Investors sue Vivendi in France

67 shareholders of Vivendi have initiated civil proceedings in France against the French company.

Readers will recall that investors had initially sued Vivendi in the U.S. However, the U.S. Supreme Court decided in *Morrison* that U.S. securities law had no extra-territorial reach and thus did not apply to shares traded outside of the U.S. As a consequence, the federal court of Manhattan dismissed the claims of investors who had bought their shares in France in February 2011 (see In re Vivendi Universal, S.A. Securities Litigation).

The lawyer for the investors specifically referred to Morrison to explain why this new suit had been brought. Although his clients are not exclusively French and include for instance American funds, it seems that they had all purchased their shares on French markets.

An interesting issue will be whether weight will be given to the New York judgment which had found Vivendi liable for misleading investors in January 2001, before the *Morrison* decision. I suspect that a consequence of the dismissal of the claims of investors who had purchased shares in France is that the judgment does not stand anymore between them and Vivendi. The New York judgment probably cannot be res judicata. But foreign judgments can produce non-normative effects under the French law of judgments. For instance, they can be used as evidence of the occurence of certain facts. The New York judgment could possibly be used for that limited purpose.

When Rome meets Greece: could Rome I help the Greek debt

restructuring?

Among all the buzz about a possible (but much feared) 'Grexit', there are two elements in the story of the Greek debt restructuring (diplomatically called 'Private Sector Involvement') which should be of interest for conflict lawyers.

First the fact that the governing law of the Greek bonds was one of the central issues in the discussion which led to the restructuring. The law governing sovereign bonds is usually only a side issue which does not attract much attention – probably because so many of the bonds issued are governed either by English law or the law of New York. The Greek bonds (issued or guaranteed by Greece) which were subject of the restructuring were overwhelmingly governed by Greek law. This peculiar feature gave Greece much more leeway vis-à-vis the bondholders, as Greece could modify its law and by doing so directly impact the terms of the debt. To give one element of comparison, when Argentina restructured its debt in 2005, the vast majority of the bonds concerned were governed by either English law or the law of New York, as is common in the market.

Greece will, however, no be able to repeat this trick twice. This distinctive feature of the Greek bonds which were eligible for the swap (for a total amount of EUR 206 billion), will indeed disappear. The new bonds which were offered to the existing bondholders as compensation for the substantial haircut they had to swallow, are issued under English law while the older bonds (tendered in the exchange) were mostly Greek law bonds. This choice of law does make a difference as it means that investors holding the new bonds will not be subject to a change in Greek legislation which Greece could unilaterally decide to impose.

The second element worth noticing is the nature of the law adopted by Greece as part of its restructuring operation. The Act which was rushed through the Greek Parliament (but had been anticipated by some highly knowledgeable commentators), inserted so-called collective action clauses (CAC's) in the documentation. This meant altering the terms of the debt, in a retroactive fashion. This move has been much discussed : rating agencies had warned that activating the CAC's would trigger lowering the issue ratings on the debt issues concerned, ISDA's determination committee also decided that the use of collective action clauses meant that a so-called Restructuring Credit Event had occurred and some

have even warned that this move could be challenged under the BIT's signed by Greece. Although the use of CAC's has been widely promoted over the past decade, with the EU recently adopting its own versions of the CAC's, the use of these clauses in the sovereign debt market remains a relatively novel phenomenon.

The Greek Act (Law 4050/2012 adopted by the Greek Parliament on 23 February 2012) introducing CACs in the terms of the outstanding Greek bonds allows for one single vote across all issues, an interesting feature. Even more interesting is that the law provides that its provisions

> *"aim to protect the supreme public interest, are mandatory rules effective immediately, prevail any contrary legislation of general or special provisions…" (translation courtesy of Andrea Koutras' blog).*

This is a clear reference to Article 9 of the Rome I Regulation and an attempt to strengthen the Greek legislation by elevating it to the status of 'overriding mandatory provisions'. It remains to be seen whether this will be sufficient to ensure that the law will be applied whenever investors (private or institutional) institute legal proceedings against what some of them have deemed to be a 'forced expropriation'. It is indeed almost inevitable that the whole operation will lead to much litigation, which will raise interesting features of investment law and even human rights. Another issue which will be discussed is whether the Greek Mopping Up Law will be applied at all by courts and possibly arbitral tribunals called to decide on claims filed by investors. Given the limitations imposed by Article 9.3 of the Rome I Regulation on the application of foreign mandatory rules, the Regulation may offer a very limited protection to Greece if investors who have not accepted the bond swap but were nonetheless forced to take part on the basis of the CAC's, succeed in bringing proceedings outside Greece.

Editors' note: Patrick Wautelet is a professor of law at Liege University.

German Federal Supreme Court Refers Preliminary Question on Article 15 I lit. c) Brussels I to the ECJ

On 1 February 12 the German Supreme court has referred two questions concerning the interpretation of Article 15 I lit. c) Brussels I to the ECJ. Following the ECJ's decisions in Pammer and Alpenhof which dealt with the targeted activity-criterion of Article 15 I lit. c) Brussels I, the questions are meant to shed light on the provisions' nexus-requirement:

> *1. Is there a matter relating to a consumer contract within the meaning of Article 15(1)(c) of Regulation No 44/2001 (1) if a trader has, by the design of his website, directed his activities to another Member State and a consumer domiciled in the territory of that Member State, on the basis of the information on the trader's website, travels to where his business is located and the parties sign the contract there, or does Article 15(1)(c) of Regulation No 44/2001 presuppose in that case that a distance contract is concluded?*
>
> *2. If Article 15(1)(c) of Regulation No 44/2001 is to be inter preted as meaning that in that case the contract must in principle be a distance contract: Does the consumer jurisdiction under Article 15(1)(c) in conjunction with Article 16(2) of Regulation No 44/2001 apply if the parties to the contract enter into a distance pre-contractual commitment which subsequently flows directly into the conclusion of the contract?*

The question referred to the ECJ can be downloaded here (in English). The full decision is available here (in German).

Long Arm Tactics

The next event in the Herbert Smith Private International Law Seminar Series at the British Institute of International and Comparative Law will take place on Tuesday 29 May, from 5:30pm, at the Institute's concrete bunker, Charles Clore House, Russell Square, London W1.

Entitled "Jurisdiction of the North-American Courts: When Will the Long Arm Reach You?", the seminar will consider important recent case law of the US and Canadian Supreme Courts considering the grounds for asserting jurisdiction in cross-border cases, in particular *J. McIntyre Machinery Ltd. v. Nicastro* and *Goodyear Dunlop Tires Operations S.A. v. Brown* (US) and *Club Resorts Ltd. v. Van Breda* (Canada).

Professor Linda Silberman (Martin Lipton Professor of Law, New York University), Adam Johnson (partner, Herbert Smith LLP, London) and Alexander Layton QC (barrister, 20 Essex Street, London) will tackle the subject matter under the chairmanship of Lord Collins of Mapesbury.

To book your place, and for other details, please go to the Institute's website: http://www.biicl.org/events/view/-/id/706/

Second Issue of 2012's Journal du Droit International

The second issue of French *Journal du droit international* (*Clunet*) for 2012 was just released. It contains four articles and several casenotes. A table of content is accessible here.

In the first article, Thomas Clay, who is a professor at Versailles Saint Quentin University, offers a survey of the French law on arbitration *(« Liberté, Égalité, Efficacité » : La devise du nouveau droit français de l'arbitrage – Commentaire*

article par article). The English abstract reads:

> *It was the long-awaited reform. The arbitration regulation has just been amended and modernized, more than thirty years after the previous regime came into force. This has been achieved by different means : by rewriting certain unclear or outdated sections, by implementing case law-developed solutions already being applied in arbitral proceedings and, finally, by promoting new (sometimes avantgardist) solutions. All the above has resulted in the enactement of a real new Arbitration act.*
>
> *Therefore, an article-by-article review seems to be a suitable form for an accurate and comprehensive study. This study consists of a comparison between the replaced articles and the new ones, a an analysis of the first commentaries on the reform and an interpretation of the case law following the enactment of the new regulation.*
>
> *The proposed analysis also evidences the main principles governing the new French law of arbitration. Surprisingly they are in fact rooted in the foundations, not only of private law, but also on the principles of our Republic since they apply (almost perfectly), our Republican maxim, except that brotherhood is substituted by efficiency (the later being more representative).*
>
> *In conclusion, it is without any doubt a successful text and the long wait was worth it. However it is useful to explain the circumstances of its endless development, which has experienced many disruptions. The article below starts by describing such circumstances.*

In the second article, Olivier Cachard, who is a professor of law at the university of Nancy, present the recently adopted Rotterdam Rules (*La Convention des Nations Unies sur le contrat de transport international de marchandises effectué entièrement ou partiellement par mer (Règles de Rotterdam)*).

> *The Rotterdam Rules, that were signed on 23th september 2009, were recently ratified by the Kingdom of Spain, while the maritime community is now expecting the ratification by the United States of America. The purpose of this Convention is to address the new realities of transportation by sea, going further than the antique Hague Rules. The scope of the Convention is larger, encompassing door-to-door transportation. Although the Convention dedicates*

substantial provisions to transportation documents, it is not limited to contracts where a bill of lading is issued. The new uniform regime is built on the traditional case law, but takes into consideration containers and tends to establish a new balance between carriers and shippers. The provisions dedicated to jurisdiction and arbitration deserve more criticism and fortunately are under a opt in regime.

In the third article, Thomas Schultz, who lectures at the University of Geneva, and David Holloway, who is barrister at Number 5 Chambers in London, provide an account of the emergence and development of comity in the history of private international law (*Retour sur la comity . – Deuxième partie : La comity dans l'histoire du droit international privé*). The English abstract reads:

In a series of two articles, published in the previous and the current issue of the Clunet, the authors provide an account of the emergence and development of comity in the history of private international law. In the previous article, the authors have reviewed the forces that led to strict territoriality in the 17th century and how comity became needed to mitigate it. In the current article, the authors discuss the historical development of the concept of comity in the context of the history of private international law generally. An examination of five issues that marked the history of comity seems to allow a global yet fragmented understanding of the concept: the idea of a natural or universal law of conflicts ; the theoretical building blocks of the modern interstate system; the normative character of a concept created specifically to avoid constraining sovereigns ; reciprocity as a principle of international collaboration; and the international dimension of private international law. The most critical finding of the study is this: the history of the comity principle negates the ideas that the very nature of comity requires bilateral reciprocity and that it is a strictly discretionary and internal principle.

Valérie Parisot, who lectures at the university of Rouen, discusses the implications of recent cases of the ECJ on choice of law in employment contracts (*Vers une cohérence verticale des textes communautaires en droit du travail ? Réflexion autour des arrêts* Heiko Koelzsch *et* Jan Voogsgeerd *de la Cour de justice*).

The multiplicity of Community legal provisions leads quite naturally to think

about their coherence, especially as far as a uniform interpretation of common terminologies is at stake. Two recent judgments of the European Court of justice deal precisely with this matter. They decide that the ECJ's case-law regarding the interpretation of the connecting factors of Article 5 (1) of the Brussels Convention of 27 September 1968 that are used to determine jurisdiction in matters relating to individual contracts of employment remains relevant to analyze the connecting factors of Article 6 (2) of the Rome Convention of 19 June 1980 and of Article 8 (2) of the Rome Regulation of 17 June 2008, concerning the law applicable to these contracts.

Article 6 (2) (a) of the Rome Convention must therefore be understood as meaning that, in a situation in which an employee carries out his activities in more than one Contracting State, the country in which the employee habitually carries out his work in performance of the contract, within the meaning of that provision, is that in which or from which, in the light of all the factors which characterize that activity, the employee performs the essential part of his obligations towards his employer (Heiko Koelzsch and Jan Voogsgeerd cases). Furthermore, article 6 (2) (b) of the Rome Convention, which makes subsidiary reference to the concept of "the place of business through which the employee was engaged" must be understood as referring exclusively to the place of business which engaged the employee and not to that with which the employee is connected by his actual employment. The possession of legal personality does not constitute a requirement which must be fulfilled by the place of business of the employer within the meaning of that provision. Finally, the place of business of an undertaking other than that which is formally referred to as the employer, with which that undertaking has connections, may be classified as a « place of business » according to the same provision, if there are objective factors enabling an actual situation to be established which differs from that which appears from the terms of the contract, and even though the authority of the employer has not been formally transferred to that other undertaking (Jan Voogsgeerd case).

CESL Conference in Tübingen, Germany

On 15 and 16 June 2012, the Publisher and Advisory Board of the "Zeitschrift für Gemeinschaftsprivatrecht – Journal of Common Private Law" (GPR) will host a conference on the Proposal for a Common European Sales Law at Tübingen University. More information (in German) is available here and here .

The programme reads as follows:

Freitag, 15. Juni 2012 (Friday, 15 June 2012)

13:30 **Grußwort und Einführung**

- *Prof. Dr. Heinz-Dieter Assmann*, Vice President of the University of Tübingen
- *Prof. Dr. Jörg Kinzig,* Vice Dean of the Law School at the University of Tübingen
- *Prof. Dr. Martin Gebauer*, University of Tübingen

I. Grundlagen und Anwendungsbereich

14:00 – 14:30 **Ein europäisches Kaufrecht für grenzübergreifende Kaufverträge – seine Bedeutung auf offenen Märkten**, *Prof. Dr. Jürgen Basedow*, Max Plack Institute for Comparative and International Private Law, Hamburg

14:30 – 15:00 **Überschießende Anwendung des EU-Kaufrechts – mitgliedstaatliche Optionen und Parteiautonomie ,** *Prof. Dr. Boris Schinkels*, University of Greifswald

15:00 – 15:30 **Diskussion** (Discussion), Chair: *Prof. Dr. Martin Gebauer*, University of Tübingen

15:30 – 16:00 **Kaffee-Pause** (Coffee break)

II. Die Wahl des EU-Kaufrechts und ihre kollisionsrechtliche Verortung

16:00 – 16:30 **Rechtsgrundlage des künftigen EU-Kaufrechts und**

kollisionsrechtliche Einordnung seiner Wahl, *Dr. Karl-Philipp Wojcik*, Brussels

16:30 – 17:00 **Dogmatische Konstruktion der Einwahl in das EU-Kaufrecht (2., 28. oder integriertes Regime) und die praktischen Folgen,** *Prof. Dr. Matthias Lehmann*, University of Halle

17:00 – 17:30 **Die aufgeklärte Entscheidung: Modalitäten der Einwahl und der kollisionsrechtliche Verbraucherschutz**, *Dr. Christoph Busch*, University of Osnabrück

17:30 – 18:30 Uhr **Diskussion** (Discussion), Chair: *Prof. Dr. Michael Stürner*, University of Frankfurt (Oder)

20:00 Uhr **Abendessen** (Dinner)

Samstag, 16. Juni 2012 (Saturday, 6 June 2012)

III. Maßstäbe der Lückenfüllung

9:00 – 9:30 **Interne und externe Lücken – die Rolle des EuGH und der mitgliedstaatlichen Gerichte,** *Prof. Dr. Beate Gsell,* University of Munich

9:30 – 10:00 **Externe Lücken, allgemeines Kollisionsrecht und die Rolle der Parteiautonomie, insbesondere beim Verbrauchervertrag**, *Prof. Dr. Dennis Solomon*, University oc Passau

10:00 – 10:30 **Diskussion** (Discussion), Chair: Prof. Dr. Peter Jung, University of Basel

10:30 – 11:00 **Kaffee-Pause** (Coffee break)

IV. Drittstaatensachverhalte und Perspektiven der praktischen Rezeption des EU-Kaufrechts

11:00 – 11:30 **Der Drittstaatensachverhalt und das EU-Kaufrecht: Perspektiven mitglied- wie drittstaatlicher Gerichte und die Wahrung des internationalen Entscheidungseinklangs**, *Prof. Dr. Stefan Leible*, University of Bayreuth

11:30 – 12:00 **EU-Kaufrecht und CISG – Konkurrenz, Gemeinsamkeiten,**

Unterschiede der zu erwartenden Akzeptanz in der Rechtspraxis, *Prof. Dr. Friedrich Graf von Westphalen*, Cologne

12:00 – 12:30 **Diskussion** (Discussion), Chair: Prof. Dr. Matthias Lehmann, University of Halle

13:00 **Ende der Tagung** (End of conference)

Conference: New Challenges in International Distribution (Venice, 18-19 May 2012)

On 18-19 May 2012, the International Distribution Institute (IDI) will hold its annual conference on international distribution law in Venice: "New Challenges in International Distribution – Distribution contracts with Department Stores and Sales through Internet". Here's an excerpt of the event's presentation (programme in .pdf):

> *The conference is addressed to lawyers and businessmen involved in negotiating, drafting and managing international distribution contracts (agency, distributorship, franchising, etc.) and will deal with a number of topical issues which justify an in-depth discussion between the participants and qualified experts in this field. The conference is divided into a main session (on Friday 18 May) and three parallel workshops on specific issues chosen by IDI in collaboration with its members (on Saturday 19 May, morning).*
>
> *Friday 18 May*
>
> - *Morning Session (9h00 – 13h00): Negotiating agreements for distribution within department stores (concessions, corners, etc.);*
> - *Afternoon Session (14h30 – 19h00): Selling through the Internet without jeopardizing the existing network and the supplier's corporate*

image.

Saturday 19 May

- *Workshop 1 (9h00 – 13h00): Critical issues arising in case of termination of a master franchise agreement.*
- *Workshop 2 (9h00 – 13h00): Drafting sales contracts/general conditions for distributors: would the European Common Sales Law be an appropriate tool?*
- *Workshop 3 (9h00 – 13h00): The notion of commercial agency and its borderlines. Are there alternative solutions with other types of contracts?*

For the full list of speakers and further information (including fees), see the conference programme and IDI's website.

(Many thanks to Prof. Fabrizio Marrella for the tip-off)

Reflections of Legal Pluralism in Multicultural Settings (article)

Prof. Zamora Cabot and Victoria Camarero (University of Castellón), have just published a new, co-authored article in the series Working Papers "El Tiempo de los Derechos" (ISSN: 1989-8797).

Focusing on the USA, Canada and the United Kingdom, the authors of the paper have carried out an extensive, thoroughly documented initial survey (published elsewhere) of the relationship between legal pluralism and multiculturality. Along this line, in the present study they offer some introductory reflections to frame the complex and multifaceted world of legal pluralism, highlighting the religious factor (especially Muslims and the Sharia). They then proceed with two sections devoted to analyze the existence of elements of plurality, both in the domestic substantive law and in the systems of private international law of the

abovementioned jurisdictions. The authors conclude that those elements are far from being enough to address the challenges arising from the presence of Muslim minorities in Western European, particularly against the current background of economic crisis.

Click here for the whole text.

Luxembourg Conference on Exequatur in the Grande Region

On May 21st, I will present the preliminary results of an empirical study conducted by the university of Luxembourg on Exequatur in Luxembourg and surrounding regions of France, Belgium and Germany. A team of researchers of the university has collected data on judgments rendered by courts of Arlon, Trier, Saarbrücken, Lorraine and Luxembourg.

The presentation will take place at lunch time in French. More information is available here.

Competition in International Sales Law – Perspectives on Choice

On Friday, 15 June 2012, the Maastricht European Private Law Institute (M-EPLI) will host a one-day roundtable conference at the Feestzaal of Maastricht Law Faculty.

From the official announcement:

> *This roundtable is divided into three panels, distinguished on the basis of perspective. Contributions in the first panel offer an institutional perspective on the choices available. A second panel focuses on competition between the instruments and how parties may be expected to choose. The third sheds some light on the similarities and differences between the instruments, suggesting criteria to evaluate these instruments, as well as views on what the best instrument is. Speakers are drawn from academia, legal practice, as well as commercial interests.*

Attendance is free, but access is limited. Admissions can be submitted until 8 June 2012 by email to mepli@maastrichtuniversity.nl.

Further information can be found here. The programm reads as follows:

10.00-10.25 **Registration and coffee**

10.25-10.30 **Welcome address**, *Professor Jan Smits* (Maastricht)

Panel 1 – A view from the institutions

10.30-11.00 **An arbitrator's perspective,** *Professor Christina Ramberg* (Stockholm)

11.00-11.30 t.b.a., *Professor Jan Smits* (Maastricht)

11.30-12.00 **Discussion**

12.00-13.30 **Lunch**

Panel 2 – How parties (ought to) choose

13.30-13.50 **A psychology of choice of laws**, *Dr Gary Low* (Maastricht)

13.50-14.10 **Choice of jurisdiction**, *Prof Jan Dalhuisen* (King's College London)

14.10-14.30 **A commercial perspective**, *Mr Eric Poelman* (Philips CE)

14.30-15.00 **Discussion**

15.00-15.20 **Coffee break**

Panel 3 – Comparing choices

15.20-15.40 **Formation/Incorporation**, *Dr Sonja Kruisinga* (Utrecht)

15.40-16.00 **Interpretation of Contracts**, *Dr Nicole Kornet* (Maastricht)

16.00-16.20 **Remedies for Breach**, *Dr Olaf Meyer* (Bremen)

16.20 – 16.50 **Discussion**

16.50-17.00 **Closing remarks**

17.00 **Reception**