnant to the public policy of New York." In so considering, however, the Court held that Judge Lynch had not "conducted a full analysis" of the issue.

In particular, the Second circuit refused to allow Defendant to rest its defense entirely upon its status as a news magazine covering a public event. Because "[i]ntellectual property laws co-exist with the First Amendment in this country, . . . [t]he First Amendment does not provide such categorical protection." Rather, in deciding whether the French Judgments are repugnant
to the public policy of New York, the district court should:

> *"first determine the level of First Amendment protection required by New York public policy when a news entity engages in the unauthorized use of intellectual property at issue here. Then, it should determine whether the French intellectual property regime provides comparable protections."*

On the first prong of the test, the court directed exclusive use of the "fair use doctrine," which "balances the competing interests of the copyright laws and the First Amendment" under a four-factor test. Because the district court analyzed the "fair use doctrine" in a single sentence, and the record as it stands was insufficient for the court to decide it here, the decision was vacated and the case remanded to be addressed on a "fully-developed record." The court also directed a more in-depth examination of the second prong of the analysis under Fed. R. Civ. P. 44.1, i.e. "the manner of protection afforded plaintiff's fashion shows by

French law."

Because the court seemed to place any First Amendment defense to foreign judgment enforcement exclusively within, and not in addition to, the "fair use doctrine," Commentators have already acknowledged that "[t]his is a major decision." The court also seems to acknowledge that, if Judge Lynch concludes that Defendant's use of plaintiff's intellectual property would be fair under U.S. law (regardless of whether it would be permitted under French law), then the judgment cannot be enforced.

Norwegian Court of Appeals on the Lugano Convention Article 1, 5, 27 and 28

The Norwegian Court of Appeals (Frostating lagmannsrett) recently handed down a decision on enforcement in Norway, in accordance with the Lugano Convention, of a German court decision on maintenance obligations between two spouses. The decision (Frostating lagmannsrett (kjennelse)) is dated 2007-05-04, was published in LF-2007-17684, and is retrievable from here.

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

Amtsgericht Dortmund ruled in its decision of 27 September 2005 that maintenance creditor A pay maintenance debtor B (A and B were spouses) a monthly maintenance sum of 1251 Euro. On 3 July 2006, B applied to the Norwegian court of first instance (Romsdal tingrett) that court use coercive means to collect maintenance fallen due, which totalled the sum of 8757 Euro. B remarried on 21 July 2006, where upon B´s right to maintenance from A came to an end. The Norwegian court of first instance authorized on 5 October 2006 (Romsdal tingrett TROMS-2006-100712) that the court decision of the German Amtsgericht Dortmund, which accorded B a right to maintenance from A, was to

be enforced, without hearing the arguments of A, in accordance with the Lugano Convention Article 34. The appealing party, maintenance creditor A, appealed the decision of the Norwegian court of first instance to the Norwegian Court of Appeals in accordance with the Lugano Convention Articles 36, first paragraph and 37, and asked the latter Court not to admit authorisation to enforce, where upon the Norwegian Court of Appeals affirmed the decision of the Court of first instance.

Before the Norwegian Court of Appeals, A contended that since A went bankrupt in September 2006, the right person to pay the maintenance obligation was, in accordance with the German Insolvenzordnung (InsO) §§ 40 and 100, A´s estate in bankruptcy, whose administrator could, with authorisation from the creditors of that estate, pay B maintenance. By consequence, A first argued, the right person to be served with the claim is A´s estate in bankruptcy located in Germany, and any attempt to seek the maintenance obligation enforced towards A in Norway is a circumvention of German laws of bankruptcy. Second, A argued that the decision to take A´s estate under bankruptcy in Germany also compass the obligation for A to pay B maintenance as decided by the German Amtsgericht Dortmund on 27 September 2005. Therefore, the decision on bankruptcy is a decision falling under the scope of §2 nr. 4, in precept to the Hague Convention of 2 October 1973 on recognition and enforcement of maintenance obligations, where, by consequence, the decision shall not be enforced, in accordance with §2 nr. 4, in precept to the Hague Convention of 2 October 1973 on recognition and enforcement of maintenance obligations, if a) that decision is irreconcilable with a decision given in Norway involving the same parties, their same cause of action and object of action, or b) that decision is irreconcilable with a decision involving the same parties, their same cause of action and object of action, provided the latter decision has been given in another State and fulfils the requirements for enforcement in Norway.

Before the Norwegian Court of Appeals, B contended that, first, the appeal was applied for too late, and, second, claims for maintenance obligations fallen due could only be made up until the time of declaring bankruptcy, and the German Insolvenzordnung (InsO) §§ 40 and 100 refers only to claims for maintenance obligations fallen due before the time of bankruptcy, and, third, a decision on having been legally declared bankrupt in Germany is not a decision falling under the scope of §2 nr. 4, in precept to the Hague Convention of 2 October 1973 on

recognition and enforcement of maintenance obligations, since a court declaration on bankruptcy does not compass a decision declaring that maintenance creditor A pay maintenance debtor B a monthly maintenance sum, and no new decision on the legal relationship exist, so that the decision by the German Amtsgericht Dortmund of 27 September 2005 is binding between the parties.

Ratio decidendi of the Norwegian Court of Appeals

First, the Court identified the legal question in issue, stating that the case at hand raised the question whether the decision of the German Amtsgericht Dortmund of 27 September 2005, which was enforceable in Germany, was enforceable in Norway in accordance with the Lugano Convention when A´s estate had been declared bankrupt. The Court reasoned that in accordance with the Lugano Convention Article 1, second paragraph nr. 1, the Lugano Convention shall not apply to "the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession", and therefore does not compass maintenance obligations between spouses, since such obligations are compassed by the Lugano Convention Article 5 nr. 2 (where upon the Court referred to legal theory; Rognlien, Luganokonvensjonen (1993, p. 124), and Thue, Internasjonal privatrett (p. 481). Hence, the Court of appeal affirmed the Court of first instance´s opinion that the Lugano Convention was applicable.

Second, on the contention that the decision of the German Amtsgericht Dortmund of 27 September 2005 – wherein the maintenance creditor A was obliged to pay maintenance debtor B a monthly maintenance sum of 1251 Euro – only could be enforced against A´s estate of bankruptcy in Germany, the Court reasoned that in accordance with the Lugano Convention Article 1, second paragraph, nr. 2, bankruptcy is not compassed by the Convention, where upon A in Norway, and independent from German authority, both can be sued and declared bankrupt, but that A´s estate in Norway was not declared bankrupt. Declaring bankruptcy in one State is not tantamount to being declared bankrupt in other States. (Norway has a system in its law on bankruptcy § 106, which is similar to the German Insolvenzordnung (InsO) §§ 40 and 100).

Third, the Court reasoned that it does not follow from §2 nr. 4, in precept to the Hague Convention of 2 October 1973 on recognition and enforcement of maintenance obligations that declaring bankruptcy in Germany hinders

enforcement in Norway of the decision of the German Amtsgericht Dortmund of 27 September 2005, since declaring bankruptcy of A´s estate is not the same legal relationship as a legal relationship involving maintenance obligations and does not involve the same parties.

Fourth, the Court reasoned that recognition and enforcement of the decision of the German Amtsgericht Dortmund of 27 September 2005 is not contrary to Norwegian Public policy, in accordance with the Lugano Convention Article 27 nr. 1. Further, that decision, the Court found no reason not to recognise in accordance with the Lugano Convention Articles 27 and 28. Furthermore, the Court lacked authority to assess the substance matter of the case, in accordance with the Lugano Convention Article 29. Hence, the Norwegian Court of appeal affirmed the decision of the Court of first instance, where upon the case was sent to the latter court for enforcement.

Rome II: Provisional Version of the Joint Text Released

A **provisional version of the Rome II joint text** which was agreed upon by the European Parliament and the Council in the meeting of the Conciliation Committee held on 15 May 2007 has been made available on the Rome II page of the EP's Conciliations & Codecision website.

The text has been released only in English, and subject to further legal linguistic verification.

A first glance at the text reveals that the general rule in Art. 4, and the special rules set out in Articles 5 (Product liability), 7 (Environmental damage), 8 (Infringement of intellectual property rights), 9 (Industrial action), 10 (Unjust enrichment), 11 (Negotiorum gestio) and 12 (Culpa in contrahendo) are almost identical to the corresponding provisions of the Council's Common Position, adopted in September 2006.

The Council's text has been retained also in respect of the provision on party autonomy (Art. 14): accordingly, an *ex ante* agreement on the applicable law is allowed, "where all the parties are pursuing a commercial activity" and such an agreement is "freely negotiated". The law designated by the conflict rules on unfair competition and infringement of IP rights cannot be derogated from by the parties.

As regards the most controversial issues, on which the Parliament had proposed a number of amendments in its Legislative Resolution at Second Reading of January 2007, here's the outcome of the Conciliation:

Unfair competition and acts restricting free competition (Article 6):

While the conflict rule governing an act of unfair competition is unchanged (application of the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected; application of the law determined pursuant to the general conflict rule of Art. 4, where an act of unfair competition affects exclusively the interests of a specific competitor: see Art. 6(1) and (2)), a more complex provision, allowing the application of the *lex fori* in case of multi-state torts, is set out by Art. 6(3) for non-contractual obligations arising out of a restriction of competition:

> *(a) The law applicable to a non-contractual obligation arising out of a restriction of competition shall be the law of the country where the market is, or is likely to be, affected.*
>
> *(b) When the market is, or is likely to be, affected in more than one country, the person seeking compensation for damage who sues in the court of the domicile of the defendant, may instead choose to base his or her claim on the law of the court seised, provided that the market in that Member State is amongst those directly and substantially affected by the restriction of competition out of which the non-contractual obligation arises on which the claim is based;*
>
> *where the claimant sues, in accordance with the applicable rules on jurisdiction, more than one defendant in that court, he or she can only choose to base his or her claim on the law of that court if the restriction of competition, on which the claim against each of these defendants relies, directly and substantially affects also the market of the country of that court.*

Violation of privacy and rights relating to the personality (including defamation):

This issue, that has been by far the most controversial in the codecision procedure (a specific rule – Art. 6 – was proposed by the Commission in its initial Rome II Proposal, and strongly advocated by the Parliament, in a very different text, both in its First and Second Reading – see Art. 5 and Art. 7a respectively), has been **excluded from the material scope of application of the Regulation** (see Art. 1(2)(g)). It is dealt with in the review clause provided by Art. 30(2):

> *Not later than 31 December 2008, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a study on the situation in the field of the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality, taking into account rules relating to freedom of the press and freedom of expression in the media, and conflict of law issues related with the Directive 95/46/EC.*

Damages in personal injury cases and traffic accidents:

The issue of quantifying damages in personal injury cases (especially in, but not limited to, case of traffic accidents) has been one of the main concerns of the EP Rapporteur Diana Wallis, who supported the application of "the principle of *restitutio in integrum*, having regard to the victim's actual circumstances in his country of habitual residence" (see Art. 21a of the EP's Second Reading).

Due to the disagreement of the Commission and the Council, such a provision has not been inserted in the Regulation, but Recital 33 of the joint text states:

> *According to the current national rules on compensation awarded to victims of road traffic accidents, when quantifying damages for personal injury in cases in which the accident takes place in a State other than that of the habitual residence of the victim, the court seised should take into account all the relevant actual circumstances of the specific victim, including in particular the actual losses and cost of after-care and medical attention.*

As regards the law applicable to road traffic accidents, the Regulation does not prejudice the application of the Hague Convention of 1971 on the law applicable

to traffic accidents (see Art. 28): however, the review clause calls on the Commission to prepare a study on the effects of the Convention's supremacy, that will be included in the Report on the application of the Regulation to be submitted not later than four years after its entry into force (Art. 30(1), second indent).

Treatment of foreign law:

This issue was raised by the European Parliament (see Art. 12 and 13 of the First Reading and Recital 29b and 30a of the Second Reading), but given its general relevance in a private international law system, it has not been regulated in the context of a specific instrument such as Rome II. The review clause in Art. 30(1) provides that the Report to be prepared by the Commission shall include

> *a study on the effects of the way in which foreign law is treated in the different jurisdictions and on the extent to which courts in the Member States apply foreign law in practice pursuant to this Regulation.*

Public policy and overriding mandatory provisions:

The public policy clause (Art. 26) does not include any reference to the question of punitive damages, nor any reference to a special concept of EC public policy, in its content and vis-à-vis the application of the law of a Member State. Punitive damages are addressed in Recital 32, according to which

> *Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions. In particular, the application of a provision of the law designated by this Regulation which would have the effect of causing non compensatory exemplary or punitive damages of an excessive nature to be awarded may, depending on the circumstances of the case and the legal order of the Member State of the court seised, be regarded as being contrary to the public policy ("ordre public") of the forum.*

As regards overriding mandatory provisions, only the provisions of the *lex fori* are taken into account by Art. 16 (whose text is almost identical to Art. 7(2) of the Rome Convention). While the exclusion of the overriding mandatory provisions of a law different from the *lex causae* and the *lex fori* has been criticized, problems may arise if a different compromise is finally found in Rome I

(the issue is currently under debate in the Council: see the title of Council doc. n. 9765/07, not accessible to the public).

As a last point, **Articles 27 and 28 deal with the relationships with other provisions of Community law and with existing international conventions** (as the above mentioned Hague Convention of 1971 on the law applicable to traffic accidents, or the Hague Convention of 1973 on the Law Applicable to Products Liability), in a traditional way, if compared with the coordination clauses that were proposed in earlier stages of the procedure (see for instance Art. 1(3) and Art. 25 of the EP's First Reading):

> *Article 27 – Relationship with other provisions of Community law*
>
> *This Regulation shall not prejudice the application of provisions of Community law which, in relation to particular matters, lay down conflict of law rules relating to non contractual obligations.*
>
> *Article 28 – Relationship with existing international conventions*
>
> *1. This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict of law rules relating to non contractual obligations.*
>
> *2. However, this Regulation shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them insofar as such conventions concern matters governed by this Regulation.*

Pursuant to Art. 251(5) of the EC Treaty, the European Parliament (by an absolute majority of the votes cast) and the Council (by a qualified majority) must adopt the Regulation within six weeks from the date of approval of the joint text.

The vote in the European Parliament is expected in the plenary session on 9-10 July in Strasbourg (see the OEIL page on Rome II). The JHA Council, under the German Presidency, is scheduled in Luxembourg on 12-13 June.

[Update 9 June 2007: as stated on a Press release by the Council, the Presidency will deliver an oral report about the result of the conciliation with the European Parliament in the JHA session of Wednesday 13 June 2007]

Private International Law Aspects of Homosexual Couples: The Netherlands Report

I. Curry-Summer (*Utrecht University*) has written an intriguing article in the new issue of the *Electronic Journal of Comparative Law* entitled, "**Private International Law Aspects of Homosexual Couples: The Netherlands Report**" (*vol 11.1, EJCL, May 2007*). Here's an overview of the paper's structure:

> *This paper has been divided into three main sections. Section 2 will deal briefly with the substantive law rules relating to the celebration of a same-sex marriage and the registration of a partnership. Section 3 will deal solely with the private international law aspects of same-sex marriage, whilst Section 4 will be devoted to an analysis of the relevant private international law rules in relation to registered partnership. In order to aid simultaneous comparison between the relevant rules for these two institutions the same structure has been used in each section. However, from the outset it must be mentioned that this paper can, in the limited space available, only attempt to deal with some of the aspects related to such relationships. A choice has therefore been made to limit this paper to the structural aspects of such relationships, i.e. the establishment of the relationship (Sections 3.1 and 4.1) and the dissolution thereof (Sections 3.2 and 4.2). In Section 5 a number of conclusions will be reached with regards the approaches taken and the possible improvements which can be made.*

You can download the paper from **here** free of charge.

May 2007 Roundup of U.S. Decisions

Here's a quick roundup of significant caselaw from the U.S. Court of Appeals and Supreme Court relating to private international law issues.

Two interesting actions relating to judgment enforcement have come down from the Ninth and D.C. Circuits. The latest salvo in *Ministry of Defense for the Armed Froces of the Islamic Rep. of Iran v. Elahi*, No. 03-55015 (9th Cir., May 30, 2007), seems to complete a tortured case history that included a Supreme Court decision, and ICC decision and several appellate decisions relating to the enforcment of a judgment for wrongful death agains the Republic of Iran. Plaintiff, whose brother was allegedly assassinated by agents of the Iranian state, sought to enforce the $11.7 million default judgment he received in the United States District Court for the District of Columbia. Unable to seek satisfaction of that amount under the Foreign Sovereign Immunity Act – a conclusion that was affirmed again here on appeal – plaintiff sought a lien against a $2.8 million ICC judgment in favor of Iran from its previous breach of contract action against an American defense contractor. The Terrorism Risk Insurance Act permits such an action against "terrorist parties," provided that the judgment was not currently "at issue" before an international tribunal. Because the ICC judgment was "present[ed]," "fully adjudicated" and "reduced to judgment" in favor of Iran, and because Iran has been labelled as a "state sponsor of terrorism" since 1984, the amount currently held by the American contractor is vulnerable to attachment. Interestingly, the U.S. Government filed papers in support of Iran in this action. The full decision is available here.

The D.C. Circuit in *Termorio S.A. v. Electanta S.P.*, No. 06-7058 (D.C. Cir., May 25, 2007) refused to enforce an arbitral award from the Republic of Columbia between a state-owned entity and two American utility companies. At issue was a $60 million arbitral award against the Columbian entity. The award was made in Columbia. Immediately thereafter, various Columbian government agencies refused to comply with the award and began criminal investigations of executives who worked for the plaintiff in that action. The award was eventually vacated by a Columbian court. Plaintiff then sued in U.S. federal court to enforce the award, notwithstanding its anullment. "[R]esolving this matter with reference to . . . the

New York Convention," particularly Article V(1)(e), the court held that once an award is lawfully set aside in its place of origin, there is nothing to enforce under that Convention. An interesting discussion of the discretion of U.S. courts to enforce such awards despite a foreign anullment followed. While the court,

> *accept[ed] that there is a narrow public policy gloss on Article V(1)(e) and that a foreign judgment is unenforceable as against public policy to the extent that it is 'repugnant to fundamental notions of what is decent and just in the United States,'*

Plaintiffs here failed to meet this high threshold. The full decision is available here.

The Eleventh Circuit decided an interesting case applying the "most significant relationship" test to determine the law applicable to a cross-border tort of tortious interference. In Grupo *Televisa S.A. v. Telemundo Comm. Group, Inc.*, No. 05-16659 (11th Cir., May 10, 2007), a Mexican broadcast company sued its American rival in U.S. federal court alleging that it thwarted its contract with a Mexican soap opera star by offering her a competing role. The American company moved to dismiss the claim by arguing that Mexican law, which does not recognize the tort of tortious intereference with contractual relations, governs the dispute. The district court agreed and dismissed the case, holding, inter alia, that the "place of the injury" should not play an important role in this choice of law decision. The Eleventh Circuit reversed that decision. It began by reference to Section 145 of the Second Restatement, and the four "contacts" that should be considered in a tort action. It then considered the "principal location of the defendant's conduct" as the single most important factor in a "misappropriation of trade values case," and held that "the Florida contacts are both numerically and qualitatively more significant" here. Turning to the general factors in Section 6 of the Second Restatement, the court also recognized that "the relevant policies of the forum [and] other interested states," the "protection of justified expectations," "certainty, predictability and uniformity of result," and "the ease in determination of the law to be applied" counselled the application of Florida law. The full decision is available here.

Finally, the Supreme Court invited the Solicitor General to file a brief in a notable conflicts case. In Teck Cominco Metals v. Pakootas, Petitioner posed the

interesting question of,

> *[W]hether the Ninth Circuit erred in concluding, in derogation of numerous treaties and established diplomatic practice, that CERCLA (and, by extension, other American environmental laws) can be applied unilaterally to penalize the actions of a foreign company in a foreign country undertaken in accordance with that country's laws.*

The Petition and other briefs at that stage are available here.

Rome I: German Position on the Applicable Law on Contracts governing Hotel and Restaurant Services

Following our previous post on new Council documents concerning Rome I, here some new information on Art. 5 of the Proposal:

As stated on the website of the German Hotel and Restaurant Association (*Deutscher Hotel- und Gaststättenverband, DEHOGA Bundesverband*), the German government changed its position with regard to the applicable law on contracts governing hotel and restaurant services and supports now this branch of industry with regard to its conception that those contracts should not be governed by the law of the hotel guest's habitual residence, but rather by the law of the country where the service is provided.

According to Art. 5 (1) of the Commission's Rome I Proposal, consumer contracts in terms of Art. 5 (2) are governed by the law of the Member State in which the consumer has his habitual residence. However, Art. 5 (3) (a) of the Proposal provides for an exception for contracts for the supply of services where the services are to be supplied to the consumer exclusively in a country other than in

which he has his habitual residence. Thus, contracts governing hotel and restaurant services are widely excluded from the application of the law of the guest's habitual residence.

However, amendments proposed by the Committe on Legal Affairs of the European Parliament suggest the deletion of Art. 5 (3) (a) which would lead, with regard to service contracts covered by Art. 5, to the application of the law of the consumer's, i.e. the guest's, habitual residence for contracts involving a guest of a Member State other than the one where the service is provided. See Amendment 62 by *Jean-Paul Gauzès* and Amendment 63 by *Diana Wallis* which can be found here. Further, see also the text of Rome I as drafted by the Council Presidency (Note of 12 October 2006) as well as the text drafted by the Finnish and the German Presidency (Note of 12 December 2006) which do not include Art. 5 (3) anymore .

This development has been observed critically by the German Hotel Association (*Hotelverband Deutschland, IHA*) and the German Hotel and Restaurant Association which feared serious disadvantages in particular for medium-sized businesses in case the law of the guest's habitual residence should be applied.

Now, as stated in the press release, these associations succeeded in convincing German Federal Minister of Justice *Brigitte Zypries* as well as Federal Minister of Economics and Technology *Michael Glos* of their position to apply the law of the country where the services are provided.

See in this context the Summary of Discussions of the Council Committee on Civil Law Matters (Rome I) of 16 February 2007, which contains with regard to Art. 5 (3) (a) the following statement:

> *Several delegations were against the deletion of Article 5(3)(a) of the Commission proposal. The*
> *Presidency noted that there was some support for the reintroduction of that provision into the text of*
> *the draft Regulation.*

Similar also Council document No. 6935/07 of 2 March 2007 where the German Presidency states that several delegations support the idea to reintroduce Art. 5 (3) (a) of the Commission's Proposal.

The **full press release** can be found on the website of the German Hotel and Restaurant Association.

Many thanks again to Dr. Jan von Hein, MPI Hamburg for the tip-off and to Giorgio Buono for valuable information on the relevant documents.

Is the Brussels Convention Compliant with Article 6 ECHR?

This is the interesting question that the French supreme court for private matters (*Cour de cassation*) addressed in a judgement of March 6, 2007.

The argument was raised in respect of the rule allowing to seek a decision of enforceability of the foreign judgement ex parte. Article 34 of the 1968 Brussels Convention provided:

> *the party against whom enforcement is sought shall not at this stage of the proceedings be allowed to make any submissions on the application.*

In this case, a Belgian bank, Fortis, had sued in Belgium two spouses domiciled in France. The Court of appeal of Mons, Belgium, had ruled in favour of the bank, which sought enforcement of the judgement in France. The Belgian judgement was declared enforceable by a French first instance court. The defendants appealed to the Court of appeal of Amiens and lost. They then appealed to the *Cour de cassation*. Their only argument was that the proceedings in the first instance in France were a violation of their right to a fair trial, as they were ex parte proceedings. The *Cour de cassation* held that there was no such violation as they were entiteld to appeal. The appeal was thus dismissed (again).

This case raises two issues. The first is anecdotal. It is fascinating to see that the defendants could take this case up to the French supreme court. The Belgian judgement was made in 2001, and it seems that the enforcement proceedings took six years.

The second issue is much more interesting. Could the Brussels Convention or the Brussels I Regulation be found to be in violation of the European Convention of Human Rights (ECHR)? Before the *Cour de cassation*, the defendants argued that the ECHR was superior to any treaty concluded by the French state. In *Fortis*, the Court does not directly deal with the argument, but it indirectly addresses it since it accepts to rule on whether article 34 complies with article 6 ECHR.

Obviously, the *Cour de cassation* will only give the point of view of the French legal order. The Strasbourg or the Luxembourg courts would certainly have different views on this.

Was the issue addressed elsewhere in Europe?

Rome I: Council's Compromise Package, Insurance Contracts, Financial Aspects Relating to Articles 4 and 5

Following our post on the note from the Luxembourg delegation relating to consumer contracts, a number of new interesting documents on the Rome I Proposal have been made publicly available on the Register of the Council.

Here's a brief presentation:

– doc. n. 8022/07 ADD 1 REV 1 of 13 April 2007, containing a **"compromise package" prepared by the German Presidency** for the JHA Council session of 19-20 April 2007 (see our related post on the Council conclusions). The text focuses on Articles 3 (Freedom of choice), 4 (Applicable law in the absence of choice) and 6 (Individual employment contracts). Art. 7 on contracts concluded by an agent is deleted; other important issues, such as contracts of carriage (art. 4a), consumer contracts (art. 5), insurance contracts (art. 5a) and overriding

mandatory provisions (art. 8) do not form part of the compromise;

– doc. n. 8935/1/07 REV 1 of 4 May 2007, on **insurance contracts**. The document provides a draft text of Art. 5a, taking into account the comments submitted in March by the Member States delegations (docs. 6847/07 and ADD 1 to 12, not accessible to the public);

– doc. n. 7418/07 of 15 March 2007, from the Services of the Commission to the Council's Committee on Civil Law Matters, dealing with **certain financial aspects relating to the application of Articles 4 and 5**. The document is divided in two parts: the first one addresses the conflict rule on contracts concluded at a financial market (Art. 4(1)(j1)), that was introduced by the Finnish presidency (see doc. n. 16353/06 of 12 December 2006) and confirmed by the German Presidency (see the French text of doc. n. 6953/07 of 2 March 2007), stressing the **importance of a specific provision on stock exchange transactions**:

> *The reason for including a specific provision for trading systems relates, in particular, to the fact that regulated markets, multilateral trading facilities and other similar trading systems need to operate under a single law. It is essential that all transactions are carried out in accordance with the governing law of the system. The application of a single governing law is an intrinsic feature of organised multilateral trading systems and necessary for legal certainty for the market participants.*
>
> *These transactions concluded within such a trading system include contracts of buying, selling, lending and other such dealings in financial instruments. Contracts for the provision of services between a financial intermediary and a client are not concluded within these trading systems.*
>
> *The transactions in question are closely connected to the market concerned and it is appropriate and, indeed, necessary that the same law governs them irrespective of the nature of the parties to the transactions (consumer/professional) and the place where the parties have their habitual residence. Any other result would mean that the systems could not operate.*

Problems arising from the **definition of "financial market"** are then addressed, in the light of the Directive 2004/39/EC (MiFID – Markets in Financial

Instruments Directive), and an improved draft of the provision is proposed:

> *[T]he use of the term "financial market" in this provision leads to undesirable uncertainty. There is no definition of this concept in any community instrument. The term is used in the particular context of Article 9 of the Insolvency Regulation but it is not defined. In the framework of a general conflict of law rule in Rome I this expression would lack precision and create legal uncertainty. Given the extreme diversity and complexity of the financial sector activities, there is a need to define all relevant concepts used.*
>
> *Taking into account the universal scope of application of Rome I (Art. 2), the definition of markets and trading systems by reference to the EU regulatory categories in Directive 2004/39/EC (MiFID) has been avoided. This is because cross-reference to the MiFID concepts would limit the provisions to an EU context. Instead, the proposed draft contains a functional description of multilateral system that uses the common elements of the definitions of regulated market and multilateral trading facility in MiFID, together with the condition that such systems should be subject to a single governing law. This description will cover all the equivalent non-EU trading facilities that need to be caught.*

The second part deals with **possible overlaps between the scope of application of the protective rule on consumer contracts** (Art. 5 of the Rome I Proposal) **and the legal regime of financial instruments** (rights and obligations which comprise a financial instrument, contracts to subscribe for or purchase a new issue of transferable securities, contracts concluded within the type of system falling within the scope of the above mentioned Article 4(1)(j1)):

> *All these issues are not covered by Art. 5 of the Rome Convention as that Article only applies to contracts for the provision of services and sale of goods. The questions […] only arise due to the enlarged scope of Article 5 of the Rome I proposal.*
>
> *The proposed text does not exclude contracts for the provision of financial services generally nor does it exclude contracts for the sale of shares and bonds concluded outside the systems referred to in the draft Art. 4(1)(j1).*
>
> *As regards financial instruments, on the assumption that the exclusion from the*

scope of the Rome I proposal of financial instrument under Art. 1(2)(d) may not be exhaustive it is absolutely necessary to provide for this exclusion since without it the actual nature of a financial instrument – the rights and obligations that constitute its essence – could change by virtue of the application of Article 5. […]

Without an amendment to this effect, the actual nature of a financial instrument and the rules of law governing it could be various and unpredictable and would depend on the habitual residence of the person holding it. This question should not be confused with contracts for the provision of financial services. For example, when a bank sells to a consumer shares from company x it is providing a financial service. The consumer friendly rule of Article 5 of the proposal will naturally continue to apply to all these contracts that were already covered by Article 5 of the Rome Convention.

As regards the subscription for shares and units in collective investment schemes, and purchase of new issues of debt, it is important that the issuer in relation to a single issue is not faced with a risk of application of multiple laws depending on the habitual residences of investors. This would effectively prevent cross-border retail offerings of shares, debt, etc. Contractual rights and obligations in relation to the subscription for or purchase of new issues of transferable securities will not necessarily be covered by the narrowly focussed exclusion discussed above for contracts which comprise financial instruments. […]

Thus, on the assumption and to the extent that this issue is not excluded entirely from the scope of the Regulation by virtue of Art. 1(2)(f) (exclusion of contracts governed by company law) it is necessary to ensure in relation to contracts of subscription for or purchase of a new issue of shares, bonds and other transferable securities that Article 5 does not apply.

As a last point, the Services of the Commission point out another **possible inconsistency between Art. 5 of the Rome I Proposal and the MiFID Directive (2004/39/EC)**, **as regards individual investors who act as "professional clients" under Annex II to the Directive**, but may be still considered as consumers for the purposes of the protective conflict rule:

Finally, the Committee may wish to consider an amendment to the text or at

least a recital in order to clarify that individuals who 'opt up' to professional status under MiFID should not be treated as consumers for the purposes of Art. 5. Annex II to MiFID allows clients of investment firms, who would otherwise be classified as "retail clients" to be treated as "professional" clients if they meet specified conditions aimed at establishing that that client is financially sophisticated and experienced in investment. However, such clients may be considered to fall within the category of "consumers" for the purposes of Art. 5. The point is important since firms would be most unlikely to let sophisticated individuals opt up to professional status if Art. 5 were to apply to their dealings, and accordingly the objectives of the MiFID in this respect would be thwarted.

Article on Rome II – Liability for Cross-Border Torts

A very interesting article on Rome II written in German by *Thomas Thiede* and *Katarzyna Ludwichowska* (both Vienna) has been published recently in the "Zeitschrift für vergleichende Rechtswissenschaft" (106 ZVglRWiss (2007), 92 et seq.):

"Die Haftung bei grenzüberschreitenden unterlaubten Handlungen" (Liability for cross-border torts).

An abstract has kindly been provided by the authors:

The article is a critical analysis of a proposal to apply the law of the victim's place of habitual residence to the compensation for personal injuries arising out of tort. The proposal, which was introduced by the European Parliament in the course of work on the EU regulation on the law applicable to non-contractual obligations (Rome II), originally concerned only traffic accidents, but was later modified and extended to all personal injury cases. The authors of the article show the proposal of the European Parliament against the background of solutions accepted in Germany and England. They present the arguments given

by the supporters of the proposal and then proceed to strongly criticise the parliamentary solution, inter alia by showing the negative consequences of splitting an otherwise uniform legal relationship as a result of subjecting the prerequisites of liability and part of its consequences (compensation for damage to property) to lex damni and the other part of the consequences of liability (compensation for personal injuries) to the law of the victim's place of habitual residence.

Jurisdiction and Forum Non Conveniens in Quebec

In *Impulsora Turistica de Occidente v. Transat Tours Canada Inc.* (available here) the Supreme Court of Canada has, in brief reasons, dismissed an appeal from the Quebec Court of Appeal. Transat sued four Mexican companies in Quebec, seeking an extraterritorial injunction against them. The companies successfully resisted the injunction and also convinced the judge at first instance to conclude both that Quebec lacked jurisdiction and that in any event Mexico was the more appropriate forum. On appeal, now confirmed by the Supreme Court of Canada, the decision on jurisdiction was reversed. The Quebec court had jurisdiction and no stay of proceedings was warranted.

The court held Quebec had jurisdiction even in respect of a request for purely extraterritorial relief. The court was able to consider granting injunctive relief against defendants who were not within the province.

The court also held that Mexico was not the more appropriate forum, in part based on a jurisdiction clause in the contract between Transat and one of the four Mexican companies.

It is somewhat unusual for the Supreme Court of Canada to grant leave to hear a case and then render only brief unanimous reasons adopting the reasoning of the

court below.

Since Transat did not appeal the initial denial of its motion for an injunction, its success on appeal resulted in the case being returned to the Superior Court for possible further proceedings.