Roger Alford's New Article on 28 U.S.C. sec. 1782: Ancillary Discovery To Prove Denial of Justice

Roger Alford has just posted on SSRN his latest article, "Ancillary Discovery to Prove Denial of Justice," which has been published in the Virginia Journal of International Law. It analyzes Section 1782 discovery proceedings in the context of BIT arbitration and argues that there is now uniform agreement among federal courts that investment arbitration panels are "international tribunals" within the meaning of Section 1782. But as he points out today on opiniojuris, the article has relevance outside that context, too. As recent cases have demonstrated, this mechanism is becoming a typical (and powerful) tool for international litigators to obtain discovery in aid of any non-U.S. proceeding. This is a fabulous article on the recent wave developments in regard to this mechanism, and reaches a number of salient conclusions regarding the growing use of ancillary discovery in international adjudication.

Sciences Po PILAGG Workshop Series, Spring 2013

The workshop on Private International Law as Global Governance (PILAGG) at the Law School of the Paris Institute of Political Science (*Sciences Po*) will take place on Fridays from 12:30 to 2:30 pm, at the Law School.

The speakers for the Spring 2013 will be:

- Workshop I: Fri 22nd February, *PIL and legal theory: A renewal?*

Benoît FRYDMANN (Brussels)

Horatia MUIR WATT (SPLS)

- Workshop II: Fri 22nd March, *Global Commons*

Makane MBENGUE (Geneva)
Stefano RODOTÀ (Rome)
Bram ven den EEM (Rotterdam)

- Workshop III: Fri 19th April, *Migrations*

Charles GOSME (SPLS)
Karine PARROT (Paris)
Veerle VAN DEN EECKHOUT (Leiden)

More information is available here.

Language Implications of Harmonisation and Cross-Border Litigation

An issue of the theme-based peer-reviewed e-journal Erasmus Law Review (free access) dedicated to the topic 'Law and Language; Implications for Harmonisation and Cross-Border Litigation' has just been published. It includes five contributions, preceded by a short introduction.

Simone Glanert, Europe Aporetically: A Common Law Without a Common Discourse.

In response to the European Union's avowed ambition to elaborate a uniform European private law, some critics have maintained that uniformisation is illusory on account of the disparities between the governing legal languages within the different Member States. This objection has, in its turn, given rise to an argument according to which uniformisation could be ensured through the emergence of a

common discourse. It has been said that such outcome is possible even in the absence of a common language. For the proponents of this claim, the theory of communicative action developed by Jürgen Habermas offers significant support. By way of reaction to the common-discourse thesis, this paper proposes to explain why it cannot be sustained and why one cannot usefully draw inspiration from Habermas's thinking in order to promote a uniform private law within the European Union.

Astrid Stadler, Practical Obstacles in Cross-Border Litigation and Communication between (EU) Courts.

In cross-border civil litigation the use of different official court languages causes severe problems when – at least one of the parties – is not familiar with the official language of the court, since the parties' constitutional right to a fair trial depends very much on the communication with the court. As a consequence, interpreters must often be used during the trials and hearings and legislatures have to decide to what extent legal documents should be translated. The article takes the position that the European legislature sometimes underestimates the language problem and does not always provide sufficient safeguards for the parties' right to be heard (in a language they can understand). In particular, the defendant's procedural rights often require a translation of documents in cross-border service of process and must take precedence over procedural economy. European regulations also tend to emphasise the cooperation between courts in different Member States without taking into consideration that there is often no common language and that many judges will not have the language skills to communicate with their colleagues. The use of standard forms available in the 23 official languages is no perfect solution for all situations.

Elena Alina Ontanu & Ekaterina Pannebakker, Tackling Language Obstacles in Cross-Border Litigation: The European Order for Payment and the European Small Claims Procedure Approach.

In cross-border litigation, language differences are one of the main obstacles preventing parties from taking action and defending their rights. The Regulations creating a European Order for Payment Procedure (EOP) and establishing a European Small Claims Procedure (ESCP) have introduced the first EU-wide procedures, the goals of which are to simplify, speed up, and reduce the costs of cross-border litigation; they also include an attempt to reduce language obstacles.

However, the simplification they propose must not sacrifice parties' right of access to justice and fair trial. This paper addresses the question as to the way language obstacles in cross-border litigation are tackled by the EOP and the ESCP. It further seeks to determine the extent to which these instruments balance the aim to simplify the procedures by reducing language obstacles and the parties' right to a fair trial and access to justice.

Christoph A. Kern, English a Court Language in Continental Courts.

Most recently, several countries on the European continent have admitted, or are discussing to admit, English as an optional court language. This article provides some information about the background of these recent initiatives, projects and reforms, clarifies the idea on which they are based and explores the purposes they pursue. It then identifies in a theoretical way the various possible degrees of admitting English as a court language and the surrounding questions of practical implementation. These general issues are followed by a presentation of the initiatives, projects and reforms in France, Switzerland and Germany. Not surprisingly, the idea of admitting English as a court language has not only found support, but has also been criticised in legal academia and beyond. Therefore, the article then attempts to give a structured overview of the debate, followed by some own thoughts on the arguments which are being put forward. It concludes with an appeal not to restrict the arguments in favour of admitting English as a court language to merely economic aspects, but also to give due weight to the fact that admitting English may facilitate access to justice and may result in bringing back cases to the public justice system.

Isabelle Bambust, Albert Kruger & Thalia Kruger, Constitutional and Judicial Language Protection in Multilingual States: A Brief Overview of South Africa and Belgium.

The purpose of this contribution is to provide a very modest comparison of judicial language protection in South Africa and in Belgium. First of all, the authors sketch briefly the historical context and the constitutional status of languages in both countries. It is difficult to argue that one always has a right to use his or her own language. However, the use of language has clear links to constitutional rights such as the right to a fair trial. The authors then consider the rules on the use of languages in court generally and in criminal proceedings particularly. Belgium has strict rules on the use of language, and these rules are based on

strong principles of territoriality and monolingualism. South Africa, on the other hand, has 11 official languages, not linked to territories, but in practice these languages do not all enjoy the same protection. The pragmatic approach by the South African courts is indicated with reference to the case law.

Vogenauer on Regulatory Competition in Contract Matters

Stefan Vogenauer, who is Professor of Comparative Law at Oxford University, has published Regulatory Competition Through Choice of Contract Law and Choice of Forum in Europe: Theory and Evidence in the last issue of the *European Review of Private Law*.

> *This paper challenges the claim that there is regulatory competition in the areas of contract law and civil litigation. It is frequently assumed that law makers reform their contract laws and dispute resolution mechanisms with the purpose of attracting 'users', i.e. parties to cross-border contracts who choose the contract law or the courts of a given legal system. I shall discuss this assumption and its plausibility in the first part of the paper. In the second part I will test the assumption by presenting the available empirical evidence on the choices of contract law and forum that businesses in Europe actually make. For a long time such data has been largely absent from the debate. Moreover, I assemble evidence of law makers competing for the production of the most attractive legal regimes in the areas of contract law and civil litigation. I conclude that meaningful regulatory competition in the areas concerned cannot be predicted with confidence; nor is there evidence of its existence.*

Paris Court Orders Twitter to Provide Data on Antisemitic Tweets

On 24 January 2013, a French court ordered Twitter Inc. to provide any data it might have which could help identify the authors of antisemitic tweets.

The plaintiff were French Jewish organizations, as well as an organization fighting against racism. They complained about tweets sent on hashtags such as "*un bon juif*" or "*un juif mort*" (a good Jew, a dead Jew). They relied on several provisions of French law.

Twitter Inc., however, is incorporated in California, where it keeps its data, and it does not have an establishment in France. A Twitter France company was created in 2012, but its activity focuses on marketing. It is not involved in the technical aspects of the social network.

Territorial Reach of European Data Protection Law

As a consequence, Twitter Inc. argued that it was not subject to French law. Indeed, it underscored that French data protection law expressly provides that it only applies to persons established in France or making use of equipment, automated or otherwise, situated in France (French version, however, being less favorable to Twitter, as it does not refer to "equipment", but only to "moyens de traitement").

The Court agreed and held that French data protection law law did not apply.

Conservative Measure

However, the plaintiffs were also seeking the same remedies under another provision of French law, Article 145 of the French Code of Civil Procedure, which provides:

> *If there is a legitimate reason to preserve or to establish, before any legal process, the evidence of the facts upon which the resolution of the dispute depends, legally permissible preparatory inquiries may be ordered at the request of any interested party, by way of a petition or by way of a summary procedure.*

The Court ruled that it had the authority to order Twitter Inc. to provide any data it may have which could help identify the authors of the antisemitic tweets.

From a conflicts perspective, the Court held that:

- Conservative measures are governed by the law of the forum
- Twitter's own rules provide that international users will comply with local laws
- French criminal law applied to the authors of the tweets, as part of the offence was committed on French territory
- Twitter would not challenge the Court's jurisdiction, nor would it dispute that the tweets were unlawful
- Twitter acknowledged that it kept certain data, and had to under California law

Twitter is therefore ordered to provide the requested data within two weeks. It will have to pay € 1,000 per day then if it does not comply (the plaintiffs had asked for € 10,000 per day).

Readers might wonder whether the Court uses the distinction between substance and procedure as an escape device. There seems to be a confusion in the judgment between the law governing interim remedies, which is clearly the law of the forum, and the law governing substance. Article 145 was clearly applicable, but the legitimate reason it serves cannot be assessed in isolation from the law applicable to the substantive rights. To the court's credit, however, the French supreme court has often failed to make this distinction in the past.

NYU Conference on Forum Shopping in International Arbitration

NYU's Center for Transnational Litigation and Commercial Law will host a conference on "Forum Shopping in the International Commercial Arbitration Context" from 28 February to 2 March 2013.

The list of speakers include Prof. George A. Bermann, Ms. Christopher Boog, Prof. Jack Coe, Jr., Prof. Filip De Ly, Mr. Domenico Di Pietro, Mr. John Fellas, Prof. Franco Ferrari, Mr. Brian King, Mr. Alexander Layton, Mr. Pedro Martinez-Fraga, Prof. Loukas Mistelis, Prof. Peter B. Rutledge, Prof. Maxi Scherer, Prof. Linda Silberman, Mr. Aaron Simowitz and Mr. Robert H. Smit.

The event will start on Thursday, 28 February, at 4 pm, and will take place at 245 Sullivan St., Furman Hall, Pollack Room, 10012 NY. More information is available here.

To RSVP (required), please send an email to: cassy.rodriguez@nyu.edu

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German Society of International Law: 33rd Bi-annual Conference

From 13 to 16 March 2013 the German Society of International Law will host its 33rd bi-annual at the University of Lucerne in Switzerland. The conference will focus on the "Hybridisation of legal systems" on the one hand and "Immunity" on the other. The list of speakers include Daniel Thürer, Paul Richli, Andreas Paulus,

Nina Dethloff, Thomas Giegerich, Ingeborg Schwenzer, Heike Krieger, Andreas Ziegler, Stefan Talmon and Haimo Schack,

More information is available here (in German).

De Werra on ADR as a Default Method for IP Disputes

Jacques de Werra, who is a professor of law at the University of Geneva, has posted Can Alternative Dispute Resolution Mechanisms Become the Default Method for Solving International Intellectual Property Disputes? on SSRN.

> *This essay explores how the use of alternative dispute resolution (ADR) mechanisms can be promoted to solve international IP disputes. It presents the case of internet domain name dispute resolution and focus particularly on the Uniform Domain Name Dispute Resolution Policy (UDRP) and the way in which this policy has been adopted as a model by legislators. On this basis, it analyzes how, and under what conditions, other types of IP ADR systems can be developed in light of the UDRP, and will explore whether ADR systems can become the default method for solving international IP disputes.*

The paper was published in the *California Western International Law Journal* in 2012.

International Commercial

Arbitration: A Guide for U.S. Judges

The U.S. Federal Judicial Center has just published a new monograph entitled "International Commercial Arbitration: A Guide for U.S. Judges." The text, which was written by Professor S.I. Strong of the University of Missouri, provides readers with information on the intricacies of international commercial arbitration and the various ways that U.S. courts may become involved in the process. The book is part of the Federal Judicial Center's International Litigation Series and helps further the Federal Judicial Center's statutory mission of providing research and education to the U.S. federal judiciary. The text, which is broken down on a motion-by-motion basis, provides judges as well as practitioners with a useful introduction to international commercial arbitration practice in the United States. The book is available in both hard copy and electronic form, and copies can be downloaded for free from the Federal Judicial Center's website (here).

German Federal Court Rules on Jurisdiction Clauses and Mandatory Rules

Beatrice Deshayes is a member of the Paris and the Cologne bars and a partner at Hertslet, Wolfer and Heintz, Paris.

On September 5th, 2012, the German Federal Court (BGH) upheld the inapplicability of a jurisdiction clause in an agency contract that gave jurisdiction to the Courts of Virginia to rule on the agent's right to indemnity after termination of the agency contract.

The dispute arose out of an agency contract between an American firm and a

German commercial agent acting in several European countries. The contract provided for the exclusive jurisdiction of the Courts of Virginia and for the application of US laws. It also provided for an exclusion of indemnity in case of termination of the contract.

Arguing that the Courts of Virginia would apply solely their own law, the Court of Appeal of Stuttgart refused to enforce the jurisdiction clause, stating that doing so would lead to the rejection of the claim for indemnity and to an obvious violation of Art. 17 and 18 of Directive 86/653 EEC. The defendant wanted to submit a request for a preliminary ruling before the ECJ, however the BGH ruled that there was no need for such a request.

Th BGH ruled that there is no doubt that Directive 86/653 gives the possibility to "refuse to recognize" such a clause, as:

- the law chosen by the parties (here, the law of Virginia) does not provide for mandatory indemnity or compensation for the agent after termination of the contract;
- the foreign court will not apply the mandatory provisions of European and German law, and will reject the agent's claim.

The BGH stated that such refusal of recognition protects the international mandatory scope of these provisions, as defined by the ECJ in the *Ingmar* decision dated November 9th, 2000 (C-381/98).

Another issue raised durig the litigation was whether the partial ineffectiveness of the jurisdiction clause shall lead to the incompetence of the US courts for the entire litigation. In addition to an indemnity based on the termination of the agency contract, the agent had claimed for unpaid commission stemming from the contract. The defendant wanted the BGH to ask the ECJ for an additional preliminary ruling regarding the jurisdiction clause: if it was considered partially ineffective because of the above mentioned reasons, would it have to be invalidated for the whole in order to guarantee the "effet utile"?

The BGH ruled that this question must only be discussed on the basis of German law, as Art. 17-19 of Directive 86/653 EEC concern only the claim for indemnity after termination of contract and not the right for pending commissions.

This seems to be a very strict but coherent approach to the jurisdiction question

by the BGH and may lead to the non-application of foreign jurisdiction clauses in many cases when agents carry out their activity in Europe.