Second Issue of 2012's Revue Critique de Droit International Privé

The last issue of the *Revue critique de droit international privé* was just released. It contains two articles and several casenotes. A full table of contents can be found here.

In the first article, Catalina Avasilencei, a PhD candidate at the university Paris I, offers a survey of the new Romanian legislation on choice of law included in the new Romanian civil code (*La codification des conflits de lois dans le Nouveau code civil roumain : une nouvelle forme en attente d'un contentieux*). The English abstract reads:

> *The Romanian New Civil Code, in force starting with 1st October 2011, includes from now on the conflicts of laws regime, reforming the older regulation in this field. The amendments concern equally the general rules and the specific conflict rules. A general intervention of overriding mandatory provisions is expressly stated for the first time in Romanian law; however its articulation with the European regime in contractual and non-contractual matters is likely to raise issues. Parties' autonomy is attributed a wider field of application, and the connecting factor of the habitual residence becomes more relevant compared to the nationality of the parties in conflicts of laws concerning personal matters, anticipating the new regulations at European level.*

In the second article, Marie Nioche, who lectures at Nanterre University and practices at Castaldi Mourre, explores whether orders authorizing provisional attachments can be recognized in Europe and produce a *res judicata* effect (*La reconnaissance de l'autorité de chose jugée d'une décision provisoire relative à une saisie conservatoire : conséquence de sa nature « décisionnelle »*).

The *Revue* can be downloaded here.

Payan on the European Law of Debt Recovery

Guillaume Payan, who is a lecturer at Le Mans University, has published Droit européen de l'exécution en matière civile et commerciale.

The book, which is based on the doctoral thesis of Dr. Payan, explores how the European law of debt recovery could evolve in the coming years and proposes a strategy for the European lawmaker. Although the book discusses the main private international law instruments already adopted, its essential focus is on substantive law rather than private international law.

The French abstract reads:

> *Depuis une quinzaine d'années environ, la doctrine européenne et la Commission européenne soulignent l'opportunité d'une action de l'Union européenne dans le domaine de l'exécution proprement dite des titres exécutoires. Pourtant, ce domaine est encore aujourd'hui pour l'essentiel abandonné aux droits nationaux. Cette situation devrait évoluer prochainement.*
>
> *La présente étude a pour objet d'anticiper les premières réalisations concrètes de l'action du législateur européen dans ce domaine, en suggérant la création d'un droit européen de l'exécution en matière civile et commerciale. L'objectif est de garantir la cohérence entre les futurs instruments européens de l'exécution. À cette fin, une stratégie législative à deux échelons est proposée. Le premier échelon se caractérise par l'adoption d'une approche globale de la problématique de l'exécution proprement dite des titres exécutoires au sein de l'Union européenne. À ce stade, il est question de définir les principales notions juridiques s'attachant à l'exécution, de délimiter le champ d'application de l'action de l'Union européenne et de définir les principes directeurs de cette action. Le second échelon de la stratégie législative proposée se caractérise, en revanche, par une approche « sectorielle ». À ce stade, sont visés les premiers instruments européens qui pourraient être adoptés dans le cadre de ce droit. Par souci de réalisme, cette seconde étape de la création d'un droit européen*

de l'exécution devrait se matérialiser par une série d'interventions ponctuelles, adaptées aux difficultés et aux besoins rencontrés. Différents chantiers prioritaires sont définis, dont la création d'une procédure européenne de saisie conservatoire des avoirs bancaires.

A full table of contents can be found here. The foreword of Professor Jacques Normand is available here.

German Society of International Law: 2011 Conference Proceedings Published

The proceedings of the 32nd conference of the German Society of International Law (Deutsche Gesellschaft für Internationales Recht, formely the Deutsche Gesellschaft für Völkerrecht) held in Cologne in spring 2011 have recently be released. Devoted to paradigms in international law as well as the implications of the financial crisis on international law the volume contains four contributions (in German) relating to conflict of laws:

- *Schools of Thought in Private International Law*, pp. 33-61, by Christiane Wendehorst, University of Vienna
- *Roles and Role Perception in Transnational Private Law*, pp. 175-242, by Ralf Michaels, Duke Law School
- *Implications of the Global Financial Crisis for International Law: Corporate and Securities Law Control Mechanisms*, pp.283-314, by Hanno Merkt, University of Freiburg
- *Financial Crisis and the Conflict of Laws*, pp.369-427, by Jan von Hein, University of Trier

The English-language summaries are available here.

ECJ Judgment in Case C-378/10, VALE Építési Kft

The Italian company VALE COSTRUZIONI S.r.l. was incorporated and added to the commercial register in Rome in 2000. On 3 February 2006, that company applied to be deleted from that register as it wished to transfer its seat and business to Hungary, and to discontinue business in Italy. On 13 February 2006, the company was removed from the Italian commercial register, in which it was noted that 'the company had moved to Hungary'.

Once the company had been removed from the register, the director of VALE COSTRUZIONI and another natural person incorporated VALE Építési Kft. The representative of VALE Építési Kft. requested a Hungarian commercial court to register the company in the Hungarian commercial register, together with an entry stating that VALE COSTRUZIONI was the predecessor in law of VALE Építési kft. However, that application was rejected by the commercial court on the ground that a company which was incorporated and registered in Italy could not transfer its seat to Hungary and could not be registered in the Hungarian commercial register as the predecessor in law of a Hungarian company.

The Legfelsobb Bíróság (Supreme Court, Hungary), which has to adjudicate on the application to register VALE Építési Kft., asks the Court of Justice whether Hungarian legislation which enables Hungarian companies to convert but prohibits companies established in another Member State from converting to Hungarian companies is compatible with the principle of the freedom of establishment. In that regard, the Hungarian court seeks to determine whether, when registering a company in the commercial register, a Member State may refuse to register the predecessor of that company which originates in another Member State.

In its judgment delivered on 12 July, the Court notes, first of all, that, in the absence of a uniform definition of companies in EU law, companies exist only by virtue of the national legislation which determines their incorporation and

functioning. Thus, in the context of cross-border company conversions, the host Member State may determine the national law applicable to such operations and apply the provisions of its national law on the conversion of national companies that govern the incorporation and functioning of companies.

However, the Court of Justice points out that national legislation in this area cannot escape the principle of the freedom of establishment from the outset and, as a result, national provisions which prohibit companies from another Member State from converting, while authorising national companies to do so, must be examined in light of that principle.

In that regard, the Court finds that, by providing only for conversion of companies which already have their seat in Hungary, the Hungarian national legislation at issue, **treats**, in a general manner, **companies differently according to whether the conversion is domestic or of a cross-border nature. However, since such a difference in treatment is likely to deter companies which have their seat in another Member State from exercising the freedom of establishment, it amounts to an unjustified restriction on the exercise of that freedom.** In other words, EU law precludes the authorities of a Member State from refusing to record in its commercial register, in the case of cross-border conversions, the company of the Member State of origin as the predecessor in law of the converted company, if such a record is made of the predecessor company in the case of domestic conversions.

Source and further developments: Press release

Drahozal on the Economics of Comity

Christopher Drahozal (University of Kansas Law School) has posted Some Observations on the Economics of Comity on SSRN.

> *Comity is the deference one State shows to the decisions of another State.*

Comity is manifested in an array of judicial doctrines, such as the presumption against the extraterritorial application of statutes and the presumption in favor of recognition of foreign judgments. Comity does not require a State to defer in every case (it is not "a matter of absolute obligation"), but determining when comity requires deference poses difficult doctrinal and theoretical issues.

This paper offers some observations on the economics of comity in an attempt to provide insights into those issues. It first describes the (largely unsatisfactory) attempts to define comity and identifies the various judicial doctrines that are based on comity. Generalizing from the existing literature, which uses game theory (most commonly the prisoners' dilemma game) to analyze legal doctrines based on comity, the paper then sets out a basic and tentative economic analysis of comity. Comity often serves a cooperative function: courts rely on comity as the basis for doctrines that enhance cooperation with other States. In such cases, refusing to grant comity to a decision of another State constitutes defection from the cooperative solution. But if the original decision itself constitutes defection — such as a State opportunistically entering a judgment against a foreign citizen — refusing to grant comity would not be defection but would instead be an attempt to sanction the other State's defection. Thus, the central inquiry when a court decides whether to grant comity can be framed as whether the State decision being examined constitutes cooperation or defection. Further, given the uncertainty courts face in making such a determination, comity itself then can be seen as establishing a default presumption that a particular type of State decision constitutes cooperation (or, in cases in which courts refuse to grant comity, as a default presumption of defection).

The paper then argues that any rule a court adopts on the basis of comity should be treated as a default rule rather than a mandatory rule. The argument in favor of default rules over mandatory rules is a familiar one, and seems to apply well here. Thus, as U.S. and U.K. courts have held — but contrary to decisions of the European Court of Justice — comity concerns should not preclude a court specified in an exclusive forum selection clause from entering an anti-suit injunction against foreign court litigation. An arbitration clause, by comparison, provides a much weaker case for finding that the parties contracted around the comity-based default. Finally, the paper suggests possible avenues for future research: in particular, examining the importance of

rent-seeking and judicial incentives in the economics of comity.

The paper is forthcoming in *The Economic Analysis of International Law* (Eger & Voigt eds, 2013).

Alien Tort Statute

For those interested in current thinking on the United States Supreme Court's consideration of the Alien Tort Statute in *Kiobel v. Royal Dutch Petroleum*, SCOTUSBlog has a fascinating online symposium available here.

Eidenmüller on the Optional Common European Sales Law as a Regulatory Tool

Horst Eidenmüller, Professor at the University of Munich and the University of Oxford, has posted "**What Can Be Wrong with an Option? An Optional Common European Sales Law as a Regulatory Tool"** on SSRN. The paper can be downloaded here. The abstract reads as follows:

This paper analyses the proposed optional Common European Sales Law (CESL) as a regulatory tool. In principle, an optional CESL can be a sensible means to achieve some level of harmonization and the associated transaction costs savings plus network benefits and at the same time subject the CESL to a market test. However, whether these goals will actually be achieved depends on the design conditions and the content of the option. The CESL option which is currently on the table is harmful. The Draft CESL (DCESL) is a defective

product. It might nevertheless become a success on the European market for contract laws or be at least highly influential as a reference text.

Regulation on the Mutual Recognition of Protection Measures in Civil Matters

In June 2011 the European Council adopted a Resolution entitled "Roadmap for strengthening the rights and protection of victims, in particular in criminal proceedings", immediately published (OJ *C* 187, June 2011, 28th). I might of course be mistaken, but it seems to me that both the Resolution and its immediate consequences in the civil realm have gone largely unnoticed . Let's fill (if only a bit) the gap.

The document starts reminding that in the Stockholm programme "An open and secure Europe serving the citizen", the European Council had stressed the importance to provide special support and legal protection to those who are most vulnerable, such as persons subjected to repeated violence in close relationships, victims of gender-based violence, or persons who fall victim to other types of crimes in a Member State of which they are not nationals or residents. In the same vein, responding to the Stockholm programme, the European Commission has proposed a package of measures on victims of crime including a Regulation on the mutual recognition of protection measures in civil matters [Com(2011) 276 *final*, May 2011, 18]. The Regulation intends to help preventing harm and violence and ensure that victims who benefit from a protection measure taken in one Member State are provided with the same level of protection in other Member States, should they move or travel there; and that protection be awarded without the victim having to go through additional procedures. In order to ensure a quick, cheap and efficient mechanism of circulation of protection measures in

the European Union, the *rationale* of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 ('Brussels II-bis'), and in particular Articles 41 and 42 (therefore automatic recognition and the abolition on intermediate procedures such as exequatur) thereof, has been followed.

The fact that the proposal follows the *rationale* of existing EU instruments on judicial cooperation in civil and commercial matters implies that many provisions are similar or equal to the correspondent articles in the mentioned legislation. This is not a problem in itself; it might be, nevertheless, as certain protection measures are already covered by the Brussels I and Brussels II-bis Regulations. It is therefore important to clarify the articulation of the proposal with these regulations. According to the Commission, as the new Regulation establishes special rules in relation to protection measures, following a general principal of law it shall supersede the general rules set out by Brussels I. As for the Regulation Brussels II-bis, the aim of which is to centralise all proceedings relating to a given divorce or legal separation the situation is different: the proposal must not jeopardise rules governing jurisdiction and the recognition of judgments contained in the Brussels II-bis Regulation by offering the possibility to seize the jurisdiction of another Member State as regards the protection measures taken in the context of the ongoing proceedings. For this reasons, all protection measures entering into the scope of Brussels II-bis shall continue to be governed by this instrument. Examples of measures that do not fall under the application of Brussels II-bis are protection measures which would concern a couple which has not been married, same sex partners or neighbours.

The proposal provides for a speedy and efficient mechanism to ensure that the Member State to which the person at risk moves will recognise the protection measure issued by the Member State of origin without any intermediate formalities. A standardised certificate issued by the competent authority of this Member State, either ex-officio or on request of the protected person, will contain all information relevant for the recognition. The beneficiary of the measure will contact the competent authorities in the second Member State and provide them with the certificate. The competent authorities of the second Member State will notify the person causing the risk about the geographical extension of the foreign protection measure, the sanctions applicable in case of its violation and, where

applicable, ensure its enforcement.

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (4/2012)

Recently, the July/August issue of the German law journal "Praxis des Internationalen Privat- und Verfahrensrechts" (**IPRax)** was published.

- ***Eva-Maria Kieninger***: "Das auf die Forderungsabtretung anzuwendende Recht im Licht der BIICL-Studie" – the English abstract reads as follows:

> *In the Rome I Reg., the question of the law applicable to priority conflicts arising from the assignment or subrogation of claims has deliberately been left open (see Art. 27 (2) Rome I Reg.). As a first step towards a future solution, the EU-Commission has requested the British Institute of International and Comparative Law (BIICL) to prepare an empirical and legal study and to elaborate options for a legislative solution. The article presents the study and partly criticises its proposals. The introduction of a restricted choice of law seems overly complex and may lead to unforeseeable results, so that the rather limited addition of flexibility seems to be outweighed by its drawbacks. The alternatively suggested applicability of the law governing the claim goes not far enough in its exemptions of bulk assignments whereas the last proposal, putting forward the law of the assignor's domicile is accompanied by exemptions which are not elaborated with the necessary precision and possibly too broad. The article welcomes, however, the BIICL's proposal to extend any future rule on priority conflicts in Art. 14 Rome I Reg. to all proprietary relationships including that between assignor and assignee.*

- ***Peter Mankowski***: "Zessionsgrundstatut v. Recht des Zedentensitzes – Ergänzende Überlegungen zur Anknüpfung der Drittwirkung von

Zessionen" – the English abstract reads as follows:

The proprietary aspects erga omnes of the assignment of debts have not been dealt with by Art. 14 Rome I Regulation. They are a topic of constant debate which appears to have come to some stalemate in recent times, though. But there still are some aspects and issues which deserve closer inspection than they have attracted yet, in particular the interfaces with the European Insolvency Regulation and the UN Assignment Convention.

- ***Kilian Bälz***: "Zinsverbote und Zinsbeschränkungen im internationalen Privatrecht" – the English abstract reads as follows:

This article challenges the widely held opinion that provisions prohibiting and restricting interest are mandatory provisions in the sense of Art. 9 Rome I Regulation. According to this opinion, provisions prohibiting and restricting interest at the debtor's seat may apply also in the case another law has been determined as the proper law of the contract.Prohibitions on taking interest which are based on the Islamic legal tradition, however, demonstrate that it is not appropriate to treat respective restrictions generally as mandatory. Normally, there are far reaching exemptions, so that one cannot speak of a prohibition of interest of general application in Muslim jurisdictions. Against this backdrop it is more than questionable whether the respective provisions are mandatory in the sense of Art. 9 (1) of the Rome I Regulation.

Further, interest rate caps normally are determined in view of a specific currency. From this it follows that under Art. 9 (3) Rome I Regulation interest rate caps can only be recognised in cases where there is a congruence of applicable law and currency. Finally, interest rate caps cannot be recognised where local banks are exempted from the respective restrictions. In the latter case, the interest rate cap merely serves the purpose of protecting the local credit market. As a result, provisions prohibiting or restricting interest can only be recognised as "mandatory provisions" in very exceptional circumstances.

- ***Stefan Arnold***: "Entscheidungseinklang und Harmonisierung im internationalen Unterhaltsrecht" – the English abstract reads as follows:

Within a world which becomes smaller and smaller, Private International Law also gains importance with respect to the area of maintenance obligations.

Harmonization measures – like the new European rules on the law applicable to maintenance obligations – promise legal certainty here. The new regime established by the Hague Protocol from November 23rd 2007 is not sufficiently coordinated with the European Regulation No. 4/2009 on Maintenance Obligations, however. This paper introduces into the main aspects of the new rules on the law applicable to maintenance obligations and suggests a way to establish better coherence between the Conflict of Laws rules and the procedural possibilities established by the Regulation No. 4/2009.

- ***Kurt Siehr***: "Kindesentführung und EuEheVO – Vorfragen und gewöhnlicher Aufenthalt im Europäischen Kollisionsrecht" – the English abstract reads as follows:

The annotated cases deal with alleged child abductions covered by the Hague Abduction Convention of 1980 and the Brussels II Regulation of 2003. The case McB. of the European Court of Justice (ECJ) had to decide whether an Irish unmarried father of three children had custody rights with respect to his children in order to qualify him to prevent a removal of the children from their home in Ireland and, if removed to England, ask for return to Ireland under the Hague Abduction Convention of 1980 and the Brussels II Regulation of 2003. The ECJ decided very quickly in the PPU-proceedings (procédure préjudicielle d'urgence) and found that at the time of removal the father had no right of custody under Irish law and therefore could not blame the mother of having illegally removed the children to England. This is correct. In the PPU-proceedings the ECJ could not go into details and evaluate Irish law under the Charter of Fundamental Rights of the European Union and the European Convention of Human Rights.

In the cases of the ECJ in Mercredi v. Chaffe and of the Austrian Supreme Court of 16 November 2010 the term "habitual residence" was correctly defined and could be applied by the lower national courts. In Mercredi v. Chaffe the English Court of Appeal finally raised doubts whether there was a wrongful removal of the child from England to the French overseas department La Réunion at all.

- ***Francis Limbach***: "Nichtberechtigung des Dritten zum Empfang einer der Insolvenzmasse zustehenden Leistung: Zuständigkeit, Qualifikation

und Berücksichtigung relevanter Vorfragen" – the English abstract reads as follows:

Upon opening German insolvency proceedings, the insolvency debtor loses the right to dispose of his assets. Thus, holding a claim against another person, the insolvency debtor is legally unable to instruct the latter to pay a third party the sum owed. In such an event, the insolvency administrator may demand recovery of the amount received by the third party on the grounds of Paragraph 816(2) of the German Civil Code. The Higher Regional Court of Hamm had to deal with such a case: It involved an insolvency debtor who had presumably instructed a party with a debt to her to perform not to herself but to her mother who eventually received the payment. The insolvency administrator then filed a claim against the mother to recover the respective sum. As the amount paid might have originated in a contract governed by Portuguese law, the Court had to consider whether the filed action appeared as an "annex procedure" related to an insolvency case, implying an international jurisdiction on the grounds of Article 3(1) of the European Insolvency Regulation. Furthermore, in order to identify the applicable law in this matter, the Court had to determine whether the respective legal relationship was to be qualified as of insolvency or as of general private law. At last, it had to consider relevant preliminary questions regarding the source of the claim filed.

- ***Tobias Helms***: "Vereinbarung von Gütertrennung durch Wahl des Güterstandes anlässlich einer Eheschließung auf Mauritius" – the English abstract reads as follows:

In this case the German-based parties (the husband being a German citizen and the wife a Mauritian national) appeared before the Federal Supreme Court (Bundesgerichtshof) to contest whether they had validly agreed on the matrimonial property regime of Gütertrennung (separation of goods) when they concluded their marriage in Mauritius. Mauritian law does not provide for a default statutory matrimonial property regime. The engaged couple is instead given a choice between separation of goods and community of goods. The courts of lower instance considered the fact that the couple had chosen separation of goods while concluding their marriage in Mauritius to be irrelevant as the matrimonial property regime in this case is governed by German law according to Art. 15 Sect. 1 EGBGB in connection with Art. 14

Sect. 1 No. 2 EGBGB. However, the Federal Supreme Court correctly disagreed with this assessment and held that the parties had validly agreed to adopt the German Gütertrennung. It was held that the deciding factor was that the spouses had given mutual declarations of their intent to regulate their property regime. This procedure was held to be equivalent to the conclusion of a marriage contract under German law (§ 1408 BGB).

- ***Rolf Wagner***: "Vollstreckbarerklärungsverfahren nach der EuGVVO und Erfüllungseinwand – Dogmatik vor Pragmatismus?" – the English abstract reads as follows:

Article 45 of Council Regulation (EC) No 44/2001 (Brussels I-Regulation) deals with the limits within which the national courts of the State of enforcement may refuse or revoke a declaration of enforceability. The European Court of Justice (ECJ) had to decide whether this provision precludes the court with which an appeal is lodged under Article 43 or Article 44 of that regulation from refusing or revoking the declaration of enforceability on the ground that there had been compliance with the judgement in respect of which the declaration of enforceability was obtained. The article discusses the decision of the ECJ and raises the question whether the German law has to be changed.

- ***Katharina Hilbig-Lugani***: "Forderungsübergang als materielle Einwendung im Exequatur- und Vollstreckungsgegenantragsverfahren" – the English abstract reads as follows:

The German Federal Supreme Court's decision concerns a complaint against a declaration of enforceability pronounced for a Swiss judgement under the Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations and the German execution provisions, contained until 18 June 2011 in the AVAG, now in the new AUG. The case raised the well-discussed questions of whether the court deciding on enforceability could take into account defenses of the debtor based on a modification of the judgement, on partial performance of the maintenance and on reasons to modify the judgement. But it particularly raised the new question of the effect of the legal transfer of the debt enshrined in the judgment to the public authority who has provided the maintenance creditor with subsidiary social security benefits. Convincingly, the Federal Supreme Court decided that

this as well qualified as a defense to be taken into account in the exequatur decision (under Section 12 AVAG). As before, the court seems to limit its statements to those defenses which are undisputed or which are based on circumstances having acquired the force of res iudicata. Pursuant to the author, the legal appreciation of the claim's transfer should be the same as the one provided by the Federal Supreme Court under the new German execution provisions in the AUG and under the maintenance regulation 4/2009.

- ***Andreas Piekenbrock***: "Ansprüche gegen den ausländischen Schuldner in der deutschen Partikularinsolvenz"
- ***Eva-Maria Kieninger***: "Abtretung im Steuerparadies" – the English abstract reads as follows:

The Austrian Supreme Court has held that the account debtor of a claim in damages cannot rely on provisions subjecting the effectiveness of an assignment to the (prior) consent of the account debtor, if those provisions do not form part of the law governing the assigned claim (art 12 (2) Rome Convention). The case note discusses the possible impact of the decision on the presently debated reform of art 14 Rome I Reg. It suggests that the term "assignability" in art 14 (2) Rome I Reg. should be replaced by a more precise definition of those rules which limit or exclude the assignability of claims in the interest of the debtor.

- ***Helen E. Hartnell:*** U.S. Court of Appeals Rules on Effect of One Country's Article 96 Reservation on Oral Contract Governed by the CISG (in English)

The U.S. Court of Appeals for the Third Circuit has decided an important case on Article 96 CISG, which permits a State "whose legislation requires contracts of sale to be concluded in or evidenced by writing" to make a declaration of inapplicability in regard to any CISG provision that disavows a writing requirement for international sales contracts. Only 11 Contracting States have such declarations in effect. In Forestal Guarani S.A. v. Daros International, Inc. (2010), the court addressed the question of how to apply Article 96 to a case involving one party with its place of business in Argentina, which made an Article 96 declaration, and one based in the U.S., which made no such

declaration. The court embraced what it called the "majority approach" and held that the Article 96 declaration did not absolutely bar an action to enforce the oral contract. Rather, the court held that Article 96 CISG gives rise to a gap that permits resort to the forum's private international law rules per Article 7(2), and remanded to the lower court with instructions on how to proceed. If Argentine law governs, then the lower court should examine Argentine domestic law to ascertain the enforceability of the oral contract. However, if U.S. law governs, then the lower court should apply the U.S. domestic law to the issue of enforceability, in lieu of CISG provisions disavowing a writing requirement. The article criticizes the result for its turn to domestic law in the latter situation, and questions the viability of Article 96 declarations by States that do not totally prohibit oral contracts.

- ***Hans Jürgen Sonnenberger***: "Deutscher Rat für Internationales Privatrecht – Spezialkommission „Drittwirkung der Forderungsabtretung"
- ***Hans Jürgen Sonnenberger***: "German Council for Private International Law – Special Committee: "Third-party effects of assignment of claims"

French Court Rules Parallel Litigation in France Bars Recognition of Foreign Judgment

In a judgment of June 20th, 2012, the French supreme court for private and criminal matters (*Cour de cassation*) ruled that parallel litigation in France could be a ground for denying recognition to a foreign judgment.

The case was concerned with an Algerian couple separating after 45 years of marriage. The couple had married in Algeria in 1962. They then moved to France where they were to spend 45 years and have 6 children. In June 2007, the

husband left and went back to Algeria. Seven months later, in February 2008, the wife initiated proceedings in France seeking maintenance.

In April 2008, the husband sought divorce in Algeria and obtained it a month and a half later, in May 2008. He then relied on the Algerian judgment in France, claiming that it had *res judicata* and that the French proceedings should thus be terminated.

Fraude au jugement

The *Cour de cassation* denied recognition to the Algerian judgment on the ground that the wife had first sued in France, and that the husband had sued "in haste" for the purpose of defeating the French proceedings.

Algerian and Morrocan divorce orders are regularly denied recognition in France on the ground that they violate public policy (either because the wife is not informed of the proceedings, or because Islamic law is discriminatory against women). However, they are virtually never denied recognition on the ground of strategic behavior of the parties (*fraude*).

The theory is that *fraude* is a ground for denying recognition to foreign judgments. *Fraude* occurs when one party sues abroad for the **sole** purpose of avoiding French justice. French scholars have long wondered, however, whether *fraude* can be found in cases where the party allegedly frauding has a strong connection with the foreign court, which is another requirement for recognizing foreign judgments under the French common law of judgments. This is because it seems hard to demonstrate that a party domiciled in a given country would petition his own courts for the sole reason of defeating French justice: he may just be suing at home because he lives there.

I had reported on a couple of jugdments of the *Cour de cassation* ruling that American wives suing in the U.S. right after their French husband had initiated proceedings in France were not committing *fraude* as it seemed perfectly legitimate for them to sue at home. Much like the Algerian husband, they had first lived as a family in France, and had then left their husband and gone back home where they had been living for more than 6 months. This was enough to make it legitimate, from a French perspective, to sue at home.

These cases are hard to reconcile with the Algerian one. The Algerian husband

had moved to Algeria seven months before his wife sued him before French courts.

Why was it illegitimate, then, for him to sue at home?

- Because he had not taken the kids with him?
- Because *fraude* can only be committed by males, and not by females?
- Because the law is different for Arabs and for Americans?