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

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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.

Metz Registrar to Grant Apostille on PACS Again

This is the end of a 5 month drama: the registrar of the Court of Appeal of Metz is now granting apostille on PACS again.

The *Pacte Civil de Solidarité* (*PACS*) is the French civil partnership allowing couples, whether same sex or not, to conclude a civil union. It attracts a variety of benefits.

Metz is the capitale of *Lorraine*, and Lorraine benefits from the economy of Luxembourg. 75,000 French citizens commute everyday to Luxembourg, essentially from Lorraine. Some of them have concluded a PACS and are entitled to significant benefits under Luxembourg law if their PACS is recognized in the Grand Duchy. It seems that 150 couples seek recognition of a French PACS in

Luxembourg each year.

Luxembourg has always insisted, however, that it would only recognize French PACS if authentified by an apostille (for German or Belgian civil unions, authentification from the town council of origin is required instead). As a consequence, French potential beneficiaries would go to the Registrar of the Court of Appeal of Metz to receive the precious apostille.

Apostille or not apostille?

But was it right for Luxembourg to require an apostille for recognition purposes?

In France, some argued that the 17th Convention of the International Commission on Civil Status on the Exemption from Legalisation of Certain Records and Documents concluded in Athens in 1977 (convention CIEC n° 17), which is applicable both in France and in Luxembourg, suppressed any need for such authentification.

On July 1st, the Registrar of the Court of Appeal of Metz decided that it would not issue apostille with respect to PACS anymore.

In the five following months, 70 applications for recognition of French PACS were dismissed in Luxembourg for lack of apostille. A number of Luxembourg papers reported on the situation of the French PACS beneficiaries who were denied a variety of benefits.

A member of the Luxembourg parliament brought the issue to the attention of the Luxembourg Minister of Justice in an official question asked in Parliament. The Minister replied that the debate had wrongly focused on the 1977 Convention, while, he explained, the 1961 Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents clearly applied to PACS and had only suppressed the requirement for legalisation, not for apostille.

Fortunately for PACS beneficiaries, the Metz Registrar resumed issuing apostille a few days ago. An official website of the Luxembourg government reports that the Luxembourg Ministry of Foreign Affairs sent an inquiry to French authorities, and that after communications between the Metz Registrar and the Luxembourg competent administrative authority, the Metz Registrar resumed its

former practice.

General Guidelines for the European Account Preservation Order

As already reported by Pietro Franzina at Aldricus, the Cyprus Presidency has transmitted to the Council of the European Union suggested general guidelines for future work on the European Account Preservation Order.

One of the critical issues raised by the text is the protection of the debtor. On this front, the Presidency proposes the following amendments:

> *(a) The application for a Preservation Order should contain an affirmation that the information provided by the creditor is true and complete, as well as a reminder that any deliberate false statements or omissions may lead to legal consequences under the law applicable.*
>
> *(b) In principle, only a court should be empowered to issue a Preservation Order.*
>
> *(c) The Preservation Order should be revoked without any intervention being required on the part of the debtor if the creditor fails to initiate proceedings on the substance of the matter within the time-limit specified in the proposed Regulation. Further discussions are needed to define the functioning of this mechanism (including the issue of time limits).*

Additionnally, it is suggested to explore further:

> *(a) The creditor should be liable to the debtor for any damage caused by any violation by him of his duties under the proposed Regulation, under circumstances and standards to be agreed later by the Member States.*

(b) When the creditor applies for a Preservation Order before initiating proceedings on the substance of his claim, he should, in principle, have to provide some kind of security to ensure adequate compensation to the debtor for damage caused by any violation by the creditor of his duties under the proposed Regulation. The court should have discretion to dispense with this requirement in situations where the provision of such security would be inappropriate or unnecessary.

Interested readers will find the text of the document here.

Wautelet on Multiple Nationalities and Choice of Law

Patrick Wautelet (Liège University) has posted L'Option de Loi et les Binationaux: Peut-On Dépasser le Conflit de Nationalités?(*Choice of Law in Family Relationships and Multiple Nationalities – A Case for a New Approach?*) on SSRN.

The English abstract reads:

In this paper I analyse the scope of the choice of law offered to parties in various family relationships (such as divorce, matrimonial contracts or alimony). In several jurisdictions and under rules of European private international law, parties may select which law will apply to their relationship. In most cases a choice may be made for the law of the nationality of the persons concerned. The question arises how such choice should be handled when the person concerned possesses several nationalities. After reviewing several possible readings, I suggest that the classical rules dealing with multiples nationalities should not be applied when the conflict of laws rules allow a party to select the applicable law.

Italian Book on Chinese Private International Law

Renzo Cavalieri and Pietro Franzina are the editors of this book on the Reform of Chinese Private International Law (*Il nuovo diritto internazionale privato della Repubblica Popolare cinese*).

The contributors are a number of Chinese and Italian scholars.

- Lu Song (China Foreign Affairs University, Beijing), *L'adozione della Legge cinese sul diritto applicabile ai rapporti civili con elementi di estraneità* [The Drafting Process and the Adoption of the Chinese Statute on the Law Applicable to Foreign-Related Civil Relations]
- Zhang Liying (China University of Political Science and Law, Beijing), *Alcune caratteristiche della legge cinese sul diritto applicabile ai rapporti civili con elementi di estraneità* [Some Features of the Chinese Statute on the Law Applicable to Foreign-Related Civil Relations]
- Pietro Franzina (University of Ferrara), *La codificazione cinese delle norme sui conflitti di leggi: elementi per un'analisi in chiave comparatistica* [The Chinese Codification of Conflict-of-Laws Rules: A Comparative Analysis]
- Long Weidi (Wuhan University and University of Groningen), *L'autonomia privata e le norme imperative nella prima codificazione cinese delle norme sui conflitti di leggi* [Party Autonomy and Mandatory Provisions in the First Chinese Codification of Conflict-of-Laws Rules]
- Renzo Cavalieri (Ca' Foscari University, Venice), *L'applicazione della legge straniera da parte dei tribunali della Repubblica Popolare Cinese* [The Application of Foreign Law by the Courts of the People's Republic of China]
- Sara D'Attoma (Ca' Foscari University, Venice), *Matrimonio e famiglia nel diritto internazionale privato della Repubblica Popolare Cinese* [Marriage and Family Relations in the Private International Law of the People's Republic of China]

- Anna Gardella (Università Cattolica del Sacro Cuore, Milan), *I diritti patrimoniali nella legge cinese di diritto internazionale privato: successioni e diritti reali* [Patrimonial Rights in the Chinese Statute of Private International Law: Successions and Rights In Rem]
- Laura Sempi (University of Salento), *La proprietà intellettuale nella nuova legge cinese sul diritto internazionale privato* [Intellectual Property in the New Chinese Statute on Private International Law].
- Luca G. Radicati di Brozolo (Università Cattolica del Sacro Cuore, Milan), *La legge cinese del 28 ottobre 2010 sui rapporti civili con elementi di estraneità: alcuni rilievi conclusivi* [The Chinese Statute of 28 October 2010 on Foreign-Related Civil Relations: Some Concluding Remarks].

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Kate Provence Pictures: the Remarkable Irish Remedy

In this era of increasing "approximation" of European laws, some readers might sometimes wonder whether choice of law is gradually losing relevance.

Well, it seems that, in the area of privacy and rights relating to personality, it really does not. In France, victims of privacy infringments can get damages and injunctions. In Ireland, these remedies are probably available, but it is also possible to get the editor of the newspaper suspended and indeed to shut down the newspaper all together.

The Irish Daily Star published in September pictures of the Duchess of Cambridge sunbathing in the South of France.

This did not make one of the owners of the Irish Daily Star happy at all, the BBC has just reported:

> *Media tycoon Richard Desmond, whose Northern and Shell group co-owns the*

paper, had threatened to shut it down.

The Dublin-based Irish Daily Star said in a statement: "As a result of the publication on 15 September 2012, issues arose with the shareholders of Independent Star Limited.

"Having considered those issues in tandem with Mr O'Kane, it is Mr O'Kane's decision to resign as editor of the Irish Daily Star, effective immediately."

Northern and Shell group co-owns the newspaper with the Irish-based Independent News and Media.

Independent News and Media said Mr O'Kane acted at all times in a highly professional and appropriate manner and in the best interests of the newspaper.

He followed all editorial policies and guidelines, it added.

Both co-owners had criticised the decision of Mr O'Kane to publish the pictures, although Independent News and Media said closing down the title would be disproportionate.

One wonders whether other Member states have even more spectacular remedies. Rumour has it that a cell in the Tower of London is being currently prepared in case a member of the English press might be tempted to follow a similar path. The English press being notoriously well behaved, however, it seems unlikely that this new Nuclear Weapon would ever be used.

ECJ Rules on Res Judicata of Judgments Declining Jurisdiction

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On November 15th, the European Court of Justice delivered its judgment in case

C-456/11 *Gothaer Allgemeine Versicherung and others*. It ruled that the judgment of a Member state which declined jurisdiction on the ground of the existence of a jurisdiction clause was res judicata and was thus binding on courts of other Member states.

A German company (Krones) sold a brewing installation to a buyer in Mexico and charged another German company (Samskip) with the task of organizing the transport from Antwerp to Mexico. Among the transport documents there was a bill of lading which stipulated an exclusive jurisdiction of the courts of Iceland. Alleging a transport damage, the transport insurers of Krones sued Samskip in Antwerp. The appeal instance dismissed the claim on the basis that transport insurers were bound by the jurisdiction clause. Transport insurers and Krones then sued Samskip in Germany. Samskip argued that German courts had no jurisdiction because of the jurisdiction clause and that German courts were bound by the Belgian judgment under the Brussels Regulation.

Under German law a judgment dismissing a claim for lack of jurisdiction is qualified as a procedural judgment, and there is a strong opinion in German legal literature which holds the view that procedural judgments have no recognizable contents. Also, under German civil procedure law the concept res judicata is very restrictive and the reasoning of a judgment does often not participate in the res judicata effect. The Court of Bremen, therefore, sent the file to the ECJ for a preliminary ruling asking whether the Belgian judgment was a judgment in the sense of the Brussels Regulation and if so whether the Bremen court would have to recognize not only that Belgian courts do not have jurisdiction but also that the jurisdiction clause is valid.

In its above mentioned judgment of 15 November 2012 the ECJ ruled that a judgment by which the court of a member state declines jurisdiction on the basis of a jurisdiction clause was a judgment in the meaning of art. 32 of the Brussels Regulation even if it was categorized as a mere procedural judgment under the national law of a member state. The ECJ further ruled that the court before which the recognition of such a judgment is sought is bound by the finding regarding the validity of the jurisdiction clause even if such finding were made in the grounds of the judgment.

The fact that the ECJ held that judgments which were categorized as “procedural judgments” in the law of a certain member state are nevertheless judgments in

the sense of the Regulation is little surprising. What is more remarkable is that the court, in respect of judgments declining jurisdiction on the basis of a jurisdiction clause, amends its previous case law, particularly the doctrine of the *Hoffmann/Krieg* judgment of 4 February 1988 (C-145/86): If the dismissal of the claim is based on the validity of a jurisdiction clause then such validity is to be recognized; the definition of the res judicata effect of the judgment in the national law of the state of origin is as irrelevant as the one in the state of recognition. The ECJ applies an autonomous European concept of res judicata to certain member state judgments (albeit for yet a very limited number of cases).

> *1. Article 32 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that it also covers a judgment by which the court of a Member State declines jurisdiction on the basis of a jurisdiction clause, irrespective of how that judgment is categorised under the law of another Member State.*
>
> *2. Articles 32 and 33 of Regulation No 44/2001 must be interpreted as meaning that the court before which recognition is sought of a judgment by which a court of another Member State has declined jurisdiction on the basis of a jurisdiction clause is bound by the finding – made in the grounds of a judgment, which has since become final, declaring the action inadmissible – regarding the validity of that clause.*

A Principled Approach to Choice of Law in Contract?

On 16 November, a Special Commission of the Hague Conference on Private International Law approved the text of the Hague Principles on the Choice of Law in International Contracts.

The Principles, an amended version of the draft text produced by the

Conference's working group, are intended to be used (among other functions) as a model for national, regional, supranational or international instruments. They deal with the effectiveness and effect of a choice of law in cross-border trade/business contracts, but not consumer or employment contracts (Art. 1). They allow not only a choice of national law (Art. 2) but also (albeit subject to conditions that are riddled with uncertainty, obfuscation and self-serving terminology) a choice of non-national rules of law (Art. 3).

The remaining Principles address other aspects of the choice of law (express and tacit choice, formal validity, law to be applied in determining choice, severability, renvoi, scope of chosen law, assignment, mandatory provisions and public policy).

The text of the Principles (which will, in due course, be accompanied by a Commentary) is as follows:

The Preamble

1. This instrument sets forth general principles concerning choice of law in international commercial contracts. They affirm the principle of party autonomy with limited exceptions.

2. They may be used as a model for national, regional, supranational or international instruments.

3. They may be used to interpret, supplement and develop rules of private international law.

4. They may be applied by courts and by arbitral tribunals.

Article 1 – Scope of the Principles

1. These Principles apply to choice of law in international contracts where each party is acting in the exercise of its trade or profession. They do not apply to consumer or employment contracts.

2. For the purposes of these Principles, a contract is international unless the parties have their establishments in the same State and the relationship of the parties and all other relevant elements, regardless of the chosen law, are connected only with that State.

3. These Principles do not address the law governing – a) the capacity of natural persons; b) arbitration agreements and agreements on choice of court; c) companies or other collective bodies and trusts; d) insolvency; e) the proprietary effects of contracts; f) the issue of whether an agent is able to bind a principal to a third party.

Article 2 – Freedom of choice

1. A contract is governed by the law chosen by the parties.

2. The parties may choose (i) the law applicable to the whole contract or to only part of it and (ii) different laws for different parts of the contract.

3. The choice may be made or modified at any time. A choice or modification made after the contract has been concluded shall not prejudice its formal validity or the rights of third parties.

4. No connection is required between the law chosen and the parties or their transaction.

Article 3 – Rules of law

In these Principles, a reference to law includes rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise.

Article 4 – Express and tacit choice

A choice of law, or any modification of a choice of law, must be made expressly or appear clearly from the provisions of the contract or the circumstances. An agreement between the parties to confer jurisdiction on a court or an arbitral tribunal to determine disputes under the contract is not in itself equivalent to a choice of law. Article 5 – Formal validity of the choice of law

A choice of law is not subject to any requirement as to form unless otherwise agreed by the parties.

Article 6 – Agreement on the choice of law

1. Subject to paragraph 2, a) whether the parties have agreed to a choice of law is determined by the law that was purportedly agreed to; b) if the parties have

used standard terms designating different laws and under both of these laws the same standard terms prevail, the law designated in those terms applies; if under these laws different standard terms prevail, or if no standard terms prevail, there is no choice of law.

2. The law of the State in which a party has its establishment determines whether that party has consented to the choice of law if, under the circumstances, it would not be reasonable to make that determination under the law specified in paragraph 1.

Article 7 – Severability

A choice of law cannot be contested solely on the ground that the contract to which it applies is not valid.

Article 8 – Exclusion of renvoi A choice of law does not refer to rules of private international law of the law chosen by the parties unless the parties expressly provide otherwise.

Article 9 – Scope of the chosen law

1. The law chosen by the parties shall govern all aspects of the contract between the parties, including but not limited to – a) interpretation; b) rights and obligations arising from the contract; c) performance and the consequences of non-performance, including the assessment of damages; d) the various ways of extinguishing obligations, and prescription and limitation periods; e) validity and the consequences of invalidity of the contract; f) burden of proof and legal presumptions; g) pre-contractual obligations.

2. Paragraph 1 e) does not preclude the application of any other governing law supporting the formal validity of the contract.

Article 10 – Assignment In the case of contractual assignment of a creditor's rights against a debtor arising from a contract between the debtor and creditor – a) if the parties to the contract of assignment have chosen the law governing that contract, the law chosen governs the mutual rights and obligations of the creditor and the assignee arising from their contract; b) if the parties to the contract between the debtor and creditor have chosen the law governing that contract, the law chosen governs (i) whether the assignment can be invoked

against the debtor, (ii) the rights of the assignee against the debtor, and (iii) whether the obligations of the debtor have been discharged.

Article 11 – Overriding mandatory rules and public policy (ordre public)

1. These Principles shall not prevent a court from applying overriding mandatory provisions of the law of the forum which apply irrespective of the law chosen by the parties.

2. The law of the forum determines when a court may or must apply or take into account overriding mandatory provisions of another law.

3. A court may only exclude application of a provision of the law chosen by the parties if and to the extent that the result of such application would be manifestly incompatible with fundamental notions of public policy (ordre public) of the forum.

4. The law of the forum determines when a court may or must apply or take into account the public policy (ordre public) of a State the law of which would be applicable in the absence of a choice of law.

5. These Principles shall not prevent an arbitral tribunal from applying or taking into account public policy (ordre public), or from applying or taking into account overriding mandatory provisions of a law other than the law chosen by the parties, if the arbitral tribunal is required or entitled to do so.

Article 12 – Establishment If a party has more than one establishment, the relevant establishment for the purpose of these Principles is the one which has the closest relationship to the contract at the time of its conclusion of the contract.