French Court Rules Gay Adoption Violates Public Policy

In two judgments of June 7th, 2012, the French Supreme Court for private and criminal matters (*Cour de cassation*) ruled that foreign judgments allowing adoption by a same sex couple were contrary to French public policy.

In the first case, the couple was composed of two men, one French and one Canadian, who had lived together in Montreal since 1997 and had welcomed in 2005 a three year old. They had obtained an adoption order from a Quebec court in 2009.

In the second case, the couple was composed of two men, one French and one British, who lived in the United Kingdom. In 2008, an English court had issued an adoption order for a 10 year old.

Both couples sought recognition of the relevant adoption judgment in France so that they could appear as the parents of the child on French registries. The lower courts had granted recognition. The *Cour de cassation* reversed, and ruled that the foreign judgments violated French public policy.

> *Attendu qu'est contraire à un principe essentiel du droit français de la filiation, la reconnaissance en France d'une décision étrangère dont la transcription sur les registres de l'état civil français, valant acte de naissance, emporte inscription d'un enfant comme né de deux parents du même sexe*

In substance, the Court held that a fundamental principle of French law prohibited that French registries provide that a child had parents of the same sex. An important factor was that the foreign judgments were perceived as cutting the filiation relationship between the child and his biological parents. This suggests that incomplete adoption would not raise the same issue.

The conciliation of these decisions with a previous one of 2010 which had recognised a foreign gay adoption will be an interesting exercise for French scholars.

Second Issue of 2012's ICLQ

The second issue of the *International and Comparative Law Quarterly* for 2012 includes three articles exploring choice of law issues.

Zheng Sophia Tang (Leeds University), Effectiveness of Exclusive Jurisdiction Clauses in the Chinese Courts — A Pragmatic Study

> *Chinese judicial practice demonstrates great diversity in enforcing exclusive jurisdiction clauses. In practice, the derogation effect of a valid foreign jurisdiction clause is frequently ignored by some Chinese courts. It may be argued that these Chinese courts fail to respect party autonomy and international comity. However, a close scrutiny shows that the effectiveness of an exclusive jurisdiction clause has close connections with the recognition and enforcement of judgments. If the judgment of the chosen court cannot be recognized and enforced in the request court by any means, the request court may take jurisdiction in breach of the jurisdiction clause in order to achieve justice. Chinese judicial practice demonstrates the inevitable influence of the narrow scope of the Chinese law in recognition and enforcement of foreign judgments. It is submitted that the Chinese courts do not zealously guard Chinese jurisdiction, or deliberately ignore party autonomy and international comity. Instead, the Chinese courts have considered the possibility of enforcement of judgments and the goal of justice. Applying the prima facie unreasonable decision test is the best the courts can do in the specific context of the Chinese law. The status quo cannot be improved simply by reforming Chinese jurisdiction rules in choice of court agreements. A comprehensive improvement of civil procedure law in both jurisdiction rules and recognition and enforcement of foreign judgments is needed.*

Jacob van de Velden (Gronigen University), The Cautious Lex Fori Approach to Foreign Judgments and Preclusion

> *If from the imperfect evidence of foreign law produced before it, or its misapprehension of the effect of that evidence, a mistake is made by an English*

court, it is much to be lamented, but the tribunal is free from blame. The mistake to be lamented presently is the High Court decision in Yukos Capital Sarl v OJSC Rosneft Oil Co that a Dutch judgment gave rise to an issue estoppel in English proceedings, precluding a party from disputing as a fact the partiality and dependence of the Russian judiciary. The decision was a mistake because on a proper construction of Dutch law the significance of the Dutch judgment was—if anything—evidential, not preclusive. The outcome is lamentable, because a party was unduly shut out from litigation by the application of English preclusion law to a foreign judgment that was not preclusive in the jurisdiction where it was originally given.

Aude Fiorini (Dundee University), Habitual Residence and the New Born – A French Perspective

Where a pregnant woman travels and subsequently gives birth to a child abroad, should the left behind father be able to petition for the 'return' of his child under the 1980 Hague Convention on the Civil Aspects of International Child Abduction? An affirmative answer would not only presuppose that the abduction of the child had been in breach of the father's actually exercised rights of custody, but would also depend on which country, if any, the child was habitually resident in immediately before the 'abduction'.

The full table of content is available here.

Second Issue of 2012's Rivista di diritto internazionale privato e processuale

The last issue of the leading Italian journal of private international law (*Rivista di diritto internazionale privato e processuale*) was just released.

It includes the following articles:

- F. Mosconi, C. Campiglio, *I matrimoni tra persone dello stesso sesso: livello «federale» e livello statale in Europa e negli Stati Uniti* (Same-Sex Marriages: ‘‘Federal’’ Level and State Level in Europe and in the United States)
- Z. Crespi Reghizzi, *«Contratto» e «illecito»: la qualificazione delle obbligazioni nel diritto internazionale privato dell’Unione europea* (‘‘Contract’’ and ‘‘Tort’’: The Characterization of Obligations in EU Private International Law)
- P. Franzina, *Sulla notifica degli atti giudiziari mediante la posta secondo la convenzione dell’Aja del 1965* (On Service by Mail of Judicial Documents under the 1965 Hague Convention)
- S. Marino, *La violazione dei diritti della personalita` nella cooperazione giudiziaria civile europea* (Infringment of Personality Rights in the European Civil Judicial Cooperation)

The full table of contents is available here.

Sources of French and Brazilian Private International Law Compared

A recent book comparing French and Brazilian laws (Droit français et droit brésilien – Perspectives nationales et comparées) includes developments on the sources of private international law in each system.

> ***La diversité des sources du droit international privé***
>
> *Rapport français : Danièle Alexandre*
> *Rapport brésilien : Carmen Tibúrcio*
> *Réponses au questionnaire : Carmen Tibúrcio*

Commentaires et débats : Gustavo Vieira da Costa Cerqueira et Luiz Fernando Kuyven
Grille d'analyse

The table of contents of the book is available here. More details can be found here.

Centre for Private International Law at the University of Aberdeen – Research Seminar

On **26 June 2012**, the Centre for Private International Law at the University of Aberdeen, Scotland, UK will be hosting a Research Seminar with three invited speakers – Professor Stefania Bariatti from Milan University in Italy; Dr Albert Font i Segura, Professor Titular de Universidad, Pompeu Fabra University, Barcelona in Spain; and Ms Burcu Yuksel from the University of Ankara in Turkey.

The event will take place in the Old Aberdeen campus, Aberdeen, AB24 3UB, Law Building, Taylor A 31 (30) between 12 and 2pm.

For more information see http://www.abdn.ac.uk/law/private-international-law/events.shtml .

Everyone welcome! If planning to attend, please e-mail carol.davies@abdn.ac.uk.

ERA Conference on Cross-Border Successions

On 22 and 23 November 2012 the Academy of European Law (ERA) will host a bilingual (English/German) conference in Trier on the new regulation on cross-border successions. The conference is set up for practitioners (lawyers, notaries, ministry officials) and academics. Key topics are:

- Scope of the instrument
- Jurisdiction and applicable law
- Recognition and enforcement of decisions
- Authentic documents in matters of succession
- Creation of a European Certificate of Succession

The official inivitation reads as follows:

> *On 7 June 2012, the Regulation aimed at simplifying the settlement of international successions was adopted by the EU's Justice Council. This new Regulation will ease the legal burden when a family member with property in another EU country passes away.*
>
> *Under the Regulation, there will be a single criterion for determining both the jurisdiction and the law applicable to a cross-border succession: the deceased's habitual place of residence. People living abroad will, however, be able to opt for the law of their country of nationality to apply to the entirety of their succession. The Regulation will also permit citizens to plan their succession in advance in more legal certainty. This new instrument paves the way for the European Certificate of Succession which will allow people to prove that they are heirs or administrators without further formalities throughout the EU.*
>
> *The conference will provide an in-depth discussion of the most topical issues regarding successions and wills in a European context.*

More information is available at the ERA's website.

Fox on Securities Class Actions Against Foreign Issuers

Merritt B. Fox, who is Michael E. Patterson Professor of Law at Columbia Law School, has published Securities Class Actions Against Foreign Issuers in the last issue of the *Stanford Law Review*.

> *This Article addresses the fundamental question of whether, as a matter of good policy, it is ever appropriate that a foreign issuer be subject to the U.S. fraud-on-the-market private damages class action liability regime, and, if so, by what kinds of claimants and under what circumstances. The bulk of payouts under the U.S. securities laws arise out of fraud-on-the-market class actions—actions against issuers on behalf of secondary market purchasers of their shares for trading losses suffered as a result of issuer misstatements in violation of Rule 10b-5. In the first decade of this century, foreign issuers became frequent targets of such actions, with some of these suits yielding among the very largest payouts in securities law history.*
>
> *The law determining the reach of the U.S. fraud-on-the-market liability regime against foreign issuers has since been thrown into flux. The Supreme Court's recent decision in the Morrison case adopted an entirely new approach for determining the reach of Rule 10b-5 in situations with transnational features. This new approach focused on whether the purchase was of a security listed on a U.S. exchange or occurred in the United States, in contrast to the previous focus on whether either conduct or effects of sufficient importance occurred in the United States. In almost immediate response, Congress, in the Dodd-Frank Act, reversed the Court's decision with respect to actions by the government and mandated that the SEC prepare a report concerning the desirability of doing the same with respect to private damages actions.*
>
> *This Article goes back to first principles to look at the basic policy concerns that are implicated by the reach of fraud-on-the-market class actions for damages, and to determine who, under a variety of circumstances relating to the*

nationality of the purchasers, the place of the trade, and the place of the issuer's misconduct, is ultimately affected by imposition of this liability regime on foreign issuers. The resulting analysis suggests a simple, clear rule likely to both maximize U.S. economic welfare and, by also promoting global economic welfare, foster good foreign relations. The U.S. fraud-on-the-market class action liability regime should not as a general matter be imposed upon any genuinely foreign issuer, even where the claimant is a U.S. investor purchasing shares in a U.S. market or where the issuer engages in significant conduct in the United States relating to the misstatement. The only exception would be a foreign issuer that has agreed, as a form of bonding, to be subject to the U.S. regime.

This Article then charts a practical path to reform based on this simple rule. It assesses the attractions of, and problems with, the two competing alternatives—using the Morrison rule and returning to the conduct/effects test—and explores the possibilities for reform through the courts, SEC rulemaking, and legislation.

PhD position at Erasmus University Rotterdam

The Erasmus School of Law has a vacancy for a PhD candidate within the area of private international law/(European) civil procedure. The application deadline is 8 July 2012.

For more information and application click here. Please direct questions to kramer@law.eur.nl.

2012 Summer Seminar in Urbino

The Faculty of Law of the University of Urbino will host this summer its 54th Seminar of European Law.

Many of the courses taught over the two weeks of the seminar (20 August-1 September) will deal with conflict issues. Although courses can be taught in English, this is a franco-italian seminar where courses are typically taught in French or Italian, with a translation in the other language.

Speakers include leading academics and practitioners.

The full program can be found here.

Kiobel – Amicus Brief of Comparative Law Scholars

A group of U.S. French and German comparative law scholars have filed an amicus brief in *Kiobel* under the lead of Professor Vivian Grosswald Curran.

The brief summarizes the argument as follows:

> *Understanding other countries' domestic legal systems and practices is necessary to determining if United States law is in conflict with theirs, and more specifically if the United States would be unique in the world by allowing extraterritorial civil jurisdiction under the Alien Tort Statute ("ATS"). This brief will argue that universal criminal jurisdiction for jus cogens violations in civil-law States is analogous to extraterritorial civil jurisdiction under the ATS.*
>
> *Unwarranted similarities between "criminal" and "civil" law in both legal orders have been assumed erroneously because both civil- and common-law systems have the same two classifications. They have significantly different meanings and functions in the different legal orders, however. United States tort law is*

more similar to civilian criminal law than to civilian civil law in many ways. "Civilian" in this brief denotes legal systems, such as those of Continental Europe, emanating from Roman law and organized around a Civil Code. Civilian criminal law and United States civil law have comparable functions because of the roles of judges, prosecutors, and lawyers in the respective legal orders and societies, and because of the methods for victims to initiate legal actions in the criminal courts of civilian States, and in tort lawsuits in the United States.

Civilian judges specialize in either criminal or private law, with criminal-law judges in civilian States having a more didactic, public role than their private-law counterparts. Civilian prosecutors traditionally are non-partisan, neutral figures. Criminal trials, which include those that arise under universal jurisdiction, are public, and organized around a concentrated, oral event. Tort trials in civilian States, on the other hand, often take place exclusively in writing, with no oral testimony, and giving the public no opportunity to witness them. Where victims in civilian States join criminal trials as civil parties, they benefit from the State's resources and can be compensated financially. By contrast, in a tort suit, they would be barred from contingency fee arrangements and class action suits, so civil actions would not be an effective option for many.

Conversely, the aspects of criminal trials in civilian States which render extraterritorial or universal criminal jurisdiction appropriate in those legal systems do exist in United States tort law: both are aired in public; both allow victims effective access to the court system; and both allow victims financial compensation. Although civilian States traditionally have rejected prosecutorial discretion, they have tended to adopt it to varying degrees for universal jurisdiction cases in the interests of international harmony. Similarly, in ATS cases, the Act of State and Foreign Sovereign Immunities Act restrain undue ATS extraterritorial jurisdiction.