Revision of the Lugano Convention: Final Round of Negotiations in Brussels

As stated by recent news on the European Judicial Network (EJN) website, **a final version of the text of the new Lugano Convention** on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters **was agreed upon at a diplomatic conference held in Brussels on 28 March 2007** by the EC, Denmark and the three EFTA States which are party to the old Lugano convention (Switzerland, Norway and Iceland).

The definitive text of the Convention, resulting from the final round of negotiations, has not been made available on the EJN website yet: **a final draft in English (as initialled by the Contracting Parties) is available on the website of the Swiss Federal Office of Justice**, where a summary of the negotiation history is provided, including the several delays that the revision process has incurred:

> *At the end of April 1999, an EU-EFTA working group completed a draft of the substantive part of the revision of the Lugano and Brussels Conventions. Shortly afterwards, in May 1999, the Treaty of Amsterdam came into force for the EU member states. This treaty provides the basis for EC competence in civil justice cooperation. The revised text of the new agreement was consequently moulded into an EC regulation known as the Brussels I Regulation, without having any substantive effect on the outcome of the negotiations. […]*
>
> *The formal revision of the Convention was delayed for several reasons: firstly, there was a difference in interpretation of the paragraph on consumers by the Internet providers and consumers. This question had to be resolved before the Brussels I Regulation (Council Regulation (EC) No 44/2001) was passed on 22 December 2000 (entry into force 1 March 2002). The Lugano negotiations were further delayed because a separate instrument had to be negotiated with Denmark, which under the EC Treaty is not a party to the EC-driven integration of police and judicial affairs.*
>
> *Moreover, it was unclear for a long time whether the European Community had*

> *exclusive or shared competence to conclude the new Lugano Convention. The opinion of the European Court of Justice dated 7 February 2006 ruled that the conclusion of the new agreement fell entirely within the sphere of the Community's exclusive competence, which means that Switzerland, Norway and Iceland now only have to negotiate with one single contracting party ? the European Community, acting through the EC Commission. The EU member states enjoy observer status.*
>
> *The final negotiations on the formal revision of the Lugano Convention took place at the Diplomatic Session in Lugano from 9 to 12 October 2006 where nearly all the controversial issues were resolved. The remaining issues were resolved in the course of subsequent informal negotiations. In March 2007, a final text was agreed upon, subject to possible subsequent linguistic corrections and to signature by the Contracting Parties […].*

The initialled text of the Convention will now be translated into the official languages of the Contracting Parties (all the languages of the EU and those of the other Contracting States, all texts being equally authentic: see art. 79 and Annex VIII to the Convention). The signature of the Convention should take place in Lugano in the coming months, probably in June 2007. The ratification procedures in the Contracting Parties will most likely not allow the Convention to enter into force before 2009.

(Many thanks to Pietro Franzina, University of Ferrara, for the tip-off, and to Rodrigo Rodriguez, Swiss Federal Office of Justice, for providing the latest information on the status of the Convention, along with Andrew Dickinson, BIICL and Clifford Chance.)

More Reflections on Sinochem

This post is written by Greg Castanias and Victoria Dorfman, attorneys with the law firm of Jones Day in Washington, D.C. who represented Sinochem before the Supreme Court. It originally appeared on Opinio Juris last week, and is cross-

posted with their generous permission. The decision, briefs and other reflections on Sinochem also previously appeared on this site.

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We're grateful to have the opportunity to give you some preliminary views on the Sinochem decision issued last week—*Sinochem International Co., Ltd. v. Malaysia International Shipping Corp.*, 127 S. Ct. 1184 (2007). Since we are lawyers, after all, we need to start with a disclaimer: These are our views alone—not those of our law firm, our partners, or our other colleagues; and not those of our client in this case (indeed, not those of any of our clients, past, present, or future).

Obviously, we are pleased about the result in the case, and about the central holding in the case, which embraced the argument we made to the Court: a district court has the power (which is to say the discretion) to dismiss a lawsuit on forum non conveniens grounds before making a conclusive determination of its own jurisdiction (either subject-matter jurisdiction, which is the power of the court itself, or personal jurisdiction, which is the power of the court over a defendant). As your readers probably know, this resolved a split in the circuits on this issue which, somewhat to our surprise at first, was four-to-two against our position (after we filed our merits brief in the case, the Seventh Circuit, in a case called *Intec USA, LLC v. Engle*, 467 F.3d 1038 (7th Cir. 2006), switched sides on the split, distinguished its prior decision in Kamel *v. Hill-Rom Co.*, 108 F.3d 799 (7th Cir. 1997), and the Supreme Court ended up quoting from Intec several times in its opinion).

But the longer-term contribution of the Sinochem decision may not be as much in the narrow area of forum non conveniens, but more broadly in its clarification of what *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998) means. *Steel Co.* had held that "[w]ithout jurisdiction the court cannot proceed at all in any cause," and further held that a federal court may not assume jurisdiction for the purposes of deciding the merits of the case. Only one Term later, the Court in *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999), held that there is no mandatory "sequencing of jurisdictional issues," and thus, a court may dismiss for lack of personal jurisdiction without first establishing subject-matter jurisdiction.

This left quite a bit of confusion in the lower courts, and it was that confusion that led to the split on the forum non conveniens issue. As one law-review article we

quoted in the Petition put it, the Supreme Court's "failure to categorically redefine the limits of the Steel rule has effectively opened Pandora's box to the speculating minds of courts and legal scholars." What ended up happening in the forum non conveniens area is that the Third Circuit (and the Fifth, Seventh—at least at the time—and Ninth Circuits) had read the *Steel Co*. bar on "hypothetical jurisdiction" as requiring courts to resolve personal and subject-matter jurisdiction both (even though Ruhrgas told them they could take those two in whatever order they chose) before taking up any other issue.

So we urged the Supreme Court that taking up our Petition would not only allow it to resolve the split that had emerged on the forum non conveniens issue, but would also provide a golden opportunity to clarify what the Steel Co. bar on hypothetical jurisdiction meant—that is, it meant that courts had to decide jurisdiction before reaching the merits, but not before reaching another "threshold, non-merits issue"—like forum non conveniens. The Court agreed with us, stating its holding as: "[A] district court has discretion to respond at once to a defendant's forum non conveniens plea, and need not take up first any other threshold objection," including subject-matter and personal jurisdiction. The Court further explained that forum non conveniens is a "threshold, non-merits issue" because "[r]esolving a forum non conveniens motion does not entail any assumption by the court of substantive law-declaring power."

We think it's a fair reading of the Sinochem decision that the Court clarified, for all contexts, and not just forum non conveniens, that the *Steel Co*. ban on hypothetical jurisdiction is only a ban on merits determinations. As the Court put it, quoting the Intec decision from the Seventh Circuit, "Jurisdiction is vital only if the court proposes to issue a judgment on the merits." Certainly, this understanding harmonizes the Court's rulings—both before and after *Steel Co*.—in a wide variety of contexts, e.g., declining to adjudicate state-law claims on discretionary grounds without first determining whether the court has pendent jurisdiction over those claims, *Moor v. Alameda County,* 411 U.S. 693 (1973); abstaining under Younger v. Harris, 401 U.S. 37 (1971), without first determining whether the case presented an Article III case or controversy, *Ellis v. Dyson*, 421 U.S. 426 (1975); or dismissing under *Totten v. United States*, 92 U.S. 105 (1876), which prohibits suits against the Government based on covert espionage agreements, before addressing jurisdiction, *Tenet v. Doe*, 544 U.S. 1 (2005).

The logic of the Court's decision also suggests that suits involving international

interests may be properly dismissed at the outset on other non-merits grounds, such as international comity, or exhaustion, or the political-question doctrine. In fact, the D. C. Circuit has already held that the political-question doctrine can be addressed before subject-matter jurisdiction under the Foreign Sovereign Immunities Act because the political question doctrine is itself a "jurisdictional limitation." *Hwang Geum Joo v. Japan*, 413 F.3d 45, 48 (D.C. Cir. 2005), cert. denied, 126 S. Ct. 1418 (2006).

But at the same time, it's important to understand the limits of the Court's holding. For one, the Court's decision does not say that courts ordinarily should dismiss a suit on forum non conveniens grounds at the outset. Quite the contrary: The Court emphasized that "[i]n the mine run of cases, jurisdiction will involve no arduous inquiry and both judicial economy and the consideration ordinarily accorded the plaintiff's choice of forum should impel the federal court to dispose of those issues first." (Emphasis added.) The only issue here was a federal court's power to do that in appropriate cases—as the Court said, "when considerations of convenience, fairness, and judicial economy so warrant," "[a] district court . . . may dispose of an action by a forum non conveniens dismissal, bypassing questions of subject-matter and personal jurisdiction."

For another, there's the lurking issue of conditional dismissals for forum non conveniens. (In our case, the dismissal was unconditional, because Sinochem itself had initiated a now-fully-completed suit in China's admiralty court, so there was no need for the district court to impose a condition that Sinochem agree to jurisdiction in China, or that Chinese courts accept jurisdiction.) While the Court technically left open the conditional-dismissal question, the logic of the opinion suggests that even a conditional forum non conveniens dismissal issued prior to ascertaining jurisdiction would be permissible—that, too, would be a non-merits ruling, and the court would not be "propos[ing] to issue a judgment on the merits." Furthermore, as Doug Hallward-Driemeier, the Assistant to the Solicitor General (who was supporting us as amicus curiae), said at oral argument, when a court conditionally dismisses a case, it bases its ruling on its understanding of the facts as they bear on the analysis, such as that defendant agrees to waive any objection to jurisdiction; that "understanding of fact is a condition of the dismissal."

As our economy (and hence litigation) becomes more global (Greg will add that that's been a major change that he has seen over his 17 years of practicing

law—the shift in his U.S. practice from mostly domestic disputes to mostly disputes having some international flavor), there are greater chances for foreign defendants to be haled into U.S. courts over mostly or entirely foreign disputes. So to what classes of cases might this ruling be particularly applicable? Obviously, where the asserted ground for federal jurisdiction is the Foreign Sovereign Immunities Act, the defendant is almost always a foreign individual or company, and the jurisdictional analyses can be lengthy and complicated: The Solicitor General noted in his brief that it would have been particularly convenient to dismiss on forum non conveniens grounds a suit against the Republic of Austria to obtain allegedly stolen Gustav Klimt paintings, *see Republic of Austria v. Altmann*, 541 U.S. 677 (2004), because it would have avoided years of litigation over Austria's sovereign immunity under the FSIA, and the parties also noted the recent decision in Turedi *v. Coca Cola Co.*, 2006 WL 3187156 (S.D.N.Y. Nov. 2, 2006), which allowed the district court to avoid resolving "immensely complex" questions of subject matter and personal jurisdiction in a suit brought by Turkish citizens alleging that they had been attacked and tortured by Turkish police at the direction of a Coca-Cola bottling joint venture in Istanbul. Another jurisdictional ground that comes to mind as bringing essentially foreign disputes into U.S. courts is the Alien Tort Claims Act, an ancient statute which has been the subject of some recent controversy and litigation, and which provides federal jurisdiction over tort claims made by aliens, alleging that the tort was "committed in violation of the law of nations or a treaty of the United States." Finally, of course, there are admiralty-jurisdiction cases like the Sinochem case itself. Here, it bears noting that, at least in the earliest days of forum non conveniens in the United States, that doctrine applied mostly in admiralty cases.

We have joked to one another that this is "the sort of case that only federal-jurisdiction dorks like us could love." And certainly it was a stealth decision the day it came out—the press covered some of the denials of certiorari issued that day with far more interest and enthusiasm. But we also think that this decision is going to play out over time as a profoundly important one in the way that litigation is pursued in the federal courts of the United States. On a personal note, the case was a lot of fun for both of us; we were proud to represent Sinochem in what we believe to be one of the first cases where a Chinese company came before the U.S. Supreme Court; and we are grateful to Opinio Juris for giving us an opportunity to relive this great experience.

Conference 2007 – A Reminder

As some of you will be aware, the **Journal of Private International Law Conference 2007** will be taking place at the **University of Birmingham on 26 – 27 June 2007**.

There is a full programme of international speakers, with both academics and practitioners presenting, as well as a keynote address by the **Right Honourable Lord Hope** together with Professor Jonathan Harris.

As we mentioned during the original conference announcement, *places are limited* and quite a few tickets have already been sold. If you wish to attend the conference, as well as the exclusive dinner on the evening of the first day, then I strongly encourage you to book your place as soon as possible.

If you have any questions, please email the conference secretary, Miss Emer McGahan, at conflicts-conference@contacts.bham.ac.uk.

I very much look forward to meeting you at the conference.

Rome I: New Rapporteur (and New Amendments) in the European Parliament Legal Affairs Committee

Following the appointment of *Maria Berger*, in January 2007, as Minister of Justice of Austria, the role of rapporteur on Rome I Proposal in the European Parliament Committee on Legal Affairs (JURI) has been taken on by *Cristian*

Dumitrescu, vice-chairman of the JURI Committee, named on February 23rd 2007 (see the OEIL page on Rome I).

In order to allow Mr Dumitrescu to set out his proposed approach and timetable, the Committee decided in its meeting of February to re-open the deadline for tabling amendments (cf. the JURI-newsletter n. 3/2007).

At the meeting of 19 March 2007, a document was released (doc. n. PE 386.328v01-00 of 5 March 2007) containing 11 new amendments, 6 of which were presented by the rapporteur. The 'Rome I' file currently being examined by the JURI Committee is thus formed by three documents:

- **the original Draft report by Maria Berger** (doc. n. PE 374.427v01-00 of 22 August 2006: see our resumé here);
- **the first set of 54 amendments** (amendments 32-85: doc. n. PE 382.371v01-00 of 7 December 2006), presented at the meeting of the Committee of 20 December 2006: most part of the modifications proposed by the MEPs deals with art. 3 (amendments nn. 40-46), art. 4 (nn. 47-52) and art. 5 (nn. 53-67);
- **the second set of amendments** (amendments 86-96: doc. n. PE 386.328v01-00 of 5 March 2007), referred to above.

In addition, an **opinion was delivered** for the JURI Committee **by the Committee on Employment and Social Affairs** (rapporteur: Jan Andersson; doc. n. PE 374.323v02-00 of 14 September 2006), exclusively focused on the conflict rule for employment contracts, in the light of the Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.

A closer look at some of the amendments presented by rapporteur *Dumitrescu* shows some potentially controversial issues:

- Recital 7, as modified by amendment 87, would **limit the party autonomy to a very narrow scope**:

> *[T]he parties' freedom to choose the applicable law can be exercised only in favour of the law of a Member State or of principles adopted by the Community legislator in accordance with the codecision procedure. In cases where the parties choose such principles as the applicable law, those principles apply without prejudice to the imperative provisions of the law applicable in the*

absence of choice and of other Community legal instruments.

- accordingly to recital 7, art. 3(2) of Rome I Proposal, on the **choice as the applicable law of a non-State body of law**, would be redrafted as follows (amendment 90):

The parties may also choose as the applicable law the principles and rules of the substantive law of contract, provided that those principles and rules have been incorporated in a Community instrument adopted in accordance with the procedure referred to in Article 251 of the Treaty. However

(a) questions relating to matters governed by such principles or rules which are not expressly settled by them shall be governed in accordance with the law applicable in the absence of a choice under this Regulation;

(b) the imperative provisions of the law applicable in the absence of choice under this Regulation shall remain applicable, in particular in the case of consumer protection. The application of these principles and rules shall not affect the application other relevant provisions of Community law.

- a **new art. 4a** is introduced **on the law applicable to real property rights** (amendment 91):

Notwithstanding Articles 3 and 4, the law applicable to real property rights, including security rights in the form of immovable property, shall be the law of the place in which the immovable property is situated.

Other amendments presented by the rapporteur deal with voluntary agency (amendment 94: art. 7), form of contract on rights in immovable property (amendment 95: art. 10(4)) and art. 13 on voluntary assignment and contractual subrogation (amendment 96).

The Draft 'Rome I' report is scheduled for adoption in the JURI Committee on 3 May 2007. The subsequent vote at plenary session by the Parliament is scheduled on 22 May 2007 (cf. the OEIL page on Rome I proposal).

Request for a Preliminary Ruling on the Service Regulation

The German *Bundesgerichtshof* (Federal Supreme Court) has referred the following questions to the ECJ for a preliminary ruling:

> *Must Article 8(1) of Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters ('the Regulation') be interpreted as meaning that an addressee does not have the right to refuse to accept a document pursuant to Article 8(1) of the Regulation if only the annexes to a document to be served are not in the language of the Member State addressed or in a language of the Member State of transmission which the addressee understands?*
>
> *If the answer to the first question is in the negative:*
>
> *Must Article 8(1)(b) of the Regulation be interpreted as meaning that the addressee 'understands' the language of a Member State of transmission within the meaning of that regulation because, in the exercise of his business activity, he agreed in a contract with the applicant that correspondence was to be conducted in the language of the Member State of transmission?*
>
> *If the answer to the second question is in the negative:*
>
> *Must Article 8(1) of the Regulation be interpreted as meaning that the addressee may not in any event rely on that provision in order to refuse acceptance of such annexes to a document, which are not in the language of the Member State addressed or in a language of the Member State of transmission which the addressee understands, if the addressee concludes a contract in the exercise of his business activity in which he agrees that correspondence is to be conducted in the language of the Member State of transmission and the annexes transmitted concern that correspondence and are written in the agreed language?*

The case is registered under C-14/07 (*Weiss und Partner*). The referring decision of the *Bundesgerichtshof* can be found on its website.

Rome II: Commission’s opinion on Parliament Second Reading

On March 14th, **the Commission released its opinion** (COM(2007)126 fin.) **on the European Parliament's amendments** to the Council Common Position on Rome II, that were adopted at second reading on 18 January 2007 (see our post here).

The guidelines of the Commission's position had been already expressed by EU Commissioner Franco Frattini during the debate that preceded the vote in the Parliament plenary session (see our resumé here): apart from a formal acknowledgment of some of the Parliament's amendments (aimed to clarify the wording of some recitals and provisions), the Commission rejects most part of the amendments on the controversial issues of the Regulation, on which an agreement could not be reached in the first two stages of the codecision procedure.

In particular, **the following provisions of the Parliament legislative resolution** (hereinafter: EP resolution) **were rejected**:

- **the introduction of a specific rule on violations of privacy and rights relating to the personality** (amendments 9, 15 and 19: new Recital 25a and new Art. 7a of the EP resolution):

> *The Commission already rejected this rule at first reading. Given the political impasse in the Council, the Commission would now prefer to exclude this tricky question from the scope of the Regulation, as in its amended proposal, especially since there is very little international litigation in this area.*

On the conflict rule on violations of privacy and rights relating to the personality, see also the letter of 28 February 2007 (Council doc. n. 6899/07) from Peter Hustinx (**European Data Protection Supervisor**) to the President of the Council, expressing some doubts and concerns on the proposed Art. 7a EP Resolution, and **risks of inconsistencies with the Directive 95/46/EC** (on the protection of individuals with regard to the processing of personal data and on the free movement of such data).

- **the possibility for the Court to "reasonably" infer a choice of law by the parties, having regard to other factors than an express clause** (amendment 10: Recital 28 of the EP Resolution):

The proposed form of words is not compatible with the legal certainty objective, which requires certainty as to the existence of a choice by the parties.

- **the introduction of the *restitutio in integrum* principle in quantifying damages for personal injuries** (amendments 11 and 22: new Recital 29a and new Art. 21a of the EP Resolution):

While [the Commission] agrees that this is a very interesting idea for improving the situation of road traffic victims, it considers that this constitutes harmonisation of the Member States' substantive civil law which is out of place in an instrument harmonising the rules of private international law.

- **the abolition of the specific rule relating to anti-competitive practices**:

The Parliament's vote on the conflict rule for unfair competition was quite contradictory: following the proposal put forward by the Rapporteur Diana Wallis in the Draft Recommendation for Second Reading, the rule itself (Art. 6 of the Council Common Position) has been deleted (see amendment 17). In a last minute attempt to agree on a compromise text, the Rapporteur had nevertheless proposed, a few days before the Parliament's plenary session, a number of modifications (doc. n. PE 382.964v01-00) to the provision of Art. 6 (see Amendment 31) and to the recitals dealing with it (see Amendments 28-30/Recitals 19-21).

In the Parliament's vote, some of the recitals have been adopted, which clarify the

wording and the scope of the provision, but the modified text of Art. 6 has been rejected: the final outcome is that Recitals 19, 20 and 21 of the EP Resolution refer to an article which does not exist any more. The Commission emphasizes this paradoxical situation, while partially agreeing on the modifications approved by the Parliament, with a view to retain the special provision:

> *[P]reserving this specific rule boosts certainty and foreseeability in the law since it anchors the place where the loss was sustained. Moreover, the Commission fails to grasp the intentions of Parliament, which, despite this deletion [of Art. 6], would preserve and even improve the recital […] relating to the specific rule. If Parliament actually wished to preserve the specific rule, the Commission would accept the rule as proposed in amendment 31, rejected by Parliament.*

- **the introduction of a very detailed provision on the relationship between Rome II and other Community instruments containing rules having an impact on the applicable law, in particular the internal market instruments** (see Amendment 24/Art. 27):

> *In view of the recent developments in the European Parliament and the Council in the context of negotiations of other proposals, such a specifically tailored provision in this instrument no longer seems necessary.*

As regards some **general issues of private international law theory, the Commission rejects the following amendments of the EP resolution**, that had been originally proposed by the Rapporteur Diana Wallis as autonomous provisions (see Amendment 21/Art. 15a and Amendment 22/Art. 15b of the Draft Recommendation for Second Reading) but then adopted by the Parliament in the form of recitals:

- **the introduction of a new recital allowing a litigant to raise the issue of the applicable law** (amendment 12: new Recital 29b of the EP Resolution):

> *The Commission already explained in its amended proposal that, while it supported the idea of easing the task of a court faced with international litigation, this was not something that could be expected of all the parties, in*

particular those who are not legally represented. Since it cannot accept a rule such as this, the Commission cannot accept either a mere recital, especially as this is a horizontal issue that should be addressed in a broader context. But the Commission is willing to look into the question of the application of foreign law in the courts of the Member States in the report on the application of the Regulation, as proposed in the amended proposal.

- **the express introduction of the *iura novit curia* principle, according to which the Court should determine the content of the applicable foreign law of its own motion** (amendment 13: new Recital 30a of the EP Resolution):

[The Commission] believes that in the current situation most Member States would be unable to apply such a rule as the requisite structures are not in place. But it agrees that this is an avenue well worth exploring and that special attention should be paid to it in the implementation report.

A **partial agreement** was expressed by the Commission **on the definition clause** contained in new Recital 21a (see amendment 32, presented by the Rapporteur a few days before the Parliament's plenary session: doc. n. PE 382.964v01-00), **which clarifies the scope of the specific rule on environmental damage set out in Art. 7** of the Council Common Position, with a view to keep it in line with Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage (see. Art. 2(1) of the directive):

While the Commission is basically in favour of clarifying the scope of the specific rule on environmental damage, it regrets that the definition adopted in amendment 32 is so restrictive, confining the scope so that the rule would not apply, for instance, to air pollution. The Commission can accept a definition only if it covers all non-contractual obligations in respect of environmental damage, irrespective of the nature of the damage.

The opinion is the last official statement of the Commission's position on Rome II, prior to the Conciliation Committee that will be convened, in accordance with Art. 251(3) of the EC Treaty, after the formal rejection by the Council of the

Parliament legislative resolution (the Council JHA is scheduled on April 19th 2007).

Germany: New Central Authority For International Child Abduction and Adoption Cases

Since 1 Januar 2007, Germany has a new authority dealing with questions of international legal relations and international legal assistance which had fallen before in the competence of the Federal Public Prosecutor (*Generalbundesanwalt*) – the *Bundesamt für Justiz*.

Thus, the *Bundesamt für Justiz* is now *inter alia* the competent authority according to:

- the 1980 Hague Convention on the Civil Aspects of International Child Abduction
- the 1993 Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption
- the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children
- the Brussels II *bis* Regulation

In addition, the *Bundesamt für Justiz*

- is the German contact point in the European Judicial Network (EJN)
- is competent to refer questions on the interpretation of the Brussels Convention and the Rome Convention on the Law Applicable to Contractual Obligations to the ECJ
- will be the central authority according to the Hague Convention on the International Protection of Adults as soon as it will enter into force (the German Parliament adopted the implementing law on 14 December 2006

– however, for the entry into force of this Convention it is necessary that, besides Germany, a third State ratifies the Convention. So far, only the UK has ratified the Convention (only for Scotland))

Cf. with regard to the competences of this new authority the article by *Rolf Wagner*, Das Bundesamt für Justiz, IPRax 2007, 87

German Courts: Non-Applicability of Art.5 (2) Lugano Convention in Favour of a Public Authority

According to the *Oberlandesgericht* (Higher Regional Court) *Dresden*, Art.5 (2) Lugano Convention is not applicable in favour of a claimant governed by public law subrogated to the rights of the maintenance creditor.

In the present case, a public authority had paid an education grant to the daughter of the defendant who was legally obliged to provide her maintenance. Afterwards, the public authority brought an action against the defendant aiming at the disclosure of his income as well as the variation of the maintenance order based on a statutory subrogation. The claimant referred to Art.5 (2) Lugano Convention.

The appeal court held that Art.5 (2) Lugano Convention was not intended to facilitate maintenance actions of public authorities subrogated to the rights of the maintenance creditor brought against the maintenance debtor. This point of view is founded on the nature of Art.5 (2) as an exception to the general rule of Art.2, according to which the defendant is to be sued in the courts of his domicile. The exception to this general principle in Art.5 (2) was justified by the goal to protect the maintenance creditor who is regarded as the weaker party and to provide him with the opportunity to sue the maintenance debtor at his, i.e. the creditor's, domicile/habitual residence. This rationale, however, could not be asserted in favour of a public authority since a public authority was – in contrast to a private

maintenance creditor – not in an inferior position. Even though the wording of the provision itself did not require the maintance creditor to be the claimant, the Court advocated, in view of the aforementioned arguments, this restrictive interpretation of Art.5 (2) Lugano Convention.

The Court referred in particular to the ECJ's ruling in C-433/01 (*Freistaat Bayern v. Jan Blijdenstein*) where the ECJ had decided in this sense as well, even though with regard to the Brussels Convention. However, the *Oberlandesgericht Dresden* held that this ruling was applicable to the case at issue since both Conventions had to be interpreted uniformly.

Abstracts of the reasoning can be found in NJW 2007, 446 (OLG Dresden, judgment of 28 September 2006 – 21 UF 381/06).

Conference: «The New European Contract Law: From the Rome Convention to the "Rome I" Regulation»

An international symposium on **Rome I Proposal** is organised **on March 23th and 24th in Bari** by the ***Fondazione Italiana per il Notariato*** (Italian Notary Public Foundation) and the **University of Bari** (Department of International Law and EU Law):

> *More than fifteen years after the Rome Convention on the law applicable to contractual obligations took effect, there are several reasons to open a new public debate on the private international law provisions for one of the most crucial areas in the notarial practice.*
>
> *First of all, the development of specific contract–related rules, both at Community and international level, frequently clashes with the discipline set by*

the Convention. Moreover, delicate problems arise both from the possibility to choose, as the applicable law, not only national statutes, but also non binding codes (for example the UNIDROIT principles) and from the progressive development of a core of mandatory Community rules applicable to intra-Community cases.

The application of the Convention meets further challenges in the rise of new issues (such as e-contracting and its influence on the rules concerning contract completion; consumers' contracts); and in the development of new legal issues, such as the agreements that govern non-matrimonial relationships.

This led the European Commission to submit a draft regulation (so-called Rome I), which not only introduces our subject into the communitarisation process of Private International Law, but which also modifies its content on important aspects. This conference represents, therefore, a special opportunity for a de iure condito discussion of the results achieved, and of problems still to be solved, and for an evaluation of possible solutions to be adopted de iure condendo.

Here's the programme:

FRIDAY 23 MARCH – MORNING SESSION

Chair: *Bruno Volpe* (Consiglio Nazionale del Notariato)

- Welcome speech – *Giovanni Cellamare* (University of Bari)
- Introductory address – *Giuseppe Gargani* (Chairman of the European Parliament Legal Affairs Committee)
- The Communitarization of Private International Law: Role and Prospects of Private Autonomy – *Sergio Maria Carbone* (University of Genoa)
- Delimiting the Scope of Application of Community Conflict Rules on Contractual Obligations: in particular, Gifts and Conventions Governing Non-matrimonial Relationships – *Giovanni Liotta* (Consiglio Nazionale del Notariato)
- Delimiting the Scope of Application of Community Conflict Rules on Contractual Obligations: in particular, Shareholders' Agreements – *Stefania Bariatti* (University of Milan)
- The Law Applicable in the Absence of Choice: Difference between the Old

and New Discipline – *Ugo Villani* ("Luiss-Guido Carli" University of Rome)
- Freedom of Choice of the Applicable Law – *Gabriella Carella* (scientific coordinator of the conference, University of Bari)

FRIDAY 23 MARCH – AFTERNOON SESSION

Chair: *Fausto Pocar* (University of Milan – President of the ICTY)

- Choosing as Applicable Law «the Principles and Rules of the Substantive Law of Contract Recognised Internationally or in the Community »: Examples and Impact on Contracts' Practice – *Olivier Tell* (European Commission, DG for Freedom, Security and Justice)
- Drafting the Choice-of-law Clauses – *Alfredo Maria Becchetti* (Consiglio Nazionale del Notariato)
- Internally, Communitary and Internationally Mandatory Rules – *Nerina Boschiero* (University of Milan)
- Consumer Contracts Concluded by Remote Communication Techniques – *Cyril Nourissat* ("Jean Moulin" University – Lyon 3)
- The Law Applicable to Agency – *David Ockl* (Consiglio Nazionale del Notariato)
- Matters Governed by Lex Contractus and the Law Applicable to the Effects of Contract as Against Third Parties – *Domenico Damascelli* (scientific coordinator of the conference, Consiglio Nazionale del Notariato)

SATURDAY 24 MARCH – MORNING SESSION

Chair: *Federico Tassinari* (Consiglio Nazionale del Notariato)

- The Law Applicable to the Form of Contracts; in particular, Contracts Relating to a Right *in Rem* or Right of User in Immovable Property – *Tito Ballarino* (University of Padua) and *Paolo Pasqualis* (Consiglio Nazionale del Notariato)
- The Law Applicable to Voluntary Assignment: Delimiting the Competence among Laws to Take into Account – *Andrea Bonomi* (University of Lausanne)
- The Impact of the "Rome I" Regulation on Italian Private International Law – *Francesco Salerno* (University of Ferrara)
- Draft Regulations Relationship with other Provisions of Community Law

and with International Conventions – *Andrea Cannone* (University of Bari)
- Coordinating the "Rome I" and "Rome II" Draft Regulations – *Luciano Garofalo* (University of Taranto)

Simultaneous interpreting in English and French will be provided.

For further information and registration, see the website of the *Fondazione Italiana per il Notariato* and the downloadable leaflet (in English and French version).

Swedish Supreme Court on Jurisdiction and Patent Infringements

Introduction

The Swedish Supreme Court (*Högsta Domstolen*) recently rendered a decision on adjudicatory jurisdiction over a negative declaration pursuant to non-infringement of a patent, and hence non-contractual non-liability. The decision is dated 2006-06-02 and was published in NJA 2006 p. 354 (NJA 2006:39), – case no. Ö 2773-05. Following is a brief note on the decision.

Parties, facts and contentions

The plaintiff, Alligator Bioscience AB, a company domiciled in Sweden, served the defendant, Maxygen Inc., a company domiciled in the USA holding a European patent (EP 0 752 008) valid in Sweden, with a subpoena in a Swedish court (Stockholms tingrätt). Alligator´s object of action was to ask the court to declare that Alligator was in its right to manufacture fragment induced diversity by a method of in vitro mutated polynucleodes (abbreviated FINDTM) without infringing Maxygen´s patent. Maxygen asserted the court must reject to hear the case and subsequently dismiss the case from becoming a member of the Swedish adjudicatory law system, based, first, on lack of Swedish adjudicatory authority,

and, second, Alligator´s lack of interest to have that question determined by the court. This case note will solely venture into the question of adjudicatory authority.

Court instances and conclusions

The decisions of the court of first and second instance as well as the Supreme Court were as follows. The court of first instance (*Stockholms tingrätt*) attributed adjudicatory authority to Swedish courts based on analogous application of the Brussels and Lugano Conventions article 5.3 and the Brussels I Regulation article 5.3, admitting that neither were directly applicable. Maxygen appealed that decision to the court of second instance (*Svea Hovrätt*), which concurred with the court of first instance. Maxygen appealed that decision to the Swedish Supreme Court, which attributed adjudicatory authority to Swedish courts on the basis of Swedish national law Chapter 10, §3 in "*rättegaangsbalken*" (1942:740).

Ratio decidendi of the Swedish Supreme Court

In the following, the rationale of the Swedish Supreme Court will be described.

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 neither was domiciled in an EU State nor an EFTA State, the legal basis for determining the attribution of jurisdiction to Swedish courts was, in accordance with the Brussels I Regulation article 4.1 and the Brussels and Lugano Conventions article 4, to be determined by Swedish law. Further, the Swedish Supreme Court reasoned that the attribution of jurisdiction to court could in principle be based on analogous application of the Brussels and Lugano Convention article 5.3 and the Brussels I Regulation article 5.3 since, finding support in Swedish legal literature (Bogdan´s book titled "Svensk internationell privat- ocj processrätt", 6th edition 2004 p. 113 with references to NJA 1994 p. 81 and 2001 p. 800) those rules express international principles in conflicts of adjudicatory jurisdiction between courts in different States under the condition that their application do not lead to limitation of Swedish adjudicatory authority. However, since the Swedish Supreme Court in case in NJA 2000 p. 273, had established that article 5.3 of the Lugano Convention was inapplicable to negative court declarations of non-contractual non-liability, and it was uncertain and a controversial issue in legal literature whether the Brussels I Regulation

article 5.3 and the Brussels Convention article 5.3 encompassed a negative declaration for non-infringement of a patent, and hence a declaration for non-contractual non-liability. Since that question so far was an open question, the Swedish Supreme Court decided it was not evident in this case to base Swedish adjudicatory authority on an analogous application of the Brussels and Lugano Conventions article 5.3 and the Brussels I Regulation article 5.3.

Second, the Swedish Supreme Court outlined its policy considerations for the possibility to seek a negative declaration of non-infringements of patents on the basis of the possibility to seek negative court declarations on non-infringements of trademarks. Since in the EU it is possible to seek a negative declaration on a non-infringement of a trademark on the condition that such a declaration is permitted to seek in accordance with a Member State´s national law (see regulation no 40/94 of 20 December 1993 article 92 b), and such a negative declaration is permitted in the Swedish trademark law § 44, by consequence, the Swedish Supreme Court reasoned, Alligator´s lawsuit were to be attributed to Swedish courts if that claim had been a claim on infringements of trademarks. (Swedish trademark law states that the legal dispute is to be attributed to the court where the defendant is domiciled or has its place of business, or, if the defendant is neither domiciled nor has a place of business in a Member State, the legal dispute shall be attributed to the court where the plaintiff is domiciled or has its place of business, see article 93.1, 93.2 and 93.5.) Further, the Swedish Supreme Court reasoned, since the European Patent Convention does not regulate the equivalent question for patents, and there are no objective grounds to determine the attribution of jurisdiction to court different from negative declarations on non-infringement of trademarks, the solution should be the same for patents as it is for trademarks. Finally, the Swedish Supreme Court noted the Commission proposal on 1 August 2000 to the regulation on European Patents, COM 2000(412), which was a proposal not yet promulgated, which presupposes in articles 30 and 34 that a plaintiff is permitted to seek a negative declaration on non-infringement of a patent against a patent-holder in an EU court for immaterial rights.

Third, upon having determined that the Brussels and Lugano Conventions article 5.3 and the Brussels I Regulation article 5.3 were inapplicable by analogy, and upon establishing that well founded reasons argue in favour to permit a plaintiff to seek a negative declaration on non-infringement of a patent, the Swedish

Supreme Court sought the legal basis for determining Swedish adjudicatory authority in Swedish national law Chapter 10, §3 in "rättegaangsbalken" (1942:740). In accordance with this law, the legal or natural person who does not have a known domicile in Sweden, can in disputes relating to movable property be sued at the place where the movable property is. In a previous Swedish Supreme Court decision, in case NJA 2004 p. 891, it was not necessary for the Swedish Supreme Court to determine whether and to what extent immaterial rights could be located within the sphere of a State territory in the sense the said law required, but expressed it was a controversial issue. Further, since Maxygen´s patent was a European patent, was valid in Sweden and had the same legal position as if the patent were registered in Sweden, and since that patent could be exploited as security rights in accordance with Swedish law, the Supreme Court reasoned those rights were possible to locate, where upon Maxygen´s patent rights could be located in Sweden as conceived in the spirit of the Swedish national law Chapter 10, §3 in "*rättegaangsbalken*" (1942:740).

Fourth, the Swedish Supreme Court ended by commenting on whether and under what conditions a future decision on establishing liability for and enforce permanent discontinuation of patent infringement would lead to a nullification of a preceding negative declaration on non-liability for non-infringement of a patent. The Swedish Supreme Court noted that a preceding negative declaration on non-liability for non-infringement of a patent could not in any event be nullified so long as the decision to establish liability for and enforce permanent discontinuation of patent infringement did not interfere with the uncertainty the plaintiff wished to achieve certainty for through her seeking of the negative declaration on non-liability for non-infringement of a patent.