A Farewell to Cross-Border Injunctions?

Annette Kur (Max Planck Institute for Intellectual Property, Competition and Tax Law) has written an article in the latest issue of the International Review of Intellectual Property and Competition Law (IIC 2006, 37(7), 844-855) entitled, "**A Farewell to Cross-Border Injunctions? The ECJ Decisions GAT v. LuK and Roche Nederland v. Primus and Goldenberg**". The abstract states [links to the judgments have been inserted]:

> *The two ECJ judgments of 13 July 2006 – GAT v. LuK and Roche Nederland – have stirred much concern in the patent community. On the basis of its reasoning, which is amazingly brief both in view of the complexity of the issues decided and the length of the time it has taken the court to ponder about its decisions, it was ruled that contrary to practice presently established in some Member Countries, the courts in the country of registration are exclusively competent to adjudicate validity, even when it only arises as an incidental matter. It is also not possible to join claims against affiliated companies for coordinated infringement of European bundle patents before the courts in the country where the principal office steering the activities has its seat.*

You can see our summary of GAT v Luk here. You may also be interested in reading the contemporary ECJ case of Reisch Montage AG v Kiesel Baumaschinen Handels GmbH (13 July 2006), which is summarised here.

Federal Council of Germany adopts Resolution on Rome III

Proposal

The Federal Council of Germany (*Bundesrat*) has adopted a resolution on the Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters ("**Rome III**").

The Federal Council adopts – in contrast to the UK and Ireland (see our older post) – in principle a positive attitude towards the proposal and welcomes the harmonisation of choice of law rules on divorce. However, the Federal Council makes also some reservations concerning the concrete approach. In particular there are criticisms that the proposal did not facilitate sufficiently a synchronism between jurisdiction and choice of law rules. Such a synchronism, which should be achieved by choosing the same connecting factors as well as the same hierarchy with regard to jurisdiction rules as well as choice of law rules, is regarded as a possibility to enhance the quality of judicature since then the *lex fori* would be applied in all cases which would lead to a speeding up of proceedings due to the fact that expert opinions would not be necessary anymore.

With regard to the individual provisions of the proposal the Federal Council took *inter alia* the following points of view:

1.) Art. 1 (2) Proposal (Art. 3a (1) new Regulation)

- The possibility of choice of court agreements is welcomed.
- With regard to the possibility to choose a court of the place which has been the spouses' last common habitual residence for a minimum period of three years it is remarked critically that in come cases a sufficient link to the present situation of the spouses might be lacking.
- In general Art. 3a (1) is criticised for not facilitating a sufficient synchronism with the rules on jurisdiction.

2.) Art. 1 (2) Proposal (Art. 3a (2) new Regulation)

- The possibility to conclude a jurisdiction agreement simply in written form is criticised. For the sake of legal certainty and the protection of the weeker party a notarial documentation of the choice of court agreement is

suggested.

3.) Art. 1 (7) Proposal (Art. 20a (1) new Regulation)

- The possibility of choice of law agreements is welcomed.
- The importance of a synchronism between jurisdiction rules and choice of law rules is stressed.
- Art. 20a (1) (d): Since the applicable law was unclear if the spouses choose the law of the Member State "where the application is lodged" at the beginning of their marriage, the possibility to choose the law of this State should be restricted to a specified time.

4.) Art. 1 (7) Proposal (Art. 20b new Regulation)

- According to the Federal Council, priority should be given to "nationality" as the connecting factor since it was more stable than "habitual residence" and easier to ascertain – in particular in view of the increasing international mobility.
- Further it is noted critically that, according to the wording of Art. 20b, the applicable law is mutable – even after the divorce proceeding has been instituted – which was contrary to legal certainty. Therefore it is suggested that the applicable law should be immutable as soon as the divorce proceeding has been instituted. Concerning the question when a court shall be deemed to be seised a reference to Art. 16 Brussels II *bis* is suggested.

5.) Art. 1 (7) Proposal (Art. 20e new Regulation)

- The inclusion of a public policy reservation is supported.

The full resolution (Drs. 531/06) of 3 November 2006 is available here.

Norwegian Supreme Court on the Lugano Convention Art 5.1.

The Norwegian Supreme Court has recently handed down a judgment on the Lugano Convention art 5.1. The judgment (Norsk Höyesterett (kjennelse)) is dated 2006-08-29 and was published in HR-2006-01492-U – Rt-2006-1008.

The facts of the case were the following. Hüttlin GmbH and Pharma-Food AS entered into an agent agreement in May 1995, which attributed Pharma-Food AS exclusive agent´s rights in Norway, Sweden and Denmark. Hüttlin GmbH was domiciled in Germany. Pharma-Food AS was domiciled in Norway. There was controversy regarding Pharma-Food AS´ commission for a concrete and individuated sale of goods delivered from Germany to Switzerland. Pharma-Food AS chose court litigation as instrument to redress and sued Hüttlin GmbH in September 2005 in Norway. Pharma-Food AS claimed 320.000 EUR with interest and expenses and asserted the case be adjudicated by a Norwegian court. Hüttlin GmbH denied the correctness of the claim and asserted the case to be dismissed due to the Norwegian court´s lack of adjudicatory authority. Since the parties had neither agreed on which court was to have adjudicatory authority to settle disputes arising in connection with their contractual relationship, nor on the place of performance of obligation, the relevant provision for determining the adjudicatory authority of Norwegian Courts was the Lugano Convention Article 5.1. That provision reads:

> *"A person domiciled in a Contracting State may, in another Contracting State, be sued: 1. in matters relating to a contract, in the courts for the place of performance of the obligation in question; in matters relating to individual contracts of employment, this place is that where the employee habitually carries out his work, or if the employee does not habitually carry out his work in any one country, this place shall be the place of business through which he was engaged;*

In general, the legal basis for conferring, delimiting and thus both attribute and exclude adjudicatory authority to Norwegian courts is regulated by chapter 2 of the Norwegian civil procedural law (the Civil Procedural Act of 13 August 1915 nr

6 om rettergangsmaaten for tvistemaal) where § 36a decides that the Norwegian civil procedural law chapter 2 is limited by "agreements with a foreign state". Such an agreement is the Lugano Convention, which was ratified by Norway on 2 February 1993 and adopted and implemented by incorporation as law on 8 January 1993 nr. 21 (Luganoloven). The law entered into force on 1 May 1993 and regulates international civil and commercial matters between persons domiciled within EFTA-States, and between persons domiciled in an EFTA-State and an EU-State.

The judgments in the court of first and second instance as well as the Supreme Court were as follows. Lack of Norwegian adjudicatory authority was the result of the judgements of both the court of first and second instance (titled respectively "Asker og Bærum tingrett" and "Borgarting lagmannsrett") of respectively 14 February 2006 and 23 June 2006, whereas Norwegian adjudicatory authority was the result of the judgement of the Norwegian Supreme Court of 29 August 2006.

The rationale of the Norwegian Supreme Court was thus:

- First, the Supreme Court identified the legal basis for the case and the legal question in issue. The legal basis for determining the place of performance of the obligation in question in accordance with the Lugano Convention Article 5.1 was the Norwegian rules of private international law, which specify the Irma-Mignon formula as the relevant choice-of-law rule. According to the Irma-Mignon formula, the legal question in issue was which country the obligation in question, and in particular the agent agreement, had its most significant connection to. That question was, in accordance with the Irma-Mignon formula, to be answered by an assessment of several relevant components.
- Second, the Supreme Court rejected the judgement of the court of second instance where upon the Supreme Court first succinctly described that court´s assessment and thereafter presented its own view.

> *The court of second instance found, in accordance with the Irma-Mignon formula, the case to have most significant connection to Germany so that German law was the proper law to determine the place of performance of the obligation in question (and the court found German law to designate the place for performance of money claims at the place where the debtor was domiciled).*

In favour of connection to Norway, the court of second instance attached importance to the agent being Norwegian, the geographical scope of the agent agreement comprising Norway, the 12-year duration and practice of the agreement and the commission having been paid to a Norwegian bank account.

Weakening the connection to Norway, the court of second instance attached importance to the geographical scope of the agent agreement, which also comprised Denmark and Sweden.

In favour of most significant connection to Germany, the court of second instance attached conclusive weight to the assignor being a German company, the agent agreement formulated in German language, the assignor delivering its goods directly to clients abroad and usually under contracts governed by German law, either formulated in German or English.

- The Supreme Court identified the place where the agent had its main office as the most important component in the assessment of which State the agent agreement had its most significant connection. That view was justified by the following considerations.

First, the agent is the contractual party who is to perform the non-monetary and real obligation, which also in the Rome Convention Article 4, number 2, is formulated as "the performance which is characteristic of the contract".

Second, the agent´s principal place of business is normally carried out at the agent´s main office.

Third, in accordance with Norwegian law, if there is no agreement on the place of performance of the obligation, the creditor´s domicile or place of business is a significant connecting factor for monetary claims in that it is the place of performance of the obligation, which also in this case accorded with practices which the parties had established between themselves.

Four, in accordance with Norwegian private international law, agent agreements have, as a starting point, closest connection to the State where the

agent carries out its operations in accordance with the agent agreement. This view is strengthened if the agent agreement has a long-term duration and actual practice, which in this case were 12 years. The legal sources supporting this view were two former Supreme Court judgements contained in Rt. 1980, p. 243 and Rt. 1982, p. 1294. In the first case, a claim for ex post commission after performance of the obligation had its most significant connection to Norway as the Supreme Court attached major importance to the agent being Norwegian, the long-term duration of the agreement, which also regulated the agent´s rights and obligations in Norway. The second case, which involved an agent agreement between a Norwegian wholesaler of flashes for photography and a German company, was for the same reasons viewed as having its most significant connection to Norway. Further, the Supreme Court attached importance to a judgement by the Swedish Supreme Court (Högsta Domstolen i Sverige av 18. desember 1992), contained in "Nytt Juridisk Arkiv 1992 page 823" which stated that in a dispute pertaining to an agent agreement, where the parties neither had agreed on forum nor on the place of performance of the obligation, the dispute would normally be determined by the law in the State where the agent had its place of business, especially if the agent mainly carried out its operations in that State. The Swedish Supreme Court emphasized that such a rule is motivated not only by the agent´s connection to that State, but also out of social policy considerations, but that, as a main rule, it could be departed from if the legal relationship clearly had a stronger connection to another State. Finally, the Norwegian Supreme Court referred to Joseph Lookofsky´s publication "International privatret på formuerettens område", 3rd edition 2004, p. 55, where the author had stated that the assessment pursuant to the requirements in the Rome Convention Article 4.1 was the same as the assessment in the Norwegian Irma-Mignon formula, where upon the Supreme Court added the text of Article 4.1.

Five, the Supreme Court did not attach any weight to the language of the agent agreement, the relation between the assignor and the (end) buyers and visits to fairs.

Six, since the geographical scope of the agent agreement was not confined to Norway, but also included Sweden and Denmark, the Supreme Court inquired whether the connection to Norway was sufficiently weakened so as the

connection to Germany could be justified to be the strongest. The Supreme Court based its conclusion on two considerations. First, the main rule was well founded. Second, fairly weighty grounds are required for departing from the main rule. The Supreme Court found the geographical scope of the agent agreement extending also to Sweden and Denmark insufficient to justify strongest connection to Germany, and attached minor importance to the fact that the monetary claim arose from a delivery carried out from Germany to Switzerland.

- Hence, the Supreme Court concluded that the dispute had its strongest connection to Norway.

The case (Norsk Höyesterett (kjennelse)) is dated 2006-08-29 and was published in HR-2006-01492-U – Rt-2006-1008.

Council Meeting on Rome I: A Live Webcast

The Council of the European Union (Justice and Home Affairs) will hold their 2768th meeting on Monday 4th – Tuesday 5th December 2006. **Item 4** on the agenda is:

*Proposal for a Regulation of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I) (debate on certain issues) (LA) (**public deliberation**)*

Thanks to the wonder of modern technology, that public deliberation should be available to watch as a **live webcast** on the Finnish Presidency's website. You will need to download and install RealPlayer, if you don't already have it. The website contains archives of the webcasts, so those that are busy on 4th – 5th December

will be able to watch it after the event; we will link to the specific webcast when it becomes available.

Update: it seems as though the version of the agenda on the Finnish Presidency's website may now be a little out of date. The press office at the Council of the European Union have produced a a new version of the agenda today (1st December 2006), and it makes no mention of Rome I. We will keep you informed of further developments.

Finnish EU Presidency calls for Streamlining of Instruments in the Field of Civil Procedural Law

The Finnish EU Presidency has published a document from their Informal JHA Ministerial Meeting on 20-22 September 2006. Their concern is "**Facilitating access to justice and better regulation in civil justice.**" At present, the Presidency argues, there is a lack of coherence caused by differences in the substance of those instruments that regulate civil procedure. They give an example:

> *Let us assume that someone would like to recover a debt of 2,000 Euros in another Member State with the expectation that the claim will not be contested. The claimant may choose between the European Enforcement Order, the Payment Order, the Small Claims instrument, and the Brussels I Regulation. The procedure that has to be followed will differ depending on his or her choice. From the point of view of the claimant, it would surely be better if there was only one single application form for starting a recovery procedure in another Member State. De facto, approximately the same basic information is needed for the commencement of each procedure: the parties, the amount of the claim, the reasons for the claim, etc. It is only when we know the reaction of the defendant that we are in a position to decide which type of procedure*

should be used to continue. It may also be noted that the methods in the service of documents differ according to which instrument is selected. Why should we accept differences in this regard?

The Presidency goes on to state their vision for an improved regime:

The Finnish Presidency is of the view that it is time to consider streamlining existing instruments in the field of civil procedural law. This work should be based on minimum standards and the aim should be to ensure the consistency and user-friendliness of the relevant provisions. Reducing the number of instruments and integrating different approaches would help practitioners and citizens in applying this legislation and thus enhance access to justice. Such benefits would clearly justify the effort that would have to be invested in negotiations aiming at streamlining the already existing substantive provisions.

The Presidency then poses two questions for discussion:

1. Do the Ministers ***agree with the conclusion that there is a lack of coherence and consistency in the instruments already adopted in the field of civil procedural law***? Could the ***extent of fragmentation of the Community legislation be lessened*** and the ***degree of user-friendliness be improved*** by taking a ***more systematic overview*** of the cooperation in civil law?
2. Do the Ministers ***agree on the advisability of streamlining the instruments on cross-border litigation in the EU into one single instrument based on consistent/common minimum standards***? Should this instrument consist of, in particular, rules covering the provisions on jurisdiction, the service of documents, the taking of evidence, the use of languages and translations, legal aid, special rules on payment and small claims procedures, and in addition, rules covering recognition and enforcement of different types of judgments?

The document can be found in full here. What do you think about the Presidency's conclusions? Comments very welcome.

The New Rule on the Assignment of Rights in Rome I – the Solution to all our Proprietary Problems?

There is an article in the new issue of the *European Review of Private Law* on "**The new rule on the assignment of rights in Rome I – the solution to all ourproprietary problems? Determination of the conflict of laws rule in respect of the proprietary aspects of assignment**" by Lilian Stephens (E.R.P.L. 2006, 14(4), 543-576). Here's the abstract:

> *Considers the extent of the neutral and formal nature of conflict of laws rules applying to the proprietary aspects of an assignment of a right, in light of the harmonisation of conflict of laws within the EU. Discusses attempts to harmonise substantive law on assignment and to harmonise conflict of laws rules in respect of assignment in the Rome Convention Art.12, in particular in respect of the proprietary aspects, and compares the interpretation of Art.12 in the Netherlands, Germany, England, France and Belgium. Assesses the relevant conflict of laws rule in the Proposal for a European Parliament and Council Regulation on the law applicable to contractual obligations (Rome I).*

Those with a subscription can download the article from the Kluwer website when the journal issue becomes available.

The Further Consequences of a

Choice of Law? Trafigura Beheer v Kookmin Bank

Adrian Briggs (Oxford University) has written a note on "**The further consequences of a choice of law?**" in the forthcoming issue of the *Law Quarterly Review* (L.Q.R. 2007, 123(Jan), 18-21). The note:

> *Comments on the three Commercial Court decisions in Trafigura Beheer BV v Kookmin Bank Co on a dispute arising when a Korean company which had issued a letter of credit to a Dutch company in respect of the sale of a cargo of oil brought proceedings in Korea alleging a breach of duty by the Dutch company regarding the failure to pass on the bills of lading. Discusses the Dutch company's application to restrain the Korean proceedings, and the questions whether the claim in tort arising out of the parties' contractual relationship was governed by English or Korean law, and whether the Korean company's behaviour was vexatious.*

State Immunity and Sovereign Debt Developments

There is a short note by Katherine Reece Thomas in *Butterworths Journal of International Banking & Financial Law* (B.J.I.B. & F.L. 2006, 21(10), 432-434) on "**State immunity and sovereign debt developments**". Here's the abstract:

> *Reviews case law on state immunity for sovereign debts, including: (1) Grovit v De Nederlandsche Bank on whether a state bank was immune from the jurisdiction of the court in a libel action; (2) AIG Capital Partners Inc v Kazakhstan on whether assets held by a third party bank in an account belonging to a central bank were immune from attachment; and (3) Svenska Petroleum Exploration AB v Lithuania (No.2) on whether the State Immunity*

Act 1978 s.3 permitted the registration or enforcement of a foreign arbitration award. Comments on public policy concerns.

Observations from the Intersection of Private International Law and Civil Procedure in the USA

Richard D. Freer (*Emory University*) has posted an article on SSRN entitled, "**Pondering the Imponderable and Other Observations from the Intersection of Conflicts and Civil Procedure**". The abstract reads:

> *In honor of the scholarship of Peter Hay, this essay explores some substantive areas of interest to scholars both of conflict of laws and civil procedure, including full faith and credit, federal common law, claim and issue preclusion, the Erie doctrine, and the efficient packaging of complex litigation. Though some have criticized conflict of laws scholarship as basing theory upon fact patterns that do not arise in the empirical world, this essay points out that Supreme Court treatment of full faith and credit has created real-world problems for which governing law simply cannot exist. In addition, while procedure often creates a structure permitting joinder of related claims in a single case, choice of law doctrine defeats the goal of efficiency by requiring the application of different substantive law. Moreover, the Supreme Court instruction to apply federal common law to determine the preclusive effect of a federal civil judgment creates an ersatz body of law by engaging in the assumption that state law provides the content of the federal prescription.*

The full article is available here.

The Quest for the Optimum in Resolving Product-Liability Conflicts

Symeon C. Symeonides (*Williamette University, College of Law*) has just posted "**The Quest for the Optimum in Resolving Product-Liability Conflicts**" on SSRN. Here's the abstract:

This essay reports the findings of a comprehensive study of product-liability conflicts cases decided by American courts from 1990 to 2004. One of the findings is that choice-of-law methodology plays a less significant role in the courts' choice of the governing law than other factors, such as the number and pertinence of factual contacts with a given state.

For example, regardless of methodology, in 79% of the cases in which the product's acquisition and the victim's domicile and injury were in the same state, the courts applied that state's law, regardless of whether it favored the plaintiff or the defendant, and regardless of whether that state was also the forum. Another finding is that, contrary to prevailing perceptions, American courts do not unduly favor plaintiffs as a class, nor the law or the domiciliaries of the forum state. Indeed, on the whole, the record of American courts in resolving these most intractable of conflicts is much better than one might assume from a selective reading of a few cases.

However, this record comes at a heavy cost in time and resources for courts and litigants. One way to remedy this problem is to provide courts with specific guidance in the form of choice-of-law rules. This essay proposes such a rule, and then examines how that rule would have resolved the cases of the study period. The answer: much in the same way (good or bad), but much more quickly, and at a lower cost.

You can download the full article here. The paper forms part of the

forthcoming publication, *ESSAYS IN HONOR OF JOHN P. KOZYRIS, Ana Grammatikaki-Alexiou, ed., Sakoulas-Kluwer Publishers, 2006*. Recommended reading.