The Differing Approach to Commercial Litigation in the ECJ and the Courts of England and Wales

Anthony Clarke (Master of the Rolls) has also written an article in the *European Business Law Review*, on "**The differing approach to commercial litigation in the European Court of Justice and the courts of England and Wales**". The abstract reads:

> *Reviews European Court of Justice cases on the allocation of jurisdiction under Council Regulation 44/2001 (the Brussels Regulation), comparing the English courts' approach. Discusses whether courts can still issue anti-suit injunctions to restrain legal proceedings in other Member States. Contrasts the principle of forum non conveniens with the emphasis on legal certainty, mutual trust and the facilitation of the single internal market under the Brussels Regulation.*

~~Again, those with a subscription can download the article from here~~. Andrew Dickinson has kindly provided a **link to the article**, which originally breathed life as a lecture at the *Institute of Advanced Legal Studies* in February 2006. You can download it free of charge.

Mance: "Is Europe Aiming to Civilise the Common Law"?

Jonathan Mance (*House of Lords*) has published an article in the *European Business Law Review* entitled, "**Is Europe Aiming to Civilise the Common Law?**" ((2007) 18 *E.B.L. Rev* pp. 77-99) Here's the abstract:

Explains the EC project to develop a Common Frame of Reference (CFR) for substantive civil law, and responds to criticism that the European Commission is acting beyond its competence and planning to replace the UK common law system with a Continental civil code. Reviews the tendency towards civilian principles in the project to harmonise private international law. Examines the development of the CFR project.

~~Those with access can download the PDF from the Kluwer website.~~ **Update**: Andrew Dickinson has kindly pointed out that this article is the *2006 Chancery Bar lecture*, and can be downloaded for free from **here**.

ECJ: AG Opinion on Article 5 (1) (b) Brussels I Regulation

On February 15th, *Advocate General Bot* delivered his Opinion in Case C-386/05 (*Color Drack GmbH v LEXX International Vertriebs GmbH*).

The proceedings for a preliminary ruling concern for the first time the interpretation of Article 5 (1) Brussels I Regulation, **in particular the question whether Article 5 (1) (b) Brussels I is applicable if several places of delivery (all situated in a single Member State) are involved – which is answered affirmative by the Advocate General.**

I.) The Background of the Case

The case concerns a dispute between a company the registered office of which is in Austria (Color Drack GmbH) and a company (LEXX International Vertriebs GmbH) the registered office of which is in Germany. Color Drack purchased sunglasses from LEXX International Vertrieb and paid them in full, but had the latter company deliver them directly to its customers in different places in Austria. Subsequently, Color Drack returned the unsold sunglasses to LEXX International Vertrieb and asked to repay the respective sum. Since LEXX

International Vertrieb did not pay, Color Drack brought a payment action against LEXX International at the District Court in St. Johann (Austria), in the jurisdiction of which its registered office is situated. While the District Court ruled that it had jurisdiction under Art. 5 (1) (b) Brussels I, LEXX International appealed and the Regional Court Salzburg set aside the judgment due to the fact that the District Court had lacked territorial jurisdiction. The Austrian Supreme Court to which Color Drack appealed, decided to stay the proceedings and to submit the following question to the European Court of Justice for a preliminary ruling:

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

II.) Legal Questions

The request for a preliminary ruling raises – according to the Advocate General – two questions (para. 23 et seq.):

First, the referring court asks whether Art. 5 (1) (b) Brussels I is applicable if, as agreed between the parties, goods have been delivered to different places in a single Member State.

In case this questions is answered in the affirmative, the courts seeks to know secondly whether, where the claim relates to all the deliveries, the plaintiff may sue the defendant in the court of the place of delivery of his choice.

With regard to the first question, the applicability of Art. 5 (1) (b) Brussels I where there are several places of delivery in a single Member State, the Advocate General holds, along with the UK Government and the European Commission, that Article 5 (1) (b) Brussels I was applicable where, as agreed by the parties, the goods have been delivered in different places within a single Member State (para. 32).

With this holding, the Advocate General did not follow the opinion of the German and the Italian government which argued, Article 5 (1) (b) Brussels I was not applicable where there are several places of delivery.

The Advocate General referred, inter alia, to one of the main objectives of the Regulation, which is to prevent irreconcilable judgments given in several Member States and sets forth that there was "no risk that irreconcilable judgments may be given by courts in different Member States" even if several courts of the respective Member State had – due to the plurality of places of delivery – jurisdiction since these were all courts of the same Member State (para. 101).

Since the Advocate General answered the first question in the affirmative, he had also to address the second question, i.e. the issue whether, pursuant to Article 5 (1) (b) Brussels I, the plaintiff can bring his action before the court of the place of delivery of his choice or before the court of a particular place of performance (cf. para. 117 et seq.).

With regard to this question, the European Commission proposed to transfer the distinction between a principal obligation and an ancillary obligation as established in the *Shenavai* judgment, to Article 5 (1) (b) Brussels I. Thus, the Commission argues, the claimant should bring his action in the court of the place of performance of the principal delivery.

This point of view is not shared by the Advocate General. He argues (at para. 128) that it was a question of the national procedural law of the Member States to decide whether all the courts in the area of which a delivery has been made have jurisdiction or whether this action falls within the jurisdiction of only one of these courts. Thus, the defendant could – as long as there were no special jurisdiction rules within the respective Member State – be sued in the court of one of the places of delivery, at the choice of the plaintiff (para. 129).

III.) Conclusion of the Advocate General

On the basis of these considerations, the Advocate General proposed to reply to the submitted questions as follows:

> ***Where there are several places of delivery, Article 5(1)(b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters is applicable if, as agreed between the parties, the goods have been delivered in different places in a single Member State.***
>
> ***If the action relates to all the deliveries, it is for the law of the Member***

State in which the goods have been delivered to determine whether the plaintiff may sue the defendant in the court of the place of delivery of his choice or only in the court of one of those places. If the law of that State does not lay down rules on special jurisdiction, the plaintiff may sue the defendant in the court of the place of delivery of his choice.

The Trust in Spanish and Italian Private International Law

Benedetta Ubertazzi (*Prof. University Firenze, Attorney in Milan and Madrid, Studio Ubertazzi, Milan, Italy*) has published the second part of his paper on **The *Trust* in Spanish and Italian Private International Law** in the *Trusts and Trustees* journal (OUP). Here's a short abstract:

> *This is the concluding part of the Article of which the first part appeared in the September 2006 issue of Trusts & Trustees and which dealt with the position of trusts under Italian conflict of law. This second part examines the position under Spanish conflict of law rules and the impact that the Hague Convention might have on it.*

Those with access can download the full article from the journal website.

ECJ: Legal Actions for

Compensation for Acts perpetrated by Armed Forces in the Course of Warfare are no “Civil Matters” in Terms of the Brussels Convention

Today, the European Court of Justice has delivered the judgment in case C-292/05 (*Lechouritou and Others v. Federal Republic of Germany*).

The case concerned an action for compensation based on the Brussels Convention brought by Greek descendants of victims of a massacre perpetrated by German armed forces in 1943 in Greece against the Federal Republic of Germany with regard to financial loss, non-material damage and mental anguish.

The Court of Appeal Patras had referred the following questions to the ECJ:

> *Do actions for compensation which are brought by natural persons against a Contracting State as being liable under civil law for acts or omissions of its armed forces fall within the scope ratione materiae of the Brussels Convention in accordance with Article 1 thereof where those acts or omissions occurred during a military occupation of the plaintiffs' State of domicile following a war of aggression on the part of the defendant, are manifestly contrary to the law of war and may also be considered to be crimes against humanity?*
>
> *Is it compatible with the system of the Brussels Convention for the defendant State to put forward a plea of immunity, with the result, should the answer be in the affirmative, that the very application of the Convention is neutralised, in particular in respect of acts and omissions of the defendant's armed forces which occurred before the Convention entered into force, that is to say during the years 1941-44?*

With regard to the first question, the Court first states that Art. 1 Brussels Convention did not define the meaning or the scope of the concept of "civil and commercial matters" (para. 28) before it is pointed out that this term had to be regarded as "an independent concept" which had to be interpreted by referring

"first, to the objectives and scheme of the Brussels Convention and, second to the general principles which stem from the corpus of the national legal systems […]" (para. 29). Further the Court refers to its case law where it has been held that actions between a public authority and a person governed by private law did not fall within the scope of the Brussels Convention if the public authority is acting in the exercise of its public powers.

The Court agrees with the Advocate General's Opinion that " […] there is no doubt that operations conducted by armed forces are one of the characteristic emanations of State sovereignty […]" (para. 37) and concludes that the present action "[…] does not fall within the scope ratione materiae of the Brussels Convention […]" (para. 39).

Thus, the Court ruled as follows:

> ***On a proper construction of the first sentence of the first paragraph of Article 1 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic, 'civil matters' within the meaning of that provision does not cover a legal action brought by natural persons in a Contracting State against another Contracting State for compensation in respect of the loss or damage suffered by the successors of the victims of acts perpetrated by armed forces in the course of warfare in the territory of the first State.***

Compare also our lengthy post on the AG Opinion which can be found here as well as the very comprehensive post at the EU Law Blog which can be viewed here.

Denmark’s ratification of the “parallel” agreements on Reg. 44/2001 and Reg. 1348/2000

As stated on recent news published on the European Judicial Network (EJN) website, on 18 January 2007 **Denmark notified the European Community that it has ratified the two "parallel" agreements** concluded between the European Community and Denmark to extend to the latter the provisions of Regulation 44/2001 (“Brussels I”) and Regulation 1348/2000 on the service in the Member States of judicial and extrajudicial documents.

The **entry into force of the two agreements, on 1st July 2007**, will put an end to the current situation where the uniform rules contained in Reg. 44/2001 and in Reg. 1348/2000 are not in force in Denmark and they are not applied in the relations between other Member States and Denmark, due to the non-participation of the latter State in Title IV of the EC Treaty (see the *Protocol on the position of Denmark* annexed to the EC Treaty as amended by the Amsterdam Treaty).

As regards judicial cooperation in civil and commercial matters, the consequences of Denmark’s opting-out have been strongly criticised by the Commission, in the *Explanatory memorandum* accompanying the *Proposals for Council Decisions concerning the conclusion and the signing of the Agreements between the European Community and the Kingdom of Denmark* (COM(2005) 145 def., as regards Reg. 44/2001, and COM(2005) 146 def., as regards Reg. 1348/2000):

> *The non-application of Regulation 44/2001 in Denmark results in a most unsatisfactory legal situation: not only does Denmark continue to apply the old rules of the Brussels Convention, but also all other Member States have to apply these rules, i.e. a set of rules different from the one they use in their mutual relations, when it comes to the recognition and enforcement of Danish decisions.*
>
> *This constitutes a step backwards given that prior to the entry into force of Regulation 44/2001 the rules of the Brussels Convention applied uniformly in all Member States. The current situation therefore jeopardizes the uniformity and*

legal certainty of the Community rules.

Hence the necessity to extend, by way of traditional international law instruments, the provisions of Brussels I Reg. (and of Reg. 1348/2000, strictly related to the functioning of the former) to Denmark.

The negotiations procedure and its outcome are summarized as follows in the Commission's Proposals referred to above:

The Commission presented on 28th June 2002 a recommendation for a Council Decision authorizing the Commission to open negotiations for the conclusion of two agreements between the European Community and Denmark, extending both Regulation 44/2001 and Regulation 1348/2000 to Denmark.

The Council decided on 8 May 2003 to exceptionally authorize the Commission to negotiate […]. The Commission negotiated the parallel agreement […] in accordance with the Council's negotiating directives, carefully ensuring that rights and obligations of Denmark under this agreement correspond to rights and obligations of the other Member States.

As a result, the parallel agreement contains, in particular, the following provisions:

- *appropriate rules on the role of the Court of Justice to ensure the uniform interpretation of the instrument applied by the parallel agreement between Denmark and the other Member States;*
- *a mechanism to enable Denmark to accept future amendments by the Council to the basic instrument and the future implementing measures to be adopted under Article 202 of the EC Treaty;*
- *a clause providing that the agreement is considered terminated if Denmark refuses to accept such future amendments and implementing measures;*
- *rules specifying Denmark's obligations in negotiations with third countries for agreements concerning matters covered by the parallel agreement;*
- *the possibility of denouncing the parallel agreement by giving notice to the other Contracting Party.*

The parallel agreements were signed on 19th October 2005, following two Council Decisions of 20th September 2005 (2005/790/EC, as regards Reg. 44/2001, and 2005/794/EC, as regards Reg. 1348/2000) and subject to their possible conclusion at a later date.

The Council decision on the conclusion of the agreements can be found here:

- for Regulation 44/2001: Council Decision 2006/325/EC (OJ 2006, L 120 p. 22);
- for Regulation 1348/2000: Council Decision 2006/326/EC (OJ 2006 L 120 p. 23).

The **text of the agreements** can be found here, as attachments to the Council Decisions on the signing of the agreements:

- **for Regulation 44/2001**: **Annex** to Council Decision 2005/790/EC;
- **for Regulation 1348/2000**: **Annex** to Council Decision 2005/794/EC.

(Many thanks to Pietro Franzina, University of Ferrara, for the initial tip-off).

Conferences on Conflicts at the Cour de Cassation in March

The *Cour de cassation*, the French supreme court for civil, commercial and criminal matters, organises conferences on a variety of topics. Although a few were held in English, they are generally in French. The speakers have been academics, lawyers or judges, both from France and from abroad.

Two conferences dealing either directly or indirectly with conflicts issues will be organised in March. The first one will take place on March 5th from 6:30 to 8:30 pm. Professor Alegrias Borras will talk on the "freedom of movement of family in Europe". The second one will take place on March 13th from 6:30 to 8:30 pm. Professor Emmanuel Gaillard will talk on the "case law of the Cour de cassation on international arbitration". For conferences organised on other topics, click

here.

To attend, the Court only asks for prior registration, but it is also possible to walk in. No fees are charged. Registration online is possible, both for the Gaillard conference and for the Borras conference.

Italian conference papers on 'Rome I' Proposal

An Italian book has been recently published which collects a number of papers dealing with old and new questions raised by the modernisation of the 1980 Rome Convention and its conversion into a Community regulation (Rome I: see our dedicated page here).

Here's a short presentation, kindly provided by *Pietro Franzina* (University of Ferrara), editor of the volume:

> *Some fourteen papers, covering a wide range of issues relating to the 2005 Commission Proposal for an EC Regulation on the law applicable to contractual obligations (Rome I), have just been published by CEDAM under the title* ***"La legge applicabile ai contratti nella proposta di regolamento Roma I" ("The law applicable to contracts according to the Rome I proposed Regulation")****, following a conference organised in 2006 by the Faculty of Law of the* ***University of Ferrara****.*
>
> *Opened by an introductory paper by* ***Professor Francesco Salerno*** *(University of Ferrara) and* ***Professor Luca G. Radicati di Brozolo*** *(Catholic University of Milan), the book (in Italian) includes contributions on the following topics:*
>
> - *the role of the European Court of Justice and the interpretation of the proposed regulation (Paolo Bertoli, University of Milan);*
> - *the choice of 'principles and rules of the substantive law of contract recognised internationally or in the Community' as the law applicable to*

contractual obligations (Fabrizio Marrella, University of Venice);

- *the law applicable to contracts in the absence of choice and the relation between the proposed regulation and international conventions bearing uniform rules (Bernardo Cortese, University of Padua);*
- *the law applicable to consumer contracts and individual employment contracts (Giuseppina Pizzolante, University of Bari, and Paolo Venturi, University of Siena, respectively);*
- *the law applicable to agency (Pietro Franzina, University of Ferrara);*
- *ordre public and mandatory rules (Giacomo Biagioni, University of Cagliari);*
- *the law applicable to voluntary assignment of rights (with two different papers, by Anna Gardella, Catholic University of Milan, and Antonio Leandro, University of Bari);*
- *consequences for the Italian system of Private International Law deriving from the conversion of the Rome Convention into a Community instrument (Fabrizio Marongiu Buonaiuti, University of Rome 'La Sapienza').*

Title: "La legge applicabile ai contratti nella proposta di regolamento Roma I" (*P. Franzina*, editor). ISBN: 978-88-13-26251-5. Pages: XII-180. Available from CEDAM.

U.S. Federal Courts and Foreign Patents: Recent Decisions Affecting the Global Harmonization of Patent Law

The U.S. Court of Appeals for the Federal Circuit recently held that a U.S. district court did not possess subject matter jurisdiction over the alleged infringement of a foreign patent. The case of Voda v. Coris Corp., concerned several patents

owned by Dr. Jan Voda, a cardiologist who invented and patented a catheter for coronary angioplasty. Believing that Cordis Corp. infringed his U.S. patents, Voda brought suit in the Federal District court for the Western District of Oklahoma. Voda ultimately obtained a large damages award from the trial court based upon Cordis' willful infringement of his U.S. patent. Voda also sought, however, to assert patents on the same invention that he had procured in Britain, Canada, France, and Germany.

There was no question that the court had jurisdiction to hear his claim of infringement of his U.S. patents. The interlocutory appeal to the Federal Circuit, however, concerned whether his claims of foreign infringement could be adjudicated on a consolidated basis under the discretionary power of Federal courts to hear "supplemental" claims within the same "case of controversy" as those under the courts' original jurisdiction. *See* 28 U.S.C. 1367 (the "supplemental jurisdiction statute"). Voda asserted that supplemental jurisdiction over the foreign patents was proper, and that exercising such jurisdiction would be fair and efficient for both litigants.

Writing for the majority, Judge Gajarsa concluded that the district court abused its discretion. The court turned first to the Paris Convention for the Protection of Industrial Property, and observed that although the Convention contained no express provision allocating jurisdiction to hear patent infringement claims, there nonetheless existed an inferred a principle that one jurisdiction should not adjudicate the patents of another. In response to Voda's claims that "the trend of harmonization of patent law" supports a consolidated adjudication in one court, the Judge Gajarsa noted:

> *Regardless of the strength of the harmonization trend, however, we as the U.S. judiciary should not unilaterally decide either for our government or for other foreign sovereigns that our courts will become the adjudicating body for any foreign patent with a U.S. equivalent 'so related' to form 'the same case or controversy.' Cf. F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 166-67 (2004) (finding "no convincing justification" for providing such subject matter jurisdiction in antitrust context). Permitting our district courts to exercise jurisdiction over infringement claims based on foreign patents in this case would require us to define the legal boundaries of a property right granted by another sovereign and then determine whether there has been a trespass to that right.. . .Based on the international treaties that the United States has*

> *joined and ratified as the 'supreme law of the land,' a district court's exercise of supplemental jurisdiction could undermine the obligations of the United States under such treaties, which therefore constitutes an exception circumstances to decline jurisdiction.*"

Judge Newman responded with a thoughtful dissent, noting generally that courts routinely apply foreign law, and specifically that courts from other nations have adjudicated claims of foreign patent infringement. Judge Newman also found that no treaty prohibited one national court from resolving private disputes that involve foreign patent rights.

Commentators have reacted to this decision. Professor Jay Thomas thoughtfully writes at Opinion Juris that:

> "*Voda v. Cordis represents a lost opportunity for the Federal Circuit to ameliorate the burdens of costly, piecemeal patent litigation faced by innovators and the world's judicial systems alike. The majority's holding is more narrow than may be initially apparent, however. The majority stressed that jurisdiction under § 1367(c) is an area of discretion, and that different results might obtain 'if circumstances change, such as if the United States were to enter into a new international patent treaty or if events during litigation alter a district court's conclusions regarding comity, judicial economy, convenience, or fairness.' . . . For now, innovative industries should recognize that although technology knows no borders, the extent of federal jurisdiction over multinational patent disputes may indeed be constrained by courts uncomfortable with the prospect of adjudicating such cases.*"

This decision presages additional developments, and increased interest, in the extrateritoriality of national patent laws. For example, the United States Supreme Court will hear argument next month in *Microsoft v. AT&T*, a case concerning the scope of a federal law that prohibits the export of unassembled component parts for overseas assembly of a product that would, if made or used in the U.S., infringe a U.S. patent. Veteran Supreme court heavyweights Theodore Olson and Seth Waxman will spar over whether that provision applies to software copied abroad from a master disk supplied from the United States. AT&T has submitted that Microsoft "supplied" an AT&T code to foreign computer manufacturers "with the intent that those companies would pay Microsoft a

royalty each time they combined that code with other components that would infringe an AT&T patent if made or used in the United States." Microsoft contends that this result would create a campaign to stretch U.S. patent laws to reach international dealings in software. Interestingly, the United States as amici curiae argues for a territorial limitation of U.S. patent law and asserts that AT&T's remedy "lies in obtaining and eforcing foreign patents, and not in attempting to extend U.S. patent law to overseas activities." Comments on this case, as well as some of the parties' briefs and a related podcast, can be found on the SCOTUSblog, and also on Law.com.

Insolvency and the Conflict of Laws: A Review of English Cases in 2006

Andrew McKnight (Salans) has written written his annual review in the *Journal of International Banking Law and Regulation* on **legal developments during 2006 of interest to practitioners in the insolvency and conflict of laws fields** (*J.I.B.L.R. 2007, 22(4)*). Here's the abstract:

> *This, the second part of a two part article, examines legal developments during 2006 of interest to practitioners in the insolvency and conflict of laws fields. Reviews the UK adoption of the Model Law on Cross Border Insolvency 1997, the range of issues examined by the Court of Appeal in Manning v AIG Europe UK Ltd and other case law on topics including common law assistance in foreign insolvency proceedings, cross border insolvencies, transactions at an undervalue, administration expenses, court powers to determine a state's entitlement in a bank account, jurisdiction agreements, sovereign immunity, conflict of laws rules concerning tortious issues and international arbitration.*

Cases referred to: *Cambridge Gas Transport Corp v Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2006] UKPC 26; [2006] 3 W.L.R.

689 (PC (IoM)); *HIH Casualty & General Insurance Ltd v Axa Corporate Solutions (formerly Axa Reassurance SA)* [2002] EWCA Civ 1253; [2002] 2 All E.R. (Comm) 1053 (CA (Civ Div)); *Manning v AIG Europe UK Ltd* [2006] EWCA Civ 7; [2006] Ch. 610 (CA (Civ Div)); *AY Bank Ltd (In Liquidation), Re* [2006] EWHC 830; [2006] 2 All E.R. (Comm) 463 (Ch D (Companies Ct)); *Svenska Petroleum Exploration AB v Lithuania (No.2)* [2005] EWHC 2437; [2006] 1 All E.R. (Comm) 731 (QBD (Comm)); *Trafigura Beheer BV v Kookmin Bank Co* (Preliminary Issue) [2006] EWHC 1450; [2006] 2 All E.R. (Comm) 1008 (QBD (Comm)); *Harding v Wealands [2006] UKHL 32*; [2006] 3 W.L.R. 83 (HL).