Deemed Service and the Hague Service Convention under German Law

See this post of Peter Bert on The Hague Service Convention, Default Judgments, and Deemed Service under German Law over at *Letters Blogatory*.

> *In a series of judgments on July 3 and July 17, 2012, the Federal Supreme Court (Bundesgerichtshof) has ruled on the compatibility of deemed service under German law with the Hague Service Convention. The Court held that only the first court document in a dispute must be served pursuant to the Hague Service Convention. Any subsequent service of court documents can be by post, in accordance with the provisions of domestic German law. Section 184 of the German Civil Code (ZPO), according to which "two weeks after it has been mailed, the document shall be deemed served," applies to service of such documents. In the cases before the Federal Supreme Court, default judgments were served by post, and the time period for filing a protest (Einspruch) was determined on the basis of deemed service.*

The rest of the post is here, including references to US cases and opinions on the issue.

ACT now?

The Attorney-General's Department of the Australian Government is currently advertising a number of vacancies for Legal Officers and Policy Officers, based in Canberra. These include one post at Legal Officer level in the Access to Justice Division, responsible for legal and policy advice on family law, administrative law and civil procedure.

It is understood that the successful candidate will work in the Private

International Law Section of the Division. The Section acts as the Central Authority for certain of the Hague Conventions, and carries out policy and case work in relation to cross-border family and civil law matters. Current projects include an assessment of the need for further harmonisation and development of rules of jurisdiction and applicable law in Australia, aimed at reducing the complexities of cross-border transactions and disputes . (Further details on this, and a link to the project website, will shortly be posted here.)

The closing date for applications is 28 September 2012.

Recognition of Chinese Arbitral Award in Finland

I've read this morning the post I reproduce below. I was wondering, do Finnish practitioners agree with the last comment?

Background

A Chinese construction company and a Finnish governmental entity were involved in arbitral proceedings in China. The proceedings were held under the applicable CIETAC rules in the Chinese language and the case was tried in accordance with the material laws of China as set forth in the contract between the parties. The award was rendered in December 2010 in favour of the Chinese company. However, the Finnish party refused to adhere to the award and the Chinese company was forced to commence a recognition and enforcement process in Finland. The Chinese company filed its application for recognition and enforcement of the arbitral award in October 2011 with the competent Finnish court. The Finnish party disputed the application and demanded its dismissal.

Helsinki District Court rendered a decision concerning the recognition and enforcement of the arbitral award in June 2012. The arbitral award was ordered to be recognised and enforced in Finland as requested by the Chinese

company. As a result, the Finnish party was also found liable to compensate the Chinese company for all of its legal costs accrued in the Finnish recognition process.

The Finnish law concerning recognition and enforcement of arbitral awards is based on the New York Convention of 1958. Article V(2)(b) of the Convention concerning public policy as a ground for refusal of recognition has been implemented with only minor amendments in the Finnish Arbitration Act. Other impediments for recognition listed in the Convention are also adopted in the Finnish Act with only some slight differences. Therefore, international case law can be used as guidance in Finland and any Finnish cases can be exploited internationally.

Grounds for Objecting the Recognition and Enforcement

In the proceedings, the Finnish party pleaded that the arbitral tribunal was partial and neglected the Finnish entity's procedural rights. The Finnish party claimed that the arbitrators had unfairly advised the Chinese company during the proceedings and that the Finnish party's right and chance to present both oral and written evidence were, in certain respect, completely ignored. Furthermore, it was claimed that the award was based on wrong application of the Chinese law, both in material and procedural respect.

Accordingly, the Finnish party claimed that its right to due process was violated and therefore the arbitral award, was against the Finnish ordre public.
The Finnish party demanded an oral hearing at the Finnish court in order to prove its claims and appointed several witnesses to witness about the arbitral proceedings.

The Court Decision

The District Court of Helsinki dismissed the Finnish party's request for an oral hearing and rendered its decision in written proceedings. The court reasoned that the award rendered by the arbitral tribunal was final and it would be inappropriate as well as against the Finnish Arbitration Act, CIETAC rules and the Convention of New York to organise an oral hearing. The court reasoned

that an oral hearing would mean that the case would be retried in practice although there already was a final decision.

The court also reasoned that Article 8 of CIETAC rules (2005) requires a party to submit its objection promptly when it holds that the CIETAC rules have not been complied with or the party shall be deemed to have waived its right to object. As the Finnish party had not submitted any objections during the arbitral proceedings, the court reasoned that it had waived its right to do so later. The court also stated that an arbitral award can be deemed invalid only extraordinarily.

After rejecting the Finnish party's request for an oral hearing, the court briefly ruled that no grounds had been presented not to recognise and enforce the arbitral award in Finland. Therefore the court decided to accept the Chinese company's application and ordered the arbitral award to be recognised and enforced in Finland.

In conclusion, the recognition process of arbitral awards in Finland is very summary and despite a party's request, the courts are reluctant to organise any oral hearings. As a result, challenging an arbitral award in Finland is at least for the moment quite difficult.

Third Issue of 2012's Revue Critique de Droit International Prive

The third issue of the *Revue critique de droit international privé* will soon be released. It contains three articles and several casenotes.

In the first article, Matthias Lehmann, who is a professor of law at Halle University, discusses the proposal of the German Council for Private International Law on financial torts (*Proposition d'une règle spéciale dans le Règlement Rome*

II pour les délits financiers)

> *This article explores conflicts of laws relating to financial torts, such as insider dealing or the publication of a prospectus containing incorrect information. The problem is of particular relevance given that in interconnected financial markets, tortious behavior often has repercussions in different countries. The law that applies to the responsibility of the tortfeasor must be determined in conformity with the Rome II Regulation. Yet the latter does not contain any specific conflicts rule for financial torts. Its general provision, article 4(1), leads to the applicability of a multitude of different laws for the same behaviour, which in addition cannot be foreseen. The economic consequences are potentially disastrous. The German Council for Private International Law therefore suggests amending the Rome II Regulation. This contribution analyses the reasons for the proposal and its content.*

In the second article, Javier Carrascosa González, who is a professor of law at the University of Murcia, offers an economic reading of the principle of proximity (*Règle de conflit et théorie économique*).

Finally, in the third article, Horatia Muir Watt, who is a professor at Sciences Po Law School, offers a critical appraisal of the International Court of Justice's decision on sovereign immunity in Germany v. Italy, Greece intervening, of 3rd Feb. 2012 (*Les droits fondamentaux devant les juges nationaux à l'épreuve des immunités juridictionnelles*).

French Court Issues Injunction over Kate Topless Photos

Couvrez ce sein que je ne saurais voir
Par de pareils objets les âmes sont blessées …

A French court in Nanterrre has issued an injunction earlier today over Kate

Middleton topless photos in the interim proceedings initiated by Mr Mounbatten-Windsor and his wife.

French tabloid *Closer* published last week photos of Kate Middleton appearing topless on the terrasse of a Chateau in Provence this summer. While the English press refused to publish the photos, Italian and Irish tabloids already have.

The Nanterre court ordered *Closer* to "hand over all digital forms of the pictures" to the plaintiffs and enjoined the defendant from assigning or forwarding them to any third party. Any breach of the injunction would be sanctioned by a Euro 10,000 civil penalty, payable to the plaintiffs. Finally, the plaintiffs were awarded a generous Euro 2,000 towards their legal costs.

By contrast, the Court ruled that it did not have the power to enjoin *Closer* from publishing the photos again, as there was no evidence that the tabloid intended to do so.

It is interesting to see that the consequence of the judgment is to create a distinction between photos published on the internet and photos published in the hard copy of the magazine. The international dimension of the case lies essentially in the potential for these photos to circulate on the internet, and to be assigned electronically to other tabloids. The mere publication in France is arguably much less of an issue.

Of course, it remains to be seen whether the fine distinction of the court will lead to the desired outcome, and whether the penalty will deter *Closer* from selling the pictures.

Conference on EU Class Actions at European Parliament

Registration is now open for a conference on E.U. class actions: 'Increasing Access to Justice Through Class Actions: A Conference for Litigators & Policy

Makers'. It will take place in Brussels within the committee rooms of the European Parliament on November 12 – 13, 2012. Seating within the European Parliament is limited so spaces should be reserved now.

The list of speakers is extraordinary and includes a lawyer who drafted Poland's law on opt-in class actions; the former Minister of Justice and Attorney General of Ireland Michael McDowell; former vice president of the European Parliament Diana Wallis; Boston lawyer Jan Schlichtmann who was portrayed by John Travolta in the film "A Civil Action"; Prof. Rachael Mulheron of Queen Mary University, London; Prof. Laura Carballo of Spain; Michele Carpagnano, co-author of a recent report on class actions for the European Parliament's Economic & Monetary Affairs Committee; and many others.

The location is the European Parliament with a few of its committee rooms, graciously hosted by Members of European Parliament McGuinness, Gallagher, Harkin, and Van der Stoep.

The topics that will be discussed include Access to Justice as a Human Right; How to Prosecute a Class Action; How to Defend a Class Action; The New Paternalism in Europe: Why Some Prefer Governments and NGOs Over Private Plaintiffs; the Opt-Out Mechanism versus the Opt-in Mechanism; and numerous other topics. The conference will provide a balanced look at some of the critical issues that Brussels is thinking about in deciding whether to design a system of collective redress for the entire E.U. The speakers will discuss class action mechanisms that already exist in certain Member States such as Sweden and Italy as well as any lessons to be learned form the United States experience with class actions.

To register, please go to this link as soon as possible to save your space, since seating in the European Parliament is limited. You can book a room at the nearby Renaissance Hotel at a reduced rate.

Numerous organizations are jointly presenting the conference including the Netherlands Bar Association, the French-speaking Brussels Bar Association, Union Internationale des Avocats, AIJA (International Association of Young Lawyers); National University of Ireland Maynooth Department of Law; New York State Bar Association International Section; Catholic University of Lyon Department of Law; PEOPIL (Pan-European Organisation of Personal Injury Lawyers); American Bar Association Section of International Law; and others.

You can view the complete list of cooperating entities at this link.

For more information, please check the link above or feel free to contact Robert J. Gaudet, Jr.

Thanks to Laura Carballo Piñeiro (University of Santiago de Compostela) for providing this announcement.

Hague Conference Seeks New Secretary General

The Hague Conference is seeking to recruit its next Secretary General.

> *The Hague Conference on Private International Law, the world's leading organisation for the progressive unification of the rules of private international law based in The Hague, the Netherlands, is looking for an outstanding lawyer to fill on 1 July 2013, the post of*
>
> ***Secretary General***
>
> *In addition to a distinguished career in his/her field (intergovernmental, governmental, academic, legal practice or other), the ideal candidate has excellent knowledge of private international law, good knowledge of comparative private law, a sound understanding of public international law, extensive experience in the practice of law including international negotiations, a creative mind and a vision of the future role of the Hague Conference in the context of an increasingly complex and globalising legal environment.*
>
> *A national of a Member State of the Hague Conference, he/she should be able to foster excellent working relationships with Member States' Governments, authorities and diplomatic representatives as well as Member Organisations and to lead an international highly qualified team of legal professionals and administrative support staff. Broad management experience including strategic and financial planning, fund-raising ability as well as excellent communication*

and interpersonal relations skills are essential prerequisites.

Fluency in English and French is required. Working knowledge of other major languages, such as Spanish, is an asset.

Duties and responsibilities

The Secretary General is in charge of:

- *preparation and organisation of the Diplomatic Sessions of the Conference, Council meetings and Special Commissions;*
- *implementing the work programme in conformity with the priorities and policies established by the Council on General Affairs and Policy;*
- *managing the human and financial resources of the Hague Conference;*
- *reporting to the Council on General Affairs and Policy and to Diplomatic Conferences (on the implementation of the work programme) and to the Council of Diplomatic Representatives (on financial matters); and*
- *representing the Hague Conference in its relations with the host Government and its authorities, other Governments and their agencies as well as intergovernmental and non-governmental Organisations.*

Duration of the appointment*: 5 years (renewable subject to satisfactory performance).*

Salary*: A7.1 (Scales of the Co-ordinated Organisations).*

Applications should be submitted by e-mail no later than 14 September 2012 to the

Chairman of the Council on General Affairs and Policy
E-mail: DJZ-CR@minbuza.nl

The applications should include a CV, list of publications and a letter setting forth the candidate's vision of his/her role as Secretary General.

Please note that only the candidates selected for interviews will be contacted.

The current Secretary General is Hans Van Loon, who has held this position since 1996 and worked at the Permanent Bureau in other capacities since 1978.

Implied Choice of Law in International Contracts

Manuel Penadés Fons has just published a new book on the implied choice of law in international contracts, entitled *Elección tácita de ley en los contratos internacionales* (Thomson Reuters Aranzadi).

Abstract provided by the author:

> The autonomy of the parties to choose the law applicable to their international commercial contracts does not always manifest through an express clause in the agreement. This silence leads occasionally to litigation over the possibility that the parties exercised such freedom, even though it was not explicitly reflected in the contract. Despite the harmonised solution provided to this issue by the European legislation, practice shows that the answer given by the courts of different Member States is substantially divergent. This reality makes the question highly controversial and unpredictable in the context of international commercial litigation. The book at hand studies the theoretical underpinnings of the institution and explores the criteria used by European caselaw under the Rome Convention and the Rome I Regulation, offering valuable professional guidance to deal with the question of implied choice of law before national and arbitral tribunals.

Summary (click here for whole table of contents)

V.- The Search for the Real Intention of the Parties

VI.- Conclusions

Manuel Penadés Fons, LLM London School of Economics, teaches Private International Law at the University of Valencia.

The Court of Justice – holiday over

Amidst a raft of judgments and opinions handed down by the CJEU on 6 September 2012, are several of note which relate to the EU private international law instruments, as follows:

Brussels I Regulation

1. Judgment: Case C-619/10, Trade Agency Ltd v Seramico Investments – application of Arts. 34(1) and (2) to the enforcement of an English default judgment, including an assessment as to whether the enforcement of a judgment given in default of appearance, without reasons, may be opposed on public policy grounds (answer: it depends).
2. Judgment: Case C-190/11, Mühlleitner v Yusufi – the consumer contract provisions (Art. 15) may apply to a contract arising from directed activities of the kind referred to in Art. 15(1)(c) even if it has not been concluded at a distance.
3. Opinion: Case C-456/11, Gothaer Allgemeine Versicherung AG v Samskip GmbH – a preliminary judgment on a question of jurisdiction (as to the validity and effectiveness of a choice of court agreement in favour of the courts of Iceland) is a "judgment" which must be recognised under the Regulation, and findings as to the validity and scope of the agreement are binding on the court addressed regardless of its status as res judicata in the Member State of origin or the Member State addressed.

Evidence Regulation

1. Judgment: Case C-170/11, Lippens v Kortekaas – the Regulation does not

preclude a Member State court, acting under its own procedural rules, from summoning a party to appear as a witness before it.

2. Opinion: Case C-332/11, ProRail NV v Xpedys NV – the Regulation does not preclude a Member State court, acting under its own procedural rules, from ordering the taking of expert evidence, partly in another Member State, provided that the performance of that part of the investigation does not require the cooperation of the authorities of that Member State.

It looks like it's time to shake off the holiday season, and prepare for another year on the EU private international law rollercoaster.

Shill on Judgment Arbitrage in the United States

Gregory H. Shill, who is visiting assistant professor at Hofstra law school, has posted Ending Judgment Arbitrage: Jurisdictional Competition and the Enforcement of Foreign Money Judgments in the United States on SSRN.

> *Recent multi-billion-dollar damage awards issued by foreign courts against large American companies have focused attention on the once-obscure, patchwork system of enforcing foreign-country judgments in the United States. That system's structural problems are even more serious than its critics have charged. However, the leading proposals for reform overlook the positive potential embedded in its design.*
>
> *In the United States, no treaty or federal law controls the domestication of foreign judgments; the process is instead governed by state law. Although they are often conflated in practice, the procedure consists of two formally and conceptually distinct stages: foreign judgments must first be recognized and then enforced. Standards on recognition differ widely from state to state, but under current law once plaintiffs have secured a recognition judgment all*

American courts must enforce it. Thus, plaintiffs can enforce in states that would have rejected the foreign judgment in the first place.

This extreme form of forum shopping, which I call "judgment arbitrage," creates a fundamental structural problem that has thus far escaped scholarly attention: it undermines the power of individual American states to determine whether foreign-country judgments are enforced in their territory and against their citizens. It also suggests a powerful, if implied, conflict of recognition laws among sister U.S. states that precedes and often determines the outcome of what scholars currently consider the primary conflict, between American and foreign law. Finally, this system impedes the development of state law and weakens practical constraints on the application of foreign nations' laws in the United States.

This Article constructs a novel framework for conceptualizing these problems, and addresses them by proposing a federal statute that would allow states to capture the benefits — and require them to internalize the costs — of their own recognition rules. Rather than scrap the current state-law regime in favor of a single federal rule, as the ALI and leading scholars call for, the statute proposed in this Article would provide incentives for competition among states for recognition law. The Article argues that sharpening jurisdictional competition would encourage experimentation, the development of superior law, and, eventually, greater uniformity in an area where scholars agree uniformity is desirable. The proposal may also suggest ways to manage other sister-state conflicts of law in an age when horizontal conflicts are proliferating.

The paper is forthcoming in the *Harvard International Law Journal*.