Burbank on Outsourcing the Treaty Function

Stephen Burbank (University of Pennsylvania Law School) has posted Whose Regulatory Interests? Outsourcing the Treaty Function on SSRN.

> *In this article I describe the status quo in the area of foreign judgment recognition, with attention to the tension between domestic interests and international cooperation. Precisely because the future of the status quo is in doubt, I then consider current proposals for change, particularly the effort to implement the Hague Choice of Court Convention in the United States. Prominent among the normative questions raised by my account is whose interests, in addition to the litigants' interests, are at stake – those of the United States, those of the several states, or those of interest groups waving a federal or state flag. A related question is whether, if the uniformity we seek is to be found in state rather than federal law, we can be, and be seen by other countries to be, serious about international cooperation. I describe in some detail the sequence of events that led to the Uniform Law Commissioners ("ULC") becoming involved in the process of drafting legislation to implement the Choice of Court Convention. I also explore reasons why the ULC has been successful in securing the lion's share of attention for its preferred approach to implementation, which the ULC calls "cooperative federalism," but which has come to resemble cooperative redundancy. Recounting how, and offering suggestions why, the ULC ultimately rejected a package of compromises proposed by the State Department's Legal Adviser, even though almost all compromises were in favor of the ULC, I conclude with observations about the ULC's ambitions in the international arena. My argument is that, if the ULC were successful in taking over the negotiation or implementation of private international law treaties, international cooperation would be if not a fortuity, then not a priority, because we would have regressed to a position of privileging not just federal but state law uniformity over international uniformity. And the state law we privileged would be anything but "indigenous."*

The article is forthcoming in the *New York University Journal of International Law*

and Politics in 2013.

London Conference on the Brussels I Recast

Reed Smith LLP will host a conference organized by the *Journal of Private International Law* on the Brussels I Regulation Recast on February 7th in London.

Programme:

Chair: Professor Trevor Hartley, LSE

1.30 pm – 2.00 pm: Overview of the revision of the Brussels I Regulation

- Oliver Parker**,** Legal Adviser, UK Ministry of Justice

2.00 pm – 2.30pm: Choice of Court Agreements: Reversal of *Gasser*, etc

- Alex Layton QC**,** 20 Essex Court Chambers, London

2.30 pm – 3.00 pm: The Relationship between Arbitration and Brussels I Revised

- Dr George Panagopoulos**,** Reed Smith, Piraeus and London

3.00 pm – 3.30 pm: Question and answer and discussion of the first three talks

3.30 pm – 4.00 pm: Coffee/Tea Break

Chair: David Warne, Partner, Reed Smith LLP

4.00 pm – 4.30pm: The Abolition of Procedural Exequatur and Retention of Public Policy

- Professor Paul Beaumont**,** University of Aberdeen

4.30 pm – 5.00 pm: Conflicts of Jurisdiction with Third States

- Professor Jonathan Harris, Serle Court; King's College London

5.00 pm – 5.30 pm: Extension of Jurisdiction to Third State Defendants and other changes to Brussels I

- Dr Karen Vandekerckhove, European Union Commission

5.30 pm – 6.00 pm: Question and answer and discussion of the last three talks

6.00 pm: Drinks Reception

Registration: The event is free but has a limited number of places and therefore you need to register in advance to guarantee a place on a first come first served basis. Please email events@reedsmith.com to register, including the event title "The Brussels I Regulation Recast" in the subject line of the email. **Update: the limit has been reached, any new registrant will be put on the waiting list.**

Location: Reed Smith LLP, The Broadgate Tower, 20 Primrose Street, London EC2A 2RS

ECJ Rules on Secondary Insolvency Proceedings

On November 22nd, the European Court of Justice delivered its judgment in *Bank Handlowy w Warszawie SA v. Christianapol sp. z o.o.* (Case C-116/11).

The reference was made in the context of proceedings relating to the opening of insolvency proceedings, in Poland, further to an application made by Bank Handlowy w Warszawie SA and PPHU 'ADAX'/Ryszard Adamiak, in respect of Christianapol sp. z o.o., a company governed by Polish law in respect of which rescue proceedings (*procédure de sauvegarde*) had previously been opened in France.

The main proceedings opened in France had a protective purpose. Article 3(3) of the Insolvency Regulation provides that any secondary proceedings opened subsequently must be winding-up proceedings. This raised two problems.

Do protective proceedings preclude winding-up secondary proceedings?

The first was whether it would be logical to allow the opening of secondary liquidation proceedings when insolvency officials are trying to rescue the business in the country of the main proceedings. Should it follow that, in such a case, the opening of main proceedings precludes the opening of secondary proceedings?

The ECJ rules that neither Article 27, nor Article 3(3) makes any distinction according to the purpose of the main proceedings, and that therefore secondary proceedings may always be opened. They are to be liquidation proceedings, but the Regulation affords various tools allowing the insolvency official appointed in the main proceedings to influence the evolution of the secondary proceedings.

The European lawmaker is currently considering reforming the Insolvency Regulation and allowing secondary proceedings, whenever opened, to be protective in character.

What if the main proceedings are pre-insolvency proceedings?

The second issue was that the French proceedings were not technically speaking insolvency proceedings. They were pre-insolvency proceedings. *La procédure de sauvegarde* is available if the business meets financial difficulties, but the debtor needs not be insolvent.

A preliminary issue was whether such proceedings fell within the scope of the Regulation. France has put them on the Annex. The Court underlines it, but insists that the merits of the inclusion in the Annex were not the subject matter of any question referred to the Court. As a consequence, it is to be considered that *Sauvegarde* was an insolvency proceedings in the meaning of the Regulation.

The problem, however, was that the French court had not, by definition, ruled on whether the business was insolvent. Could the Polish court rule on the issue, then? The ECJ decides that it may not.

Holding:

1. *Article 4(2)(j) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, as amended by Council Regulation (EC)*

No 788/2008 of 24 July 2008, must be interpreted as meaning that it is for the national law of the Member State in which insolvency proceedings have been opened to determine at which moment the closure of those proceedings occurs.

2. Article 27 of Regulation No 1346/2000, as amended by Regulation No 788/2008, must be interpreted as meaning that it permits the opening of secondary insolvency proceedings in the Member State in which the debtor has an establishment, where the main proceedings have a protective purpose. It is for the court having jurisdiction to open secondary proceedings to have regard to the objectives of the main proceedings and to take account of the scheme of the Regulation, in keeping with the principle of sincere cooperation.

3. Article 27 of Regulation No 1346/2000, as amended by Regulation No 788/2008, must be interpreted as meaning that the court before which an application to have secondary insolvency proceedings opened has been made cannot examine the insolvency of a debtor against which main proceedings have been opened in another Member State, even where the latter proceedings have a protective purpose.

HCCH Family Law Briefings, September and November 2012

The *International Family Law Briefings* of the Hague Conference are quarterly updates provided by its Permanent Bureau regarding the work of the Hague Conference in this field.

The Briefings for September and November are now available:

Content September 2012

- Introduction
- Meeting of the Council on General Affairs and Policy of the Hague Conference on Private International Law, 17 to 20 April 2012

- Publication of the Guide to Good Practice on Mediation under the 1980 Hague Child Abduction Convention
- An update from the Hague Conference's Regional Office in Latin America
- A seminar on the work of the Hague Conference on Private International Law and its relevance for the Caribbean Region and Bermuda, 21 to 24 May 2012
- Intercountry Adoption in Africa: an update
- The Hague Children's Conventions: status update

Contents November 2012

- Introduction
- The Emerging Guidance regarding the development of the International Hague Network of Judges and General Principles or Judicial Communications
- Intercountry adoption update
    - Meeting of an expert group on the financial aspects of intercountry adoption (8-9 October 2012)
    - ICATAP: an update
- The Third International Family Justice Judicial Conference for Common Law and Commonwealth States (China (Hong Kong SAR), 28-31 August 2012)
- Second Meeting of the Central American Judicial Council (CJC), (Antigua, Guatemala, 26-27 June 2012)
- The Hague Children's Conventions: Status Update

International Maintenance Conference

Recovery of Maintenance in the EU and worldwide

International Conference Heidelberg | 5 – 8 March 2013

Maintenance Regulation (EC) No 4/2009, the 2007 Hague Protocol and the 2007 Hague Maintenance Convention have given rise to exciting developments in the interna- tional recovery of maintenance. Make sure to be there when speakers such as Prof. Frédérique Ferrand, Prof. Nadia de Araújo, Prof. Dr. Erik Jayme, William Duncan, Prof. Paul Beaumont, Robert Keith and Prof. Dr. Burkhard Hess present and discuss this topic. Within the framework of the confe- rence, there will be the possibility to enter into an exchange and to establish a network with all the persons working in this field.

For more information, please visit ***www.heidelberg-conference2013.de***.

Vicki Turetsky, Prof. Andrea Bonomi, William Duncan, Philippe Lortie, Prof. Paul Beaumont, Prof. Dr. Burkhard Hess, Chris Beresford, Hannah Roots, Maja Groff, Dr. Matthias Heger, Dr. Thomas Meysen, Mary Dahlberg, Gary Caswell, Martina Heller, Dr. Richard Frimpong Oppong, Robert Keith, David Stillman, Prof. Nadia de Araújo and Dr. James Ding, Katja Lenzing, Lis Ripke and Jessica Pearson will present the following topics, among others:

Cultural dimension of maintenance from an international law perspective

- From complexity to simplicity, from chaos to Hague Convention 2007
- Presentation of "highly functional administrative systems", including IT solutions
- EU Maintenance Regulation: The devil's in the details
- Applicability and application of foreign law
- Effective cooperation of the Central Authorities
- Good practice for caseworkers: the rocky pathways to the recovery of maintenance
- Perspectives of Asian, American, African and Latin American states
- Children in focus: poverty and maintenance
- Successful alternative dispute resolution

Curious? Click here: ***www.heidelberg-conference2013.de/program.html***

Online registration at:

www.heidelberg-conference2013.de/registration/?page=1&lng= en.

Journal of Intellectual Property, Information Technology and E-Commerce Law (JIPITEC), Third Issue 2012

Founded in 2010, JIPITEC aims at providing a forum for in-depth legal analysis of current issues of intellectual property, information technology and E-commerce law with the main focus on European law. Its intention is to develop an information platform that allows authors and users to work closer together than is the case in classical law reviews. It has been conceived as an Open Access Journal, i.e., articles are available according to the terms and conditions of the Digital Peer Publishing Licenses, and in addition, authors may permit the use of their articles under a Creative Commons or other license. Its latest issue (2012, 3: click here to download), is devoted to PIL and intellectual property with articles from Paulius Jurcys, Benedetta Ubertazzi, Matulionyté Rita, Pedro de Miguel Asensio, and Axel Metzger.

JIPITEC is financially supported by the Deutsche Forschungsgemeinschaft (DFG).

Brussels I Recast Set in Stone

At its 3207th meeting held in Brussels, the Council of the European Union has approved the recast of the Brussels I Regulation in the form settled with the

European Parliament in a first reading agreement. The accompanying press release announces as follows:

> *The purpose of this regulation is to make the circulation of judgments in civil and commercial matters easier and faster within the Union, in line with the principle of mutual recognition and the Stockholm Programme guidelines.*
>
> *The recast regulation will substantially simplify the system put in place by "Brussels I" as it will abolish exequatur, i.e. the procedure for the declaration of enforceability of a judgment in another member state. According to the new provisions, a judgment given in a member state will be recognised in the other member states without any specific procedure and, if enforceable in the member state of origin, will be enforceable in the other member states without any declaration of enforceability.*
>
> *The recast regulation will provide that no national rules of jurisdiction may be applied any longer by member states in relation to consumers and employees domiciled outside the EU. Such uniform rules of jurisdiction will also apply in relation to parties domiciled outside the EU in situations where the courts of a member state have exclusive jurisdiction under the recast regulation or where such courts have had jurisdiction conferred on them by an agreement between the parties.*
>
> *Another important change will be a rule on international lis pendens which will allow the courts of a member state, on a discretionary basis, to stay the proceedings and eventually dismiss the proceedings in situations where a court of a third state has already been seized either of proceedings between the same parties or of a related action at the time the EU court is seized (sic)."*

Under Art. 81, the recast Regulation ("Brussels 1a"?) will apply from a date 24 months after its entry into force, being 20 days after its publication in the Official Journal. The new rules will not, therefore, apply until early 2015, by which time their potential impact will likely have been closely scrutinised on this site and elsewhere. The UK and Ireland are taking part in the adoption of the recast Regulation, which will also be applicable to Denmark under the terms of the 2005 Agreement between that country and the EC extending the Brussels I regime.

Russian Move for Keeping Judicial Business at Home

The *Financial Times* has reported yesterday about the willingness of Russian elite to repatriate Russian judicial business back home.

Russian oligarchs have notoriously been litigating essentially Russian cases in London in the last few years. The dispute between Roman Abramovich and Boris Beresovsky heard by the English High Court was the most famous of such cases.

In a recent judgment, one of Russia's supreme court annuled a clause whereby foreign parties could avoid being sued in Russia. It is reported that the clause was a "unilateral option clause". The court stated that it had nothing to do with protectionism, which was a separate issue. It probably is.

More interestingly, Russian higher judges have stated that they were willing to fight against unfair competition from other jurisdictions. They went as far as threatening to retaliate against parties participating to such proceedings abroad, and indeed against lawyers and judges aiding and abetting.

Russian Court Strikes Down Unilateral Option Jurisdiction Clauses

The *Financial Times* has reported yesterday on a recent judgment of the Russian Arbitration Court in *Sony v. RTC* in which the court struck down a unilateral option jurisdiction clause.

The case involved two commercial companies, Sony and Russian Telephone Company (RTC). The contract included a clause which forbad the Russian party to sue in Russia while, it seems, giving much more freedom to Sony to bring proceedings. The Russian party nevertheless sued in a Russian court, which retained jurisdiction notwithstanding the jurisdiction clause.

The chief of staff of the Russian court is reported to have specifically referred to the judgment of the French supreme court which struck down a one way jurisdiction clause in September.

Update:

- A full report on the case is available here.
- See also the guest post of MM Sullivan and Maynard on the Russian judgment in today's *FT*

The Stream-of-Commerce Doctrine under McIntyre and the First Reactions of U.S. Courts to the U.S. Supreme Court's Ruling

Cristina M. Mariottini is a Senior researcher at the Max Planck Institute Luxembourg on International, European and Regulatory Procedural Law

How the U.S. Supreme Court Has Relinquished Reciprocity in Jurisdiction in Cross-Border Products Liability Cases and Possible Future U.S. Federal Legislation on the Matter

Products liability is the area of law in which manufacturers, distributors, suppliers, retailers, and others who make products available to the public are held accountable for the injuries caused by those products. As Justice Kennedy points out at the outset of his opinion in *J. McIntyre Machinery, Ltd. v. Nicastro et. al.*,

131 S. Ct. 2780 (2011), whether a natural or legal person is subject to jurisdiction in a State is a question that frequently arises in products liability litigation. This question arises even with an out-of-forum defendant, i.e. despite the fact that the defendant was not present in the State, either at the time of suit or at the time of the alleged injury, and did not consent to the exercise of jurisdiction. Before the U.S. Supreme Court's ruling in *McIntyre*, the issue of specific *in personam* jurisdiction of U.S. courts over out-of-forum defendants in products liability cases was addressed several times by the U.S. Supreme Court, and particularly in *International Shoe Company v. Washington*, 326 U.S. 310 (1945), *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980) and *Asahi Metal Industry Co. v. Superior Court of California, Solano Cty*, 480 U.S. 102 (1987). With its decisions, the Court framed the scope of the Fourteenth Amendment's Due Process Clause and introduced the stream-of-commerce doctrine. As the Court held, in products liability cases over an out-of-forum defendant it is the defendant's purposeful availment that makes jurisdiction constitutionally proper and notably consistent with traditional notions of fair play and substantial justice; moreover, the Court held that the transmission of goods permits the exercise of jurisdiction only where the defendant targeted the forum. It is not enough that the defendant might have predicted that its goods would reach the forum State. However, in *Asahi*'s plurality opinion,the Court developed two separate branches in the stream-of-commerce analysis. Holding that in a products liability case, constitutionally proper jurisdiction may only be established over an out-of-forum defendant where the defendant purposefully availed himself of the market in the forum State; merely placing the product or its components into the stream of commerce that swept the products into the forum State was insufficient to meet the minimum contacts requirement. Justice O'Connor, joined by Chief Justice Rehnquist, and Justices Powell and Scalia, drafted what is commonly known as the "foreseeability plus" or "stream-of-commerce plus" theory of minimum contacts. In a concurring opinion Justice Brennan, joined by Justices White, Marshall, and Blackmun, appeared to accept the principle that sales of large quantities of the defendant's product in a U.S. State, even indirectly through the stream of commerce, would support jurisdiction in that State, depending on the nature and the quantity of those sales. However, in Justice Brennan's opinion, even simply placing a product into the stream of commerce with knowledge that the product will eventually be used in the forum State constitutes purposeful availment for jurisdictional purposes. Regardless of the fact that eventually the Justices agreed that a constitutionally proper specific *in personam* jurisdiction could not be established

in *Asahi* over the out-of-forum defendant, inconsistency has developed among the lower courts in regards to how the foreseeability test should be applied.

By granting certiorari on the petition from the New Jersey Supreme Court in *J. McIntyre Machinery, Ltd. v. Nicastro et al.* (in which the N.J. Supreme Court found personal jurisdiction over the manufacturer), the U.S. Supreme Court acknowledged the need to tackle the question of the stream-of-commerce doctrine, and particularly the issues left open by the lack of a majority opinion in *Asahi*. Nonetheless, on June 27, 2011, a – once again – deeply divided U.S. Supreme Court handed down its opinion in *McIntyre*, holding that, because a machinery manufacturer never engaged in activities in New Jersey with the intent to invoke or benefit from the protection of the State's laws, New Jersey lacked personal jurisdiction over the company under the Due Process Clause. As the plurality opinion held, a foreign company that markets a product only to the United States generally, but does not purposefully direct its product to an individual State, is not subject to specific jurisdiction in the State where its product causes an injury.

Unfortunately, the *McIntyre* decision failed to provide a comprehensible framework for practitioners and lower courts faced with specific *in personam* jurisdiction questions. In a sharply fragmented plurality opinion – where six Justices voted to overrule the lower court's decision, but only four joined the lead opinion, and a dissenting opinion was filed by Justice Ginsburg, joined by Justices Sotomayor and Kagan – *McIntyre* marks a strong narrowing down of the stream-of-commerce doctrine. Justice Kennedy's plurality made clear that the stream of commerce, per se, does not support personal jurisdiction, and that something more is required. While the concurrence did not fully support Justice Kennedy's opinion, they too apparently rejected Justice Brennan's view in *Asahi* that a product is subject to jurisdiction for a products liability action, so long as the manufacturer can reasonably foresee that the distribution of its products through a nationwide system might lead to those products being sold in any of the fifty States. The U.S. Supreme Court's opinion in *McIntyre* undoubtedly results in a positive development for foreign companies and a truly unfavorable outcome for U.S. plaintiffs in products liability cases.

At the outset of her dissenting opinion in *McIntyre*, Justice Ginsburg provocatively asks:

> *A foreign industrialist seeks to develop a market in the United States for machines it manufactures. It hopes to derive substantial revenue from sales it makes to United States purchasers. Where in the United States buyers reside does not matter to this manufacturer. Its goal is simply to sell as much as it can, wherever it can. It excludes no region or State from the market it wishes to reach. But, all things considered, it prefers to avoid products liability litigation in the United States. To that end, it engages a U.S. distributor to ship its machines stateside. Has it succeeded in escaping personal jurisdiction in a State where one of its products is sold and causes injury or even death to a local user? Under this Court's pathmarking precedent in International Shoe Co. v. Washington, and subsequent decisions, one would expect the answer to be unequivocally, 'No.' But instead, six Justices of this Court, in divergent opinions, tell us that the manufacturer has avoided the jurisdiction of our State courts, except perhaps in States where its products are sold in sizeable quantities.*

In her dissent, Justice Ginsburg seems to suggest that under Article 5(3) of the Brussels I Regulation the courts of the United Kingdom would have had no hesitation in asserting their jurisdiction over the case, if J. McIntyre had been a U.S. manufacturer and Nicastro a UK resident and had the accident occurred in the United Kingdom. Based upon the fact that, pursuant to Article 2, the Brussels I Regulation applies to defendants domiciled in the EU and that pursuant to Article 4(1) when "the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Articles 22 and 23, be determined by the law of that Member State", the argument could be raised that the hypothetical suggested by Justice Ginsburg (where the defendant is a U.S. manufacturer, *i.e*. a non-EU domiciliary), would not fall in the scope of application of the Brussels I Regulation. As for England and Wales, the Civil Procedure Rules of England and Wales would apply, instead, and notably CPR 6.20(8), whereby the courts of England and Wales may assume jurisdiction in tort claims where the damage was sustained in England, or the damage sustained resulted from an act committed within England. Accordingly, the difference in the applicable statute does not weaken the final point made by Justice Ginsburg in her dissent. In the hypothetical put forward by Justice Ginsburg, the courts of England and Wales would indeed have had no hesitation in asserting their jurisdiction over the U.S. manufacturer.

Moreover, the European solution in this area of law goes even further. Article 3(1) and (2) of the EEC Directive 85/374/EEC on Product Liability provides:

> *Article 3*
>
> *1. 'Producer' means the manufacturer of a finished product, the producer of any raw material or the manufacturer of a component part and any person who, by putting his name, trade mark or other distinguishing feature on the product presents himself as its producer.*
>
> *2. Without prejudice to the liability of the producer, any person who imports into the Community a product for sale, hire, leasing or any form of distribution in the course of his business shall be deemed to be a producer within the meaning of this Directive and shall be responsible as a producer.*

As a result of, respectively, Articles 2, 5 and 60 of the Brussels I Regulation, there will always be a defendant domiciled in the Internal Market: the importer deemed to be the producer.

Hence, the conclusion may be drawn that with *McIntyre* the U.S. Supreme Court has relinquished reciprocity in jurisdictional issues in cross-border torts and notably in products liability cases, to the disadvantage of United States plaintiffs who seek to acquire jurisdiction over foreign defendants who caused them an injury in the plaintiffs' home State.

The need for legislation in this area was recognized in 2009 by the U.S. Senate Committee on the Judiciary "Leveling the Playing Field and Protecting Americans," which subsequently introduced the Foreign Manufacturers Legal Accountability Act of 2009 (see here Trey Childress' post on this blog). This bill required foreign manufacturers of products imported into the United States to establish registered agents in the United States who are authorized to accept service of process against such manufacturers, and for other purposes. The Foreign Manufacturers Legal Accountability Act of 2010 was a re-introduction of the 2009 bill; but, again, it was not enacted. In 2011, the bill was re-introduced a third time as the Foreign Manufacturers Legal Accountability Act of 2011. The bill is assigned to a Congressional committee, which will now consider it before possibly sending it on to the House of Representatives and then to the Senate. Hopefully, the uncertainties that stem from the U.S. Supreme Court's ruling in

McIntyre will be taken into due consideration by the U.S. legislators when addressing the possible enactment of this bill.

The First Reactions of U.S. Courts to McIntyre

As expected, objections and critiques are now being raised by U.S. courts against the U.S. Supreme Court's ruling. In *Weinberg et al. v. Grand Circle Travel LLC*, 2012 WL 4096611 (D.Mass.), the estate of a Florida resident, who died in a hot air balloon crash in the Serengeti, and the deceased's fiancée, who was also a Florida resident and who sustained severe bodily injuries in the crash, brought a negligence action against the travel agent (a Massachusetts company) and the Tanzanian company that operated the hot air balloon. The balloon company moved to dismiss for want of personal jurisdiction. In drawing its conclusions, and regretfully granting the motion to dismiss, the District Court of Massachusetts stated:

> *It seems unfair that the Serengeti defendants can reap the benefits of obtaining American business and not be subject to suit in our country. It is perhaps unfortunate that recent jurisprudence appears to "turn the clock back to the days before modern long-arm statutes when a [business], to avoid being hailed into court where a user is injured, need only Pilate-like wash its hands of a product by having [agents] market it.," Russell J. Weintraub, A Map Out of the Personal Jurisdiction Labyrinth, 28 U.C. Davis L.Rev. 531, 555 (1995), and that, in many circumstances, American consumers "may now have to litigate in distant fora – or abandon their claims altogether," Arthur R. Miller, Inaugural University Professorship Lecture: Are They Closing the Courthouse Doors? 13 (March 19, 2012) (criticizing the plurality opinion in J. McIntyre Mach. v. Nicastro), but this Court must follow the law as authoritatively declared.*

The fact that in *Weinberg* the accident occurred in the defendant's State (unlike in *McIntyre*, where the accident occurred in New Jersey, where the plaintiff was also resident), inevitably weakens the constitutional soundness of the District Court's jurisdictional power over the foreign defendant. Nonetheless, regardless of such a weakened power, it appears that the District Court – siding with Justice Ginsburg's dissent – felt the urge to emphasize the fact that foreign defendants can benefit from American business without the risk of being brought to court in the U.S., and suggested that this issue should be reviewed in order to ensure

access to justice to U.S. plaintiffs in cross-border tort claims.

Finally, in *Surefire LLC v. Casual Home Wolrdwide, Inc.*, 2012 WL 2417313 (S.D.Cal.), the U.S. District Court for the Southern District of California refused to apply the U.S. Supreme Court's ruling in *McIntyre* in a patent infringement claim against an out-of-forum defendant, stating that a Supreme Court plurality opinion is not binding law.

One can only hope that it will not take a further quarter of a century for the U.S. Supreme Court to sort out – possibly with a stronger awareness of the ramifications of the assessment of jurisdiction in cross-border matters and especially with a view to international private relations – the confusing picture that the lack of a majority in *McIntyre* has left behind and with which courts and legal practitioners must cope.

My most sincere gratitude goes to Prof. Dr. Burkhard Hess for his very insightful inputs.

My appreciation also goes to Adrienne Lester-Fitje for kindly editing this text.

Any errors are, of course, mine.