Article: Muir Watt on Economics of Adjudication and Int'l Arbitration

In an article forthcoming in the French *Revue de l'arbitrage*, Horatia Muir Watt (Paris I University) explores further the economics of adjudication and wonders what the implications of the lead taken by international arbitration are for the governance of the global economy.

The article is in French. Its title is *Economie de la justice et arbitrage international (réflexions sur la gouvernance privée dans la globalisation)*. The English abstract reads:

> *Arbitration has conquered a dominant part of the global market for dispute resolution in the field of international commerce, where it is now widely held to be a preferable alternative to adjudication before State courts. Indeed, it may be observed that access to the latter is being privatized in international litigation through the generalisation of choice of forum clauses, while the commercial courts of the more competitive national systems tend in turn to behave like private umpires. This article looks at the consequences of this contractualisation of adjudication for the governance of the global economy. In the light of the distinction set out three decades ago by the first analyses of the economics of adjudication, between the regulatory function of the courts (whether through precedent or other modes of creating case-law), seen as a public good provided by the collectivity, and the mere adjustment of private interests, which might legitimately be financed by the parties to the dispute, the transfer of international commercial adjudication to the private sector is synomynous with private appropriation of the regulatory function of of the courts, of which States are progressively divested. This transformation of international commercial adjudication into a private good, subject to a global market, is an invitation to think about normativity through the de-centered lens of legal pluralism, rather than from an exclusively State-centered perspective. On a more practical level, it should also lead to redesign the offer of private justice, so as to adapt its content to the regulatory function it is now called upon to perform*

To my knowledge, articles of the *Revue de l'arbitrage* cannot be downloaded.

Conference: Arbitration and EC Law

The Heidelberg Centre for International Dispute Resolution at the Institute for Private International and Comparative Law will host a conference with the topic

"Arbitration and EC Law – Current Issues and Trends".

 The conference will focus on the relations between European civil procedure and arbitration which have been an intensely debated topic among legal scholars and practitioners for a long time. Lately the debate has been fuelled in particular by:

- the upcoming decision of the European Court of Justice which will decide on the availability of anti-suit injunctions for the protection of arbitral agreements (case C-185/07) – on September 4, 2008 GA Kokott proposed in her conclusions not to permit such remedies in the European Judicial Area,
- recent case law in several EC Member States addressing the arbitrability of EC antitrust law,
- the publication of a report, commonly known as the Heidelberg Report, analyzing – in view of the European Commission's upcoming proposals on possible improvements of the Brussels I Regulation in 2009 – the application of the Regulation in 25 Member States, which proposes to delete the arbitration exception in article 1 no. 2d in order to bring ancillary proceedings relating to arbitration under the scope of the Brussels I Regulation

The conference will take place from 5th to 6th December 2008 in

Heidelberg. Here is the **conference program**:

Friday, Dec. 5, 2 p.m.

1. Free movement of arbitral awards: European challenges

Prof. Gomez Jene, Madrid

2. West Tankers Litigation – the present state of affairs

Att. Prof. H. Raeschke-Kessler, Karlsruhe

3. Articles 81 and 82 EC-Treaty and arbitration

Prof. P. Schlosser, Munich

4. The Regulations Rome I and Rome II: Their impact on arbitration

Prof. T. Pfeiffer, Heidelberg

Dinner

Saturday, Dec. 6, 9.30 a.m.

5. Roundtable: The Brussels I Regulation and arbitration

(Chair: *Prof. H. Kronke*)

5.1 Findings and proposals of the Heidelberg Report on the Regulation (EC) 44/01

Prof. B. Hess, Heidelberg

5.2 A French reaction

Att. Alexis Mourre, Paris

5.3 An English reaction

Att. VV. Veeder, London

5.4 A Belgian perspective

Prof. H. van Houtte, Leuven

5.5 An Italian reaction

Prof. C. Consolo, Verona.

The conference will end at 12.00.

Further information, in particular on registration and accomodation, can be found at the website of the Institute for Private International and Comparative Law Heidelberg.

BIICL event: 11th annual review of the Arbitration Act 1996 – Is English law really better?

The British Institute of International and Comparative Law (BIICL) organizes on Monday 21 January 2007, 09.00 -18.00 (at the Honourable Society of Lincoln's Inn, Lincoln's Inn, London, WC2A 3TL) the **11th annual review of the Arbitration Act 1996 titled "Is English law really better?"** The speakers will review the English Arbitration Act 1996. The 2007 annual review proposes a comparative look at developments in England as the courts now approach 1,000 decided cases since entry into force of the Act. This year's review takes place against the background of claims by the Law Society (England and Wales: The Jurisdiction of Choice, October 2007) that London as an arbitration venue and English law are superior to civil law jurisdictions in terms of quality of legal norms, certainty, predictability, arbitration friendliness, lawyers and infrastructure. Are the Law Society's claims legitimate or merely an expression of legal ethnocentrism by practitioners unfamiliar with systems of law other than their own? The special after dinner speaker is M. Jean-Pierre Ancel Président de Chambre honoraire de la Cour de cassation, France who will give a speech titled

“Les principes confirmés et les nouvelles avancées dans l’arbitrage international”. For a list of the speakers, have a look at the website.

Arbitration Agreements, Anti-Suit Injunctions and the Brussels Regulation

Martin Illmer (*Hamburg*) and Ingrid Naumann (*Berlin, currently New York*) have published a very interesting analysis of the compatibility of anti-suit injunctions in aid of arbitration agreements with the Brussels Regulation in *International Arbitration Law Review* (Int. A.L.R. 2007, 10(5), 147-159): **Yet another blow – anti-suit injunctions in support of arbitration agreements within the European Union**.

An abstract has been kindly provided by the authors:

Following the ECJ’s judgment in *Turner* the issue of the compatibility of anti-suit injunctions with the regime of the Brussels Regulation has again attracted much attention due to the reference by the House of Lords to the ECJ in the *West Tankers* case. By virtue of the eagerly awaited judgment of the ECJ anti-suit injunctions in support of arbitration agreements are at risk to fall within the European Union. Illmer and Naumann provide a thorough and detailed analysis of whether anti-suit injunctions in support of arbitration agreements are compatible with the Brussels Regulation (Regulation 44/2001) and general principles of EU law. Weighing and assessing the arguments put forward in both directions they reach the compelling conclusion that anti-suit injunctions in support of arbitration agreements are incompatible not only with the Brussels Regulation but with general principles of European law. This conclusion based on legal reasoning cannot be overcome by reference to an alleged practical reality of arbitration which the authors unveil as disguised protectionism for the arbitral seat London.

In the first part of their article, Illmer and Naumann provide a detailed analysis of

the scope of the arbitration exception of Art. 1(2)(d) of Regulation 44/2001 with regard to anti-suit injunctions. This comprises of an analysis of the ECJ's former judgments in *Marc Rich* and *van Uden*, the English courts' understanding and interpretation of Art. 1(2)(d) which the authors criticise as a cherry picking exercise and finally a thorough construction of the arbitration exception based on the canon of interpretation tools generally applied by the ECJ. They conclude that the arbitration exception does not cover anti-suit injunctions in support of arbitration agreements. Caught by the the regime of the Brussels Regulation they are incompatible with it as follows inevitably from the ECJ's judgment in *Turner*.

In the second part of the article, the authors continue their analysis under the presumption that the anti-suit proceedings are covered by the arbitration exception and thus do not fall under the Brussels Regulation. Whereas one may take the view that principles underlying the Regulation, in particular the notion of mutual trust, cannot be applied to anti-suit proceedings falling outside the scope of the Regulation, one cannot bypass the general principle of *effet utile*: Even proceedings in national state courts that do not fall under the Brussels Regulation by virtue of the arbitration exception must not impair proceedings that come within the scope of the Brussels Regulation (i.e. the proceedings which are intended to be restrained by the anti-suit injunction) and thus distort the effective functioning of European law.

In a third, complementary part the authors rebut the arguments put forward by the House of Lords in the *West Tankers* reference concerning the so-called practical reality of arbitration. They show that the truth behind this argument is a protection of London as an arbitral seat vis-à-vis its European competitors in the fierce competition for arbitration amongst arbitral seats. Furthermore, the authors hint at alternatives to anti-suit injunctions in protecting the undeniable interest of the parties to an arbitration agreement in avoiding a breach or circumvention of it.

Proskauer on International Litigation and Arbitration: A Review

Proskauer Rose LLP has just announced the release of its new E-Guide: "Proskauer on International Litigation and Arbitration: Managing, Resolving and Avoiding Cross-Border Business and Regulatory Disputes." It is a welcome compendium of information for all sorts of practitioners – both litigation-centered and transactional – and brings together a wide array of topics under the common heading of cross-border legal issues.

To cover these issues, the E-Guide is divided into three sections dedicated to "International Litigation," "International Arbitration," and "International Issues in Select Substantive Areas." The litigation section is broad and comprehensive, tackling matters that arise at the outset of a suit (e.g., securing U.S jurisdiction, venue and service outside the U.S.), and during the prosecution of a suit (e.g., choice of law, discovery, and trial), but also issues that are not commonly discussed in the traditional model if private international law texts. The chapters on government investigations and government immunity, U.S. abstention doctrine, the role of comity in U.S. courts, and anti-suit injunctions are particularly helpful to the practitioner aiming, in the authors' words, to "present clients with strategic choices." Later chapters on litigation ancillary to arbitration, and fighting to compel *or* avoid arbitration, have a similar practical focus.

The text of the E-guide is presented simply and and effectively, grazing the surface to focus more detailed research when necessary, and providing necessary details itself when appropriate. The authors believe that Proskauer on International Litigation and Arbitration is a "useful tool in . . . efforts to confront, resolve, and even avoid the issues that arise when a commercial or regulatory dispute jumps – or should jump – national borders." A useful tool it certainly is.

It is available in its entirety here.

Proceeds from the Croatian Arbitration and Conciliation Days Published

Perhaps not as fresh news as possible but still worth noting is the second most recent edition of the Croatian journal *Law in Economics*, vol 46, no. 2, which brings together some of the proceeds from the 14th Croatian Arbitration and Conciliation Days held on 30 November and 1 December 2006 in the Croatian Chamber of Economy in Zagreb. The number of renewed foreign and Croatian legal experts and practitioners gathered at this annual meeting to present current developments in arbitrations of several legal systems and institutional rules, including Austrian, Croatian, Italian, Serbian and Swiss. The contributions published in the cited journal are as follows:

Krešimir Sajko: *On Conciliation as an Alternative Way of Settling Private International Law Disputes – The Existing Situation and the Solutions* De Lege Ferenda, pp. 7-18.
Nina Tepeš: *Activities and Practice of the Conciliation Centre of the Croatian Chamber of Economy*, pp. 19-26.
Mihajlo Dika: *Legal Position of Institutional and* Ad Hoc *Arbitration in Croatian Law* De Lege Lata *and* De Lege Ferenda, pp. 27-37.
Hrvoje Sikiri?, *Zagreb Rules and the Arbitration Act in Practice of the Permanent Arbitration Court at the Croatian Chamber of Economy – Selected Issues*, pp. 38-70.
Miljenko A. Giunio, Compétence de compétence – *A Preliminary Decision or an Award?*, pp. 71-89.
Eduard Kunštek, *Authority of the ICSID Arbitration Court for Stay of Enforcement of an Award*, pp. 60-101.
Aleksandra Magani?, *Arbitrability in Non-Contentious Matters*, pp. 102-133.
Boris Stani?, *Arbitral Settlement of Disputes Arising Out of the Agreements on Association of the Attorneys-at-Law*, pp. 133-150.
Gašo Kneževi?, *New Serbian Law on Arbitration*, pp. 151-161.

Arsen Janevski/Toni Deskoski, *Law on International Arbitration in the Republic of Macedonia*, pp. 162-177.

The papers by foreign authors will be published in the next edition of the Croatian Arbitration Yearbook.

Arbitration and the Brussels Convention

Legal Department du Ministère de la Justice de la République d'Irak c./ Stés Fincantieri, Finmeccanica et Armamenti E Aerospazio is the first French case to address the issue of whether the 1968 Brussels Convention applies to the enforcement of a foreign judgement declaring an arbitration clause void. The judgement was rendered by the Paris Court of Appeal on June 15th, 2006, and I understand that an appeal is now pending before the French Supreme court for civil, commercial and criminal matters (*Cour de cassation*). The dispute had arisen between the State of Iraq and three Italian companies. Of course, as any proper French judgement, not much is said on the facts. It is only stated that Iraq concluded a contract with each of the companies, and that each contract contained an ICC arbitration clause. At the beginning of the 1990s, arbitration proceedings were initiated pursuant to the clauses, while the Italian companies initiated proceedings in Italy to have the arbitration clauses declared void. In 1994, the Genoa Court of Appeal did declare the clause void as being contrary to the embargo established by the U.N. 661 Resolution of 1990, but did not go on to rule on the merits. For the following decade, the arbitration went on. In 2004, the Italian companies sought a declaration of enforceability of the 1994 Genoa judgement in France. The Paris Court of appeal noticed in its judgement that, interestingly enough, that was precisely at the time when the arbitral tribunal was getting close to make its award. The case before the Paris Court of appeal was whether the Italian judgement could be declared enforceable in France. The Court held that it could not. The first reason was that the Brussels Convention did not apply, because the case fell within the exclusion of article 1, d) of the

Convention. One could maybe have expected the Court to rule that the Italian judgement was clearly dealing with an issue of arbitration, as it had only held that the arbitration clauses were void, and had not ruled on the merits. Instead, the Court held that the rationale behind the exclusion was to allow the contracting states to comply freely with their international undertakings under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and that one of such undertaking was the obligation for courts of Contracting states to decline jurisdiction in presence of an arbitration clause, pursuant to article II of the New York Convention. The Court then went on to examine whether the 1930 Franco-Italian Convention applied, and found that it did not either. Finally, and most interestingly, the Court held that the Genoa Court did not have jurisdiction from the French perspective. The reason why it lacked jurisdiction was that it had accepted to examine whether the arbitration clause was valid and applicable when, under French law, courts do not have such power unless the clause can be found prima facie void or inapplicable.

In order to fully appreciate the meaning of this judgement, it is important to appreciate how French law of arbitration differs from the law of arbitration of most jurisdictions. Under French law, arbitrators have a priority to rule on their own jurisdiction. The competence-competence principle entails not only that arbitrators may rule on their own jurisdiction, but also that they have a priority to do so over national (French) courts, and that such courts ought to decline jurisdiction to do so unless they find that the clause is prima facie void or inapplicable ("*manifestement nulle ou inapplicable*"). The French judgement projects this peculiar perception of the strength of the jurisdiction of arbitrators internationally. The Italian Court is found as lacking jurisdiction because it declared the arbitration clause void without finding that it was prima facie so, although Italian law may well have provided that (Italian) Courts do have the power to examine whether arbitration clauses are valid and applicable before declining jurisdiction.

Articles on the Conflict of Laws in International Arbitration

There are two articles in the new issue of *Abitration International* that deal with private international law issues arising out of international commercial arbitration. They are:

Thomas Buergenthal, "The proliferation of disputes, dispute settlement procedures and respect for the rule of law" *Arbitration Int*. 2006, 22(4), 495-499. Abstract:

> *Considers the reasons for the proliferation of disputes, particularly international disputes, and of dispute resolution mechanisms. Discusses whether respect for the rule of law has kept pace with these trends, especially with regard to conflict of laws issues and the selection of arbitrators and judges.*

Klaus Peter Berger, "Evidentiary privileges: best practice standards versus/and arbitral discretion" *Arbitration Int.* 2006, 22(4), 501-520. Abstract:

> *Examines the diverse approaches to evidentiary privileges in international commercial arbitration that are taken in various jurisdictions, and considers conflict of laws issues in this area. Assesses whether there is a need for harmonised best practice standards or whether the resolution of privilege rule conflicts can be left to arbitral discretion.*

Those with a subscription to *Arbitration International* can access the full articles online.

Enforcing International Arbitration Agreements: the Remedial Powers of Federal Courts

Daniel S. Tan (*O'Melveny & Myers LLP*) has posted an article on "**Enforcing International Arbitration Agreements in Federal Courts: Rethinking the Court's Remedial Powers**" on the Social Science Research Network (SSRN) that will be published in the *Virginia Journal of International Law* in Spring 2007. The abstract reads:

> *The area of remedies in private international law is largely unexplored, but provide the very means by which the courts can advance private international law aims such as controlling international litigation and enforcing forum selection. The contractual nature of arbitration agreements and the policy in favor of arbitration make this a good starting point from which a wider remedial framework can be developed.*
>
> *In practice, the U.S. federal courts invariably enforce arbitration agreements with the statutory remedies in the Federal Arbitration Act. Yet, there is no reason why this should be. Where the statutory remedy is deficient or inappropriate, the courts may appeal to their wider inherent remedial powers to fashion suitable relief. The domestic law of remedies suggests that the courts may use specific and (antisuit) injunctive relief to enforce the parties' right to the arbitral forum, or to award ordinary contractual damages to vindicate what is a straightforward breach of contract. Private international law remedies such as stays of proceedings and nonrecognition of judgments obtained in breach of arbitration agreements are other remedial alternatives that can be used to enforce such agreements. All the same, development of each of these remedies must be done within the context of an overarching remedial scheme – akin to that which exists in domestic law. The domestic law of remedies offers an interlocking set of remedial responses to vindicate wrongs. To effectively control international litigation and improper attempts at forum shopping, the courts must endeavor to develop a similar remedial framework in the private international law context, in order that they may be able to render the most appropriate remedial relief to enforce agreements to arbitrate and advance the*

policy in favor of arbitration.

You can download the full article here.

The Abu Dhabi Civil Family Court on the Law on Civil Marriage – Applicability to Foreign Muslims and the Complex Issue of International Jurisdiction