Service of Process through Facebook or Twitter???

A curious piece of news published yesterday in Opinio Iuris by Julian Ku:

> ***Legal claims can now be served via Facebook in Britain, after a landmark ruling in the English High Court.***
>
> *Mr Justice Teare gave the go-ahead for the social networking site to be used in a commercial case where there were difficulties locating one of the parties.*
>
> *Facebook is routinely used to serve claims in Australia and New Zealand, and has been used a handful of times in Britain. However, this is the first time it has been approved at such a high level.*
>
> *Jenni Jenkins, a lawyer at Memery Crystal, which is representing one of the parties in the case said the ruling set a precedent and made it likely that service-via-Facebook would become routine.*
>
> > *"It's a fairly natural progression. A High Court judges has already ruled that an injunction can be served via Twitter, so it's a hop, skip and a jump away from that to allow claims to be served via Facebook," she said.*
>
> *In 2009, Mr Justice Lewison allowed an injunction to be served via Twitter in a case where the defendant was only known by his Twitter-handle and could not easily be identified another way.*

Amendment of Annexes to

Brussels I

Commission Regulation (EU) No 156/2012 of 22 February 2012 amending Annexes I to IV to Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters has been published today (see OJ L 50).

Common European Sales Law, Third States and Consumers

This is the second post of a series discussing conflict issues raised by the European Commission's Proposal for a Regulation on a Common European Sales Law.

From a choice of law perspective, two important features of the Proposal are that the Common European Sales Law (CESL) would be optional, and that it would not be a 28th regime, but rather a second regime in the substantive law of each Member State. As a consequence, the CESL would only apply if the parties agree on its application, and if the law of a Member state is otherwise applicable. The CESL will, as such, never govern a contract; the law of a Member state will and, as the case may be, within this law, the CESL.

In the first post, I discussed the issues that the Proposal would raise for B2B contracts. Specifically, I argued that it was unrealistic to expect small and medium businesses to appreciate the difference between choosing CESL and choosing the law governing their contract, and that many contracts providing for CESL might thus fail to provide for the applicable law. I thus concluded that CESL should provide a rule ensuring that the law of a member state would govern in such cases.

In this post, I focus on B2C contracts.

The Impact of CESL on the Operation of Article 6, Rome I Regulation

The Proposal claims that the CESL does not affect applicable choice of law rules. For B2C contracts, this means that the applicable law should be determined by application of either Article 6 of the Rome I Regulation for contracts falling within its scope, or else by Articles 3 and 4.

Recital 14 of the Preamble to the Draft Regulation states:

> *The use of the Common European Sales Law should not be limited to cross-border situations involving only Member States, but should also be available to facilitate trade between Member States and third countries. Where consumers from third countries are involved, the agreement to use the Common European Sales Law, which would imply the choice of a foreign law for them, should be subject to the applicable conflict-of-law rules.*

Despite the claim that the operation of the Rome I Regulation is unaffected, however, the European lawmaker does not want to apply article 6(2) of the Regulation. The Preamble further states that there is no need to compare the protection afforded to the consumer by the law chosen by the parties with CESL, because this law will not, it is argued, afford a higher protection than CESL.

Situation one: Article 6 does not apply

Some B2C contracts do not fall within the scope of Article 6 of the Rome I Regulation, for instance because the consumer was active rather than passive (see also Article 6(4)). In such cases, Article 4 will determine the applicable law absent a choice by the parties, and the law of the habitual residence of the seller will typically govern.

The analysis for B2B contracts is thus valid.

Situation two: Article 6 applies

For B2C contracts falling within the scope of Article 6, the law of the habitual residence of the consumer will govern the contract absent a choice by the parties.

If the parties choose CESL, but fail to choose the applicable law, a problem will

arise when the consumer will be based outside of the European Union. The law of a third state will govern the contract, and it will thus be impossible to elect CESL within a legal system which does not include it.

As argued in my previous post, one way out of this would be to include a rule of interpretation in the CESL Regulation providing that the choice of CESL is an implicit presumption that the parties chose the law of a Member state. In contracts falling within the scope of Article 6, the problem will arise when the consumer will have his residence outside of the EU. As CESL is only available when one of the parties has its habituel residence in the EU, this would mean that the seller would have its habitual residence there. The rule should thus provide a presumption that the parties wanted this law to govern.

Conclusion

There is a need for opposite presumptions for B2B contracts and for B2C contracts falling within the scope of Article 6. Alternatively, a single presumption providing for the application of the law of the most closely connected Member state could be envisaged.

Possible New Provision

Article 11 of the Draft CESL Regulation could be amended to address these issues in several possible ways.

Single Presumption

> ***Article 11***
> ***Consequences of the use of the Common European Sales Law***
>
> *(1) Where the parties have validly agreed to use the Common European Sales Law for a contract, only the Common European Sales Law shall govern the matters addressed in its rules. Provided that the contract was actually concluded, the Common European Sales Law shall also govern the compliance with and remedies for failure to comply with the pre-contractual information duties.*
>
> *(2)Where the parties have validly agreed to use the Common European Sales Law for a contract, but have not chosen the applicable law, they are presumed to have chosen the law of a Member state.*

(a) This law shall be the law designated by Article 4 or Article 6 of the Rome I Regulation, or any other applicable choice of law rule.

(b) If the law referred to in (a) is not the law of a Member state, this law shall be the law of the Member state which is the most closely connected with the contract.

Several Presumptions

Article 11
Consequences of the use of the Common European Sales Law

(1) Where the parties have validly agreed to use the Common European Sales Law for a contract, only the Common European Sales Law shall govern the matters addressed in its rules. Provided that the contract was actually concluded, the Common European Sales Law shall also govern the compliance with and remedies for failure to comply with the pre-contractual information duties.

(2)Where the parties have validly agreed to use the Common European Sales Law for a contract, but have not chosen the applicable law, they are presumed to have chosen the law of a Member state.

(a) This law shall be the law designated by Article 4 or Article 6 of the Rome I Regulation, or any other applicable choice of law rule.

(b) If the law referred to in (a) is not the law of a Member state, this law shall be the law of the habitual residence of the buyer, or the law of the habitual residence of the seller for contracts falling within the scope of Article 6 of the Rome I Regulation.

Brand and Fish on Choice of Law Rules in Contract and Tort Cases in the PIL Japanese Act

Ronald Brand (University of Pittsburgh – School of Law) and Tabitha Fish (Saxon, Gilmore, Carraway & Gibbons, P.A.) have posted An American Perspective on the New Japanese Act on General Rules for Application of Laws on SSRN.

> *Any changes in rules of applicable law in one state are necessarily of interest to those concerned with the outcome of potential cross-border disputes. This makes the new Japanese Act on Application of Laws of interest beyond the borders of Japan. In this article, we focus on the new rules governing applicable law in contract and tort cases. The primary point of comparison is U.S. law, but there is also reference to the other major recent civil law developments brought about by the European Union's Rome I and II Regulations. Specific attention is given to how each of the sets of rules deals with the concept of party autonomy, taking into account the recent retreat in the United States from proposed changes to the party autonomy rule in Article 1 of the Uniform Commercial Code.*

The paper was published in the *Japanese Yearbook of International Law* in 2009.

Hess on Germany v. Italy

State Immunity, Violation of Human Rights and the Individual's Right for Reparations – A Comment on the ICJ's Judgment of February 2, 2012 (Germany v. Italy, Greece Intervening)

Burkhard Hess is a Professor of Law at the University of Heidelberg

In this blog, the pronouncement of the judgment of the ICJ in the case *Germany v.*

Italy was announced, but no comment has been posted yet. I would like to start a discussion on this judgment and its implications for the development of international law, because this judgment seems a landmark decision to me. My following comments are part of a more comprehensive article (written in German) commenting the judgment which will be published in *IPRax* 3/2012.

1. The Background of the Decision

As the background of the ICJ's judgment is well known to most of the readers of this blog it can be briefly summarised as follows: Since the 1990s, Germany has been sued by many victims of Nazi atrocities in European (and American) courts. The plaintiffs asserted that they had not been fully compensated for losses of the lives of their family members, for their personal injuries, for violations of their personal liberty and for losses of property through the reparation agreements after WW II. A major incentive triggering these lawsuits was the ambiguous wording of the Treaties on the Reunification of Germany (especially the so-called 2+4 Treaty) which stipulated to be "final regarding the legal effects of WW II", but did not comment on the reparation issue. In the late 1990s, German companies were sued in American and German courts for reparations of forced (or more correctly: slave) labour during the war. Finally, these claims were settled by a governmental agreement establishing the Foundation "Remembrance, Responsibility and Future" which provided for compensation for many, but not all victims of Nazi atrocities. Especially those victims who were not compensated initiated additional lawsuits against Germany (and German corporations) in their respective home-states.

In 2000, the Supreme Greek Civil Court gave a judgment against Germany and ordered the compensation of damages (of several million Euros) for atrocities committed by the German Wehrmacht and SS soldiers in the Greek village of Distomo where almost the whole population was killed in 1944. The Greek Court denied Germany's claim for sovereign immunity for two reasons: First the Court held that the crime committed by the German soldiers was considered a non-commercial tort in the forum state which was no longer covered by state immunity. Secondly, and more importantly, the Court opined that the claims were based on violations of jus cogens and, therefore, Germany was not entitled to immunity. However, two years later a Greek special court declared that this judgment was not to be enforced in Greece. In 2002, the plaintiffs challenged this case law in the ECHR, but without success. In 2004, the Italian Corte di

Cassazione, in the *Ferrini*-decision gave judgment against Germany and denied the immunity for the same reasons: first because the crimes had been committed by the soldiers of the German Reich on Italian soil and secondly, because the atrocities were qualified as war crimes and crimes against humanity belonging to jus cogens. According to the *Ferrini*-decision, jus cogens overrules state immunity which cannot bar the victims' civil action for damages. In 2008, the Corte di Cassazione rendered two additional judgments against Germany which confirmed that Italian courts had jurisdiction over Germany in compensation cases for war damages. Since 2005, the Greek claimants sought the enforcement of the Distomo decision in Italy and, finally, seized the Villa Vigoni, a property of the German State near the Lac Como which is used for cultural exchanges.

In 2008, Germany initiated proceedings in the ECJ under the European Convention on the Peaceful Settlement of Disputes of 1957 which confers the ICJ the jurisdiction for disputes among the Contracting parties on the interpretation of international law. Italy counterclaimed for war damages, but the ICJ rejected this counterclaim in 2010 as inadmissible because the European Convention of 1957 did not confer jurisdiction on disputes which arose before its entry into force. Finally, Greece intervened in the proceedings in order to "protect" the judgments of its courts and the ICJ permitted this intervention.

2. The Arguments of the ICJ

On February 2, 2012, the ICJ found by a majority of twelve to three judges that Germany's right to sovereign immunity had been infringed by the decisions of the Italian courts and by a majority of fourteen to one vote that the enforcement measures against the Villa Vigoni equally infringed Germany's sovereign immunity from enforcement measures. The majority opinion was written by President *Owada*; only the dissent of *Cancado Trindade* asserted that international law generally privileges human rights claims. Accordingly, the fundamental issue before the court was the relationship between jus cogens and state immunity. The importance of the decision is underlined by its clear outcome: although recent decisions of the ECtHR on the relationship of human rights protection to state immunity (*ECtHR, Al Adsani v. United Kingdom*, ECHR-Reports 2001-XI, p. 101, *Kalegoropoulou v. Germany and Greece,* ECHR Reports 2002 X-p.417), had been given by very small majorities (of only one vote), the majority of the ICJ is clear and unambiguous. The majority opinion on jurisdictional immunity unfolds in three steps: first, it enounces the importance of

state immunity as a principle of the international legal order and derives from this premise thatItaly must demonstrate that modern customary law permits a limitation of state immunity in the situation under consideration. Secondly, the Court scrutinises whether there is an exception from immunity in the case of tortuous conduct committed by foreign troops in the forum state. Thirdly, the Court addresses the issue of whether the violation of a peremptory norm (jus cogens) demands an exception from state immunity. The argument of the majority is based on a positivist approach to customary international law which can be summarised as follows:

2.1 Setting the Scene: State Immunity as a Fundamental Principle of International Law

The majority opinion acknowledges the importance of state immunity as a principle of the international legal order which is closely related to the principle of the sovereign equality of States, and in addition recognises that present international law distinguishes acta jure imperii and acta jure gestionis, Furthermore the Court states that the dispute depends on the determination of customary international law in this area of law. However, the Court notes that the underlying atrocities of the troops of the German Reich clearly were acta iure imperii, regardless of their unlawfulness. Consequently, the Court states thatItalymust prove that customary international law provides for an exception from state immunity in the present case.

2.2 The Territorial Tort Principle

The Court addresses the first argument ofItalythat the jurisdiction of the Italian courts could be based on an exception from state immunity in cases where the defendant state caused death, personal injury or damage to property on the territory of theforumState, even if the act performed was an act jure imperii. In this respect, the ICJ carefully reviews the pertinent practice and opinion juris which it finds in international conventions, national legislation and court decisions on this issue. The result, however, is unambiguous: with the exception of the Italian case law (and the Distomo decision which the Court considers overruled), there are almost no cases holding such an exception – although the ICJ cited several judgments which expressly stated that foreign troops on domestic soil still enjoy full immunity – even in the case of tortuous conduct.

2.3 State Immunity and jus cogens

The most important part of the judgment deals with the relationship between state immunity and jus cogens. Again, the findings of the Court are rigid and succinct: It starts by expressing doubts on the argument that the gravity of a violation entails an exception from immunity. According to the Court, immunity from jurisdiction does not only shield the State from an adverse judgment, but from the judicial proceedings as such. However, an exception based on the "gravity of the violation of law" would demand an inquiry of the court on the existence of such gravity. Here, the Court differentiates between State immunity as a procedural defense and the (asserted) violations of international law which belong to the merits of the claim. In a second step, the Court inquires whether State practice supports the argument that the gravity of acts alleged implies an exception from immunity. Again, the Court does not find sufficient evidence for a new rule of customary law in this respect.

The distinction between procedure and substance is also used as the main argument against the assertion that jus cogens overrules state immunity. Again, the argument of the ICJ is unambiguous: There is no conflict of rules, because the rules address different matters: procedure and substance. The peremptory character of the norm breached does not per se entail any remedy in domestic courts. According to the ICJ, the breach of a peremptory norm of international law entails the responsibility of the state under international law, but does not deprive it from its claim for sovereign immunity (in this respect, the Court refers to its judgment in the Arrest Warrant of 11 April 2000, Congo v. Belgium, ICJ Reports 2002, p. 3 paras 58 and 78). Again, the Court quotes case law of national and international courts where the plea of immunity had been uphold in cases of violations of ius cogens.

The last part of the judgment addresses the so-called last resort argument: according to argument Italy asserted that the denial of immunity was the only way to secure compensation to the various groups of victims not included in the international reparation regime after WW II. Although the ICJ notes – with "surprise and regret" that the so-called Italian internees have been excluded from compensation, it nevertheless reiterates the argument that immunity and state responsibility are entirely different issues. The ICJ concludes that there is *"no basis in State practice from which customary international law is derived that international law makes the entitlement of a State dependent upon the existence*

of alternative means of securing redress." (no 101). Furthermore, the Court sticks to the adverse practical consequences of such situation as the domestic courts would be called to determine the appropriateness of international reparation schemes for the compensation of individual victims. Finally the Court states that it is well aware of the fact that its conclusions preclude judicial redress for the individual claimants, but recalls the State parties to start further negotiations in order to resolve the issue.

3. Evaluation

3.1 The Methodological Approach of the ICJ

The line of argument of the ICJ demonstrates a positivist approach mainly based on the determination of customary international law. According to this approach, the argument based on legal theory that the international legal order had changed and a new exception of state immunity was imminent, was not decisive. The majority of the Court held that any asserted change of the established rule on state immunity required the determination that such change was supported by state practice and opinion juris – consequently, the majority does not quote any scholarly opinion . The dissent of *Cancado Trindade* is different in its methodology and its conclusions: it is based on the idea that a new international constitutional order is emerging which is aimed at the enforcement of human rights. The dissent bases its argument on the opinion of international institutions and reputable scholars, not – as did the majority – on state consent. In this respect, the opinion of the majority is more conservative, but reflects much more the present state of international law. These considerations may explain the clear majority of the judgment which is supported by 12 of the 15 judges.

3.2 The Lacking Reference to American Case Law in the ICJ's Judgment

The practical consequences of the positivist approach of the majority are twofold: as the determination of state practice was decisive, the Court had not to review the line of arguments of national court decisions, but mainly focus on the outcome of these decisions. Accordingly, the Court could refrain from evaluating the different arguments used by domestic courts. However, there is some evaluation of state practice in the opinion of the majority: the ICJ gives considerable weight to national decisions which were supported by the European Court of Human Rights and improves the (indirect) dialogue of international courts and tribunals

on the coherent application and development of international law. The opinion even quotes literally parts of the judgments of the ECtHR.

On the other hand, the ICJ does not refer to decisions on state immunity which are mainly based on the application of domestic law. However, it comes as a matter of surprise that the (pertinent) practice of American courts does not appear in the judgment – even the pertinent and prominent case *Amerada Hess v. Argentina*, or *Hugo Princz v. Germany*. The striking absence of American case law may be explained by the attitude of American courts to interpret international law via the lenses of domestic doctrines like the Alien Tort Claims Act and comity. However, according to the ICJ's decision in Germany v. Italy, sovereign immunity is not a matter of comity (as it is sometimes asserted by American authors), but directly determined by customary international law. Regarding the American practice, the Court simply noticed that the exception from immunity for "state sponsored terrorism" as provided for in 28 USC § 1605A "has no counterpart in the legislation of other states" and, therefore, was not considered relevant for the development of state immunity under international law (no 88). The question remains, however, whether national laws on State immunity which deviate considerably from international customary law in this field are compatible with international law.

3.3 The Impact of the Judgment on the so-called International Human Rights Litigation in Domestic Courts

One important aspect of the judgment relates to the individual's right of access to a court and its relationship with state immunity. In this respect, the findings of the Court are twofold: first, the Court does apparently not consider this fundamental right of the individual as part of jus cogens. Furthermore, the Court notes that public international law does not confer an individual right for full compensation to victims of war atrocities, but refers to set-off and lump sum agreements in the context of war reparations which clearly demonstrate that international law does not provide for a rule of full compensation of the individual victim from which no derogation is permitted (no. 94). These findings are important with regard to doctrinal thinking as advocated by authors like *H.H. Koh, J. Paust* and *B. Stephens* on the decentralised enforcement of human rights by civil courts. According to these authors, domestic courts shall actively implement peremptory human right laws in a decentralised way. This idea is – to some extent – borrowed from the case law of the ECJ which refers to national

courts of EU-Member States as decentralised European courts. According to the present judgment of the ICJ, the situation in international law is distinct when foreign states (and their agents) are targeted: In this case state immunity sets the limits and does not provide for any jus cogens exception.

However, the issue remains to what extent individuals or corporate actors may be sued for damages instead of the foreign state. Permitting these lawsuits (based mainly or even solely on international law) logically contradicts to the procedural bar of these lawsuits against the main actors (the States) under international law. However, the possibility remains to base such lawsuits on the private law of torts which applies to tortuous and criminal actions among private persons. In this respect, further clarification is needed and the decision of the U.S. Supreme Court in *Kiobel v. Royal Dutch Petroleum* is imminent. It is hoped that the U.S. Supreme Court will take the ICJ's judgment in the present case into account.

Finally, it should be noted that the ICJ's landmark decision on State immunity does not exclude the possibility that domestic courts refer to international law when determining legal obligations of their own governments and administrations under international law. The same considerations apply to criminal responsibility of individuals under international and under domestic criminal law.

Two Wins for Chevron

Here.

Volume on "International Antitrust Litigation"

Jürgen Basedow, Director of the Max-Planck-Institute for Comparative and Private International Law in Hamburg, ***Stéphanie Francq***, Professor of European Law at the Université catholique de Louvain, and ***Laurence Idot***, Professor at the University of Paris 2 Panthéon-Assas have edited a volume on international antitrust ligitation. It has been published by Hart Publishing (Oxford) and covers a variety of topics, including jurisdiction and applicable law, in EU and US law.

The official summary reads as follows:

> *"The decentralisation of competition law enforcement and the stimulation of private damages actions in the European Union have led to an increasing internationalisation of competition law proceedings. As a consequence, there is an ever-growing need for clear and workable rules to coordinate such cross-border actions. The background of this in-depth publication is a European Commission sponsored research project which brought together European and US experts from the areas of academia, legal practice and policy-making to critically examine the most important international antitrust provisions, to analyse them in relation to EU conflict of laws provisions and to formulate proposals for the improvement and consolidation of cross-border actions.*
>
> *The findings have been compiled in 16 chapters which cover not only the relevant provisions of EU private international law, but also key issues of US procedural law which are highly relevant for transatlantic damages actions. The work additionally considers thus far neglected topics such as questions regarding jurisdictional competence and the applicable law as well as rules on the sharing of evidence and the protection of business secrets."*

More information, including a table of content, can be found on the publisher's website.

European PIL Conference Series at the Cour de cassation

The French supreme court for private and criminal matters (*Cour de cassation*) will host three conferences on European private international law in the coming months.

The first conference will take place on June 14th and will focus on the law applicable to obligations (Rome I and Rome II). The speakers will be Professor Paul Lagarde and Justice Jean-Pierre Ancel (former president of the division of the *Cour de cassation* specialised in PIL matters).

The second conference will take place on September 27th and focus on Jurisdiction and Judgments in Civil and Commercial Matters (Brussels I). The speakers will be Professor Catherine Kessedjian and Michael Wilderspin (European Commission).

The third conference will be held on October 25th and will focus on family law (*le couple et l'enfant*). The speakers will be Professor Marc Fallon and Justice (formerly professor) Françoise Monéger (Division of the *Cour de cassation* specialised in PIL matters).

All conferences will be held in French, from 6 to 8 pm on Thursdays. Admission will likely be free.

Hague Academy Sixth Newsletter

The sixth Newsletter of the Hague Academy of International Law can be found here.

Bermann on the Gateway Problem in International Commercial Arbitration

George A. Bermann, who is the Gellhorn Professor of Law & Jean Monnet Professor of European Union Law at Columbia University School of Law, has published The "Gateway" Problem in International Commercial Arbitration in the last issue of the *Yale Journal of International Law*.

> *Participants in international commercial arbitration have long recognized the need to maintain arbitration as an effective and therefore attractive alternative to litigation, while still ensuring that its use is predicated on the consent of the parties and that the resulting awards command respect. A priori, at least, all participants—parties, counsel, arbitrators, arbitral institutions—have an interest in ensuring that arbitration delivers the various advantages associated with it, notably speed, economy, informality, technical expertise, and avoidance of national fora, while producing awards that withstand judicial challenge and otherwise enjoy legitimacy.*
>
> *National courts play a potentially important policing role in this regard. Most jurisdictions have committed their courts to do all that is reasonably necessary to support the arbitral process. Among the ways courts do so is by ensuring that arbitral proceedings are initiated and pursued in a timely and effective manner. But those same courts are commonly asked by a party resisting arbitration to intervene at the very outset to declare that a prospective arbitration lacks an adequate basis in party consent. No legal system that permits the arbitration of at least some disputes (and most do) is immune to the possibility that its courts will become engaged in an inquiry of that sort at the very threshold of arbitration. Each must decide how, at this early stage, to promote arbitration as an effective alternative to litigation, while at the same time ensuring that any order issued by a court compelling arbitration is supported by a valid and enforceable agreement to arbitrate. The challenge consists of identifying those*

issues that courts—in the interest of striking the proper balance between these two objectives—properly address at what is increasingly known, in common U.S. parlance, as the "gateway" of arbitration. This "gateway" problem is the focus of the present Article.

For purposes of this Article, I consider an arbitral regime to be effective to the extent that it operates to promote the procedural advantages I posited earlier—speed, economy, informality, technical expertise, and avoidance of national fora. While legitimacy might be defined in many different ways, I consider an arbitral regime to be legitimate (or to enjoy legitimacy) to the extent that the parties who were compelled to arbitrate rather than litigate, and will be bound by the resulting arbitral award, consented to step outside the ordinary court system in favor of an arbitral tribunal as their dispute resolution forum.

Legal systems differ in their responses to the challenge of reconciling efficacy and legitimacy in arbitration, and even in the extent to which they acknowledge that the challenge exists and try to articulate a framework of analysis for addressing it. This Article proceeds on the premise that legal systems have a serious enough interest in properly reconciling the values of efficacy and legitimacy to warrant their developing an adequate framework of analysis, as well as articulating that framework in a clear, coherent, and workable fashion.

In the United States, Congress has largely ignored the challenge of reconciling efficacy and legitimacy in arbitration, as have the states even when establishing statutory regimes to govern arbitration conducted in their territory. The matter has accordingly fallen to the courts. In this Article, I reexamine the jurisprudence that American courts have developed, increasingly under the leadership of the U.S. Supreme Court, to address the fundamental tension between arbitration's efficacy and legitimacy interests that exists at the very threshold of arbitration. The exercise has come to consist largely of demarcating "gateway" issues (i.e., issues that a court entertains at the threshold to ensure that the entire process has a foundation in party consent) from "non-gateway" issues (i.e., issues that arbitral tribunals, not courts, must be allowed to address initially, if arbitration is to be an effective mode of dispute resolution).

This Article proceeds as follows. Part II briefly sketches the settings in which

courts may be asked to conduct the early policing with which this Article is concerned. Part III identifies the terminological confusion that has hampered clear thinking on the subject, and proposes a coherent vocabulary for overcoming it. Part IV then explores critically the conceptual devices that courts and commentators have traditionally employed in sorting through the issues. In so doing, it demonstrates that the two notions most widely relied upon for this purpose—Kompetenz-Kompetenz and separability—are unequal to the task, and explains why. A critical understanding of U.S. law in this regard is aided by comparing it to models—the French and German—that claim to have devised simple and workable formulae for reconciling efficacy and legitimacy interests at the outset of the arbitral process. That discussion will show how the often proclaimed universality of Kompetenz-Kompetenz and separability is in fact misleading.

Against this background, Part V traces how recent U.S. case law has progressively pursued a more nuanced balance between efficacy and legitimacy than the traditional conceptual tools tended to yield. The courts have achieved this result, not by erecting a single comprehensive framework of analysis, but rather through a series of pragmatic adjustments to the received wisdom associated with Kompetenz-Kompetenz and separability. I conclude that they have developed a suitably complex body of case law that ordinarily reaches sound results. But I am equally certain that, in doing so, they have failed adequately to rationalize the case law. The disparate strands of analysis—each of which is basically sound—have combined to produce a needlessly confusing case law to the detriment of clarity, coherence, and workability. I suggest that the case law can and should be recast, and that the central feature of that recasting must be a serious and frank confrontation of the underlying tradeoff between arbitration's efficacy and legitimacy interests. This Article is thus both descriptive and normative in outlook.