New ICC Rules in 2012

The International Chamber of Commerce (ICC) has launched a revised version of its Rules of arbitration. The new Rules will come into force on 1 January 2012.

See the announcement of the ICC here.

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (5/2011)

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

Here is the contents:

- ***Marc-Philippe Weller***: "Anknüpfungsprinzipien im Europäischen Kollisionsrecht: Abschied von der „klassischen" IPR-Dogmatik?" – the English abstract reads as follows:

> *Friedrich Carl v. Savigny has influenced modern private international law. His method is known as the "classic" private international law doctrine. Its principles are the international harmony of decisions and the neutrality of private international law, embodied in the principle of the most significant relationship.*
>
> *However, in European private international law a slight paradigm change concerning the structure of the conflict of law rules can be detected from a classic point of view. The conflict of law rules of the Rome I and Rome II Regulation are prevalently oriented according to the material principles of the European Union such as the promotion of the internal market, the increase of legal security and the protection of the weaker party (e.g. consumer*

protection).

Nevertheless, in the event of a future codification of private international law at European level, the classic connecting principles of private international law deserve greater attention in the law making process. The Lisbon Treaty would allow such a "renaissance" of the classic private international law doctrine.

- ***Dieter Martiny***: "Die Kommissionsvorschläge für das internationale Ehegüterrecht sowie für das internationale Güterrecht eingetragener Partnerschaften" – the English abstract reads as follows:

On 16 March 2011 the European Commission proposed two separate Regulations, one for married couples on matrimonial property regimes and another on the property consequences of registered partnerships. A Communication of the Commission explains the approach of the proposals. While it is in principle to be welcomed that the Proposals are gender neutral and neutral regarding sexual orientation, the relationship between the intended overarching European rules with the (existent) divergent national rules for different types of marriages and partnerships raises some doubts. It is regrettable that, whereas spouses may themselves expressly choose the applicable law to a certain extent, the assets of registered partnerships are, as a rule, subject to the law of the country where the partnership was registered. In the absence of a choice of law by the spouses, similar to the Rome III Regulation – but following the immutability doctrine – the law of their common habitual residence applies in the first instance. The scope of the Proposals as to "matrimonial property" is not totally clear, nor is the role of overriding mandatory rules. Rules on jurisdiction and recognition are broadly in line with the Brussels II bis Regulation and the Succession Proposal. Many details of the recent Proposals need more clarification. However, despite a number of flaws the Proposals seem basically to be acceptable – at least for the civil law Member States.

- ***Andreas Engert*/Gunnar Groh**: "Internationaler Kapitalanlegerschutz vor dem Bundesgerichtshof" – the English abstract reads as follows:

In 2010, the German Federal Court handed down a number of judgments on the liability of investment service providers in an international setting. The

Court faced two specific fact patterns: On the one hand, broker-dealers from the U.S. and Britain participated in a fraudulent investment scheme operated by a German asset manager through investment accounts located abroad. The question arose whether German courts had jurisdiction over the foreign defendants for aiding and abetting, and if so, which tort law governed the case. On the other hand, an investment fund from Turkey and a Swiss asset manager offered their services to investors in Germany without being licensed by the German financial services supervisor.

As regards the jurisdiction issue vis-à-vis defendants from the U.S. and Turkey, the Court concluded that foreign aiders and abettors to a tort committed in Germany can be sued in Germany. The tortfeasor's acts were imputed to them under § 32 Zivilprozessordnung (German Code of Civil Procedure). In relation to European defendants, the Federal Court claimed jurisdiction under art. 5 no. 3 Brussels I Regulation/Lugano Convention based on the place where the damage occurred. Because investors were almost certain to lose money on the

fraudulent scheme, the damage occurred in Germany when investors transferred their funds to a foreign account. In one case, the Court relied on its jurisdiction over consumer contracts for adjudicating a torts claim, which allowed the Court to dismiss a jurisdiction clause.

With regard to the conflicts rules on tort law, the cases were still governed by German conflicts law leading to similar issues. As a result, investors were able to rely on German tort law. Under the new Rome II Regulation, future tort claims may well qualify as culpa in contrahendo. The applicable law then depends on the law applicable to the contract itself. In this case, the special conflict rule for consumer contracts (Art. 6 Rome I Regulation) ensures that retail investors can invoke their home country's tort law.

- ***Jürgen Samtleben:*** "Schiedsgerichtsbarkeit und Finanztermingeschäfte – Der Schutz der Anleger vor der Schiedsgerichtsbarkeit durch § 37h WpHG" – the English abstract reads as follows:

The present article discusses the disputed provision of § 37h of the German Securities Trading Act (WpHG), according to which non-merchants are not able to enter into a valid advance arbitration agreement as regards financial services transactions. The decision of the Federal Court of Justice (BGH) at

issue addressed a damages claim brought against a US broker who had, through the use of independent German financial intermediaries, secured clients for the purchase of financially risky futures. As in other cases, the BGH found the business practice of the financial intermediaries to be contrary to public policy and concluded that the broker is subject to liability for his participation in an unlawful commercial practice. The central issue, however, was the defendant's contention that the court was bound to refer the matter to arbitration in light of an arbitration clause included in the original account agreement. Although signed only by the client, the clause arguably comported with US law, notwithstanding its failure to meet the formal requirements of Art. II of the New York Convention. As it was not clear whether the claimant could be labeled a merchant, the BGH could not make a final determination on the applicability of § 37h WpHG. Equally left open was the question whether the claimant had engaged in the financial activities in question for private purposes and thus as a consumer; in such a case the account agreement would fail to satisfy the formal requirements of § 1031(5) of the German Code of Civil Procedure (ZPO). The article makes clear that the formal requirements of § 1031(5) ZPO can be overridden by a written arbitration agreement that otherwise satisfies the New York Convention. In contrast, § 37h WpHG constitutes a matter of (missing) subjective arbitrability which, according to the Convention, is to be determined under national law. Whereas § 37h WpHG in its current version only protects non-merchants, this limitation is overly narrow and should be abandoned so that all investors acting in a private capacity are protected from the application of an arbitration clause.

- ***Astrid Stadler***: "Prozesskostensicherheit bei Widerklage und Vermögenslosigkeit" – the English abstract reads as follows:

The key issue in the proceedings before the Court of Appeal in Munich was the question whether an insolvent US corporation – with its center of main interest being located in Great Britain – was exempt from its obligation to provide security for legal expenses of a counterclaim after the principal cause of action had been dismissed. The author agrees with the court's judgment, stating that the counterclaimant legally was exempt but disagrees with the reasons given by the court. In her opinion, an exemption would have been possible according to Sec. 110 para. 1 German Code of Civil Procedure, which imposes the obligation

to provide security only upon claimants domiciled outside the EU. With the (counter-)claimants insolvency estate being located in Great Britain, the companies statutory head office in the US (Delaware) was irrelevant. The article furthermore raises the question whether an exemption to the obligation of providing security for legal expenses should be granted whenever the foreign (counter-)claimant is penniless. The article objects to such a rule considering the ratio legis of Sec. 110 German Code of Civil Procedure, which simply tries to compensate the difficulties being linked to an execution outside the EU or the EEA. The defendants risk of being sued by an insolvent plaintiff not being able to reimburse the defendant's legal costs in case of a dismissal of his action exists as well with respect to plaintiffs domiciled in the forum state. Thus a general rule applicable to all insolvent plaintiffs would be necessary, which however runs contrary to a tendency in European countries of generally abolishing the obligation of foreign plaintiffs to provide security for legal expenses in order to make their court more attractive.

- ***Thomas Rauscher:*** "Ehegüterrechtlicher Vertrag und Verbraucherausnahme? – Zum Anwendungsbereich der EuVTVO" – the English abstract reads as follows:

The contribution discusses several decisions rendered by the Berlin Court of Appeal (Kammergericht) concerning the qualification of a right in property as arising out of a matrimonial relationship in the sense of Art 2 (a) of the EC-Enforcement-Order-Regulation (Regulation (EC) No 805/2004) as well as the application of the EC-Enforcement-Order-Regulation towards consumer cases. The meaning of matrimonial property rights under the EC-Enforcement-Order-Regulation should be interpreted with regard to the ECJ's DeCavel-decisions given under the Brussels Convention. The primary claim will be decisive for the interpretation of this exemption from the Regulation's scope of application; secondary claims are exempted from the scope of application as well. The protection of consumers under Art 6 (1)(d) EC-Enforcement-Order-Regulation should not only apply in B2C-cases as under Art 15 Brussels I-Regulation but also in C2C-cases; the consumer being the defendant needs protection against certification of a title as European Enforcement Order without regard to the plaintiff's qualification as a consumer or professional. Finally it is questionable that the court did not ask the ECJ to render a preliminary decision concerning those remarkable questions.

- ***Martin Illmer***: "Englische anti-suit injunctions in Drittstaatensachverhalten: zum kombinierten Effekt der Entscheidungen des EuGH in Owusu, Turner und West Tankers" – the English abstract reads as follows:

Due to the territorial limits of the ECJ's judgments in Turner and West Tankers, English courts are still granting anti-suit injunctions in relation to non-EU Member States. However, even this practice may be contrary to EU law due to the combined effect of the ECJ's judgments in Turner, West Tankers and Owusu. This line of argument which was lurking in the dark for some time now came only recently before the English High Court. Based on the assumption that forum non conveniens (which was the critical issue in Owusu) and anti-suit injunctions (which were the critical issue in Turner and West Tankers) are two related issues with overlapping preconditions, anti-suit injunctions might have been buried altogether. The High Court, however, rejected such an assumption without further discussion of the issue and granted the anti-suit injunction.

- ***Ghada Qaisi Audi***: DIFC Courts-ratified Arbitral Award Approved for Execution by Dubai Courts; First DIFC-LCIA Award pursuant to Dubai Courts-DIFC Courts Protocol of Enforcement

The enforcement of arbitral awards made by the Dubai International Financial Centre-London Court of International Arbitration (DIFC-LCIA) can only be achieved by a ratification Order of the Dubai International Financial Centre Courts (DIFC Courts). The first DIFC Courts-ratified arbitral award was recently approved for execution by the Dubai Courts under the 2009 Protocol of Enforcement that sets out the procedures for mutual enforcement of court judgments, orders and arbitral awards without a review on the merits, thus providing further uniformity and certainty in this arena.

- ***Christel Mindach***: Russland: Novellierter Arbitrageprozesskodex führt Sammelklagen ein
- ***Carl Friedrich Nordmeier***: Beschleunigung durch Vertrauen: Vereinfachung der grenzüberschreitenden Forderungsbeitreibung im Europäischen Rechtsraum – Tagung am 23./24.9.2010 in Maribor
- ***Mathäus Mogendorf***.: 16. Würzburger Europarechtstage am

29./30.10.2010

Clarkson & Hill, The Conflict of Laws (4th edn OUP, 2011)

Those who teach or study in private international law will be interested to know that Chris Clarkson and Jonathan Hill have published the 4th edition of their excellent student text on *The Conflict of Laws*. From the blurb:

- *Covers the basic principles of the conflict of laws in a succinct and approachable style making this an ideal introductory text*
- *Explains complex points of law and terminology clearly and without oversimplification, offering both an authoritative and accessible approach to a subject which has changed greatly in recent years*
- *Offers comprehensive coverage for undergraduate and postgraduate courses on the Conflict of Laws.*
- *Provides analysis of existing legislation in addition to considering reform proposals and theoretical issues.*

New to this edition

- *Restructured content better reflects the topic coverage of typical undergraduate courses in Conflict of Laws and allows for extended analysis of the most relevant topics*
- *Expanded introductory chapter discusses the major changes to the subject and the theoretical issues surrounding it*
- *Fully updated to reflect the emphasis on issues relating to jurisdiction and the recognition and enforcement of judgments in private international law*
- *Completely re-written chapter on choice of law relating to non-contractual obligations (Rome II Regulation)*

- *Substantially revised chapter on choice of law relating to contractual obligations in light of the Rome I Regulation*
- *Revised chapters on habitual residence and matrimonial causes taking account of increasing case-law (both domestic and European) on the Brussels II Revised Regulation.*

The fourth edition of this work provides a clear and up-to-date account of the private international law topics covered in undergraduate courses. Theoretical issues are introduced in the first chapter and, where appropriate, considered in greater detail in later chapters. Basic principles of the conflict of laws are presented in an approachable style, offering clarity on complex points and terminology without over-simplification.

The area of conflict of laws has undergone a profound change in recent decades. Much of the subject is now dominated by legislation, both domestic and European, rather than by case law. In practical terms, issues relating to jurisdiction and the recognition and enforcement of judgments have taken centre stage and choice of law questions have become of less practical importance.

These changing emphases in private international law are fully reflected in this book. The authors provide detailed analyses of the most important commercial topics (civil jurisdiction, the recognition and enforcement of foreign judgements, and choice of law relating to contractual and non-contractual obligations) as well as the most central topics in family law (marriage, matrimonial causes and property law).

OUP has kindly offered a **15% discount** to all of our readers: purchase the text direct from OUP's website, then use promotional code **WEBXSTU15** when you add the book to your shopping basket. This takes the book from £34.99 to **£29.74**. Overwhelmingly recommended.

The “Conflicts Revolution”

With thanks to one of our readers, here is a decision that may be of interest. The New York Court of Appeals recently decided a case that adresses many of the basic tort fact patterns that that started the way to the “conflicts revolution” in the 1950s and
1960s. Interestingly, the court is split on how to decide some of these issues, even after all these years.

New Workshop on PIL as Global Governance at Sciences Po

Horatia Muir Watt and Diego Fernandez Arroyo are establishing a workshop on « Private International Law as Global Governance » at the Law School of the Paris Institute of Political Science (*Sciences Po*). The group will meet regularly over the year ; the first meeting is on October 21st.

Private International Law as Global Governance : from Closet to Planet

> *Despite the contemporary turn to law within the global governance debate, private international law remains remarkably silent before the increasingly unequal distribution of wealth and power in the world. By leaving such matters to its public international counterpart, it leaves largely untended the private causes of crisis and injustice affecting such areas as financial markets, levels of environmental pollution, the status of sovereign debt, the confiscation of natural resources, the use and misuse of development aid, the plight of migrating populations, and many more. This impotency to rise to the private challenges of economic globalisation, is all the more curious that public international law itself, on the tide of managerialism and fragmentation, is now increasingly confronted with conflicts articulated as collisions of jurisdiction and applicable law, among which private or hybrid authorities and regimes now occupy a significant place. The explanation seems to lie in the development,*

under the aegis of the liberal separation of law and politics and of the public and the private spheres, of an « epistemology of the closet », a refusal to see that to unleash powerful private interests in the name of individual autonomy and to allow them to accede to market authority was to construct the legal foundations of informal empire and establish gaping holes in global governance. It is now more than time to de-closet private international law and excavate the means with which, in its own right, it may impact on the balance of informal power in the global economy. Adopting a planetary perspective means reaching beyond the schism and connecting up with the politics of public international law, while contributing its own specific savoir-faire acquired over many centuries in the recognition of alterity and the responsible management of pluralism.

Contact horatia.muirwatt@sciences-po.org or diego.fernandezarroyo@sciences-po.org if you wish to participate.

Recognition and proprietary consequences of a UK civil partnership in South Africa

The decision in AC v CS 2011 2 SA 360 (WCC) (Western Cape High Court, Cape Town) deals with the recognition in South Africa of a civil partnership registered in the United Kingdom under the Civil Partnership Act, 2004. Gamble J obiter referred to the proprietary consequences of such partnership in South Africa.

The South African Civil Union Act 17 of 2006 makes provision for civil unions between couples of the same or different sex. The parties may choose whether their civil union must be known as a marriage or a civil partnership (section 11 of the act). The UK Civil Partnership Act, 2004, makes provision for same-sex couples only and a civil partnership is not known as a marriage. Notwithstanding these differences, the court recognises the UK civil partnership as a civil union for

the purposes of South African (private international) law. Although the court does not refer to the process of classification, the decision attests to an enlightened lex fori approach to characterisation. (On classification in South(ern) African private international law, see Forsyth Private International Law (2003) 68-81 and Neels "Falconbridge in Africa" 2008 Journal of Private International Law 167.)

In South African private international law, both the formal and the inherent validity of a marriage are governed by the law of the place of the conclusion of the marriage (the lex loci celebrationis). (See Forsyth 263-265.) This decision is the first in South Africa in which the same conflicts rule is applied in respect of the inherent validity of a foreign civil partnership. As the partnership is inherently valid in terms of English law, it is valid for the purposes of South African (private international) law.

The court finds that the grounds for divorce and payment of maintenance inter partes are governed by the relevant provisions in the Civil Union Act, which refer to the arrangements in the Divorce Act 70 of 1979. This is not the position, at least not in the first place, because the word "marriage" in the Divorce Act may be interpreted to include foreign partnerships, as the court implies, but because these issues are governed by the lex fori (namely the Civil Union Act referring to the Divorce Act) (see Forsyth 286).

The parties were probably both domiciled in South Africa at the time that the partnership was registered in the UK (although one party was a UK citizen). As they did not conclude an ante-nuptial contract, the partnership/civil union would according to South African law have been concluded in community of property. It was unnecessary for the court to determine which law applied in respect of the proprietary consequences of the partnership/civil union as the parties concluded a deed of settlement in this regard.

The Roman-Dutch rule referred the proprietary consequences of a marriage to the law of the domicile of the husband at the time of the conclusion of the marriage (see Sperling v Sperling 1975 3 SA 707 (A)). This rule is today unconstitutional on the basis of the equality principle and also because it does not make provision for same-sex marriages/civil unions/civil partnerships. The court in casu comes to the same conclusion but does not refer to other case law where the same point was already made: see Fourie v Minister of Home Affairs 2005 1 All SA 273 (SCA) par 125 n 112; Sadiku v Sadiku case no 30498/06 (26 January 2007) (T) per

www.saflii.org, discussed by Neels and Wethmar-Lemmer "Constitutional values and the proprietary consequences of marriage in private international law – introducing the lex causae proprietatis matrimonii" 2008 TSAR 587.

Gamble J suggests that the legislature address the position in respect of the patrimonial consequences of same-sex marriages/civil unions/partnerships. This does not seem to be necessary. The courts have the inherent power to develop the common law in conformity with constitutional values (sec 8(3)(a), 39(2) and 173 of the Constitution of the Republic of South Africa of 1996). In this regard they should take note of the relevant academic opinion: see Stoll and Visser "Aspects of the reform of German (and South African) private international family law" 1989 De Jure 330; Schoeman "The connecting factor for proprietary consequences of marriage" 2001 TSAR 72; Schoeman "The South African conflict rule for proprietary consequences of marriage: learning from the German experience" 2004 TSAR 115; Schoeman "The South African conflict rule for proprietary consequences of marriages: the need for reform" 2004 IPRax 65; Neels "Revocation of wills in South African private international law" 2007 ICLQ 613; and Neels and Wethmar-Lemmer supra.

We have indicated before that we support the five-step model proposed by Stoll and Visser supra (Neels and Wethmar-Lemmer supra). The proposal ends the infringement of the equality principle and also provides a solution for same-sex marriages/civil unions/partnerships. Here it follows, adapted to make provision for civil unions and similar institutions:

> *In the absence of an express or tacit choice of law in an ante-nuptial contract, the proprietary consequences of a marriage, a civil union or similar institution (eg a civil partnership) must be governed by the law of the country of the common domicile of the parties at the time of the conclusion of the marriage, civil union or similar institution. If they did not have such a common domicile, the law of the country of the common habitual residence of the parties at the time of the conclusion of the marriage, civil union or similar institution must apply. If they did not have such a common habitual residence, the law of the country of the common nationality of the parties at the time of the conclusion of the marriage, civil union or similar institution must apply. If they did not have such a common nationality, the law of the country with which both spouses were most closely connected at the time of the marriage must apply.*

Hoffheimer on Goodyear Dunlop Tires

Michael Hoffheimer, who is a professor of law at the University of Mississippi School of Law, has posted General Personal Jurisdiction after *Goodyear Dunlop Tires Operations, S.A. v. Brown* on SSRN. The asbtract reads:

> *In June 2011 the Supreme Court published its first major decisions on due process limits on personal jurisdiction in decades. Though the cases provided an opportunity to remove longstanding confusion, the decisions expose new divisions on the Court that give rise to new uncertainties.*
>
> *This Article focuses on the less controversial case. Seeming to express an emerging consensus with respect to general jurisdiction, the unanimous opinion in Goodyear Dunlop Tires Operations S.A. v. Brown announces a new, restrictive formula for general jurisdiction: for a state to exercise general personal jurisdiction over a corporation, the corporation must be incorporated in the state, maintain its principal place of business in the state or have such continuous and systematic ties in a forum state that is "at home."*
>
> *Exploring the decision and its early reception by lower courts, this Article contends that the opinion is ambiguous. On the one hand, it can be read to support contacts-based general jurisdiction over foreign corporations that are sufficiently active in the state. On the other hand, it can be read to restrict general jurisdiction to those corporations that maintain a legal home in the state by incorporating under the laws of the state or by engaging in such a level of activity that the state becomes the equivalent of their principal place of business.*
>
> *The different readings produce different results in many routine situations. In fact, the Article shows they produce different answers to the question posed during oral argument as to whether Goodyear USA (which operates a factory in North Carolina) would be subject to general jurisdiction in that state without its consent.*

In addition to explaining divergent positions on the Court, the Article proposes a middle path, a fair reading of the opinion that avoids the most tendentious interpretations and that implements the Court's shared commitment to eliminating general jurisdiction over a broad category of cases.

Finally, the Article identifies specific problem areas that the decision leaves for future judicial elaboration and examines early decisions by lower courts that have begun to grapple with these problems. The Article offers courts and litigants a useful resource for understanding and applying the new doctrine.

Second Issue of 2011's Revue Critique de Droit International Privé

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

In a first article, Pascal de Vareilles Sommieres, who is a professor of law at Paris I Pantheon Sorbonne University, explores the relationship between international mandatory rules and policy (*Lois de police et politiques legislatives*). The English asbtract reads:

Still somewhat ill-defined the role of legal policy, which is irrelevant in the determination of ordinary private law rules in Savigny's methodology, is of course a decisive element in characterization of mandatory rules, as a definition of their scope. In conflict of laws, policy considerations occupy a more significant place when the mandatory rule emanates from the legal system of the forum then when it is a foreign rule. In conflict of jurisdiction, policy requirements of varying intensity have to compose with other considerations of

judicial administration, so that each mandatory rule exerts its own specific impact, whether on the jurisdiction of the court or on the status of foreign judgments.

In the second article, Petra Hammje, who is a professor of law at the University of Cergy-Pontoise, offers a survey of the new Rome III Regulation (*Le nouveau reglement (UE) no 1259/2010 du Conseil du 20 décembre 2010 mettant en oeuvre une coopération renforcée dans le domaine de la loi applicable au divorce et à la séparation de corps*).

Finally, in the last article, Horatia Muir Watt, who is a professor of law at the Paris Institute of Political Science (*Science Po*) discusses the implications of the Chevron litigation (*Chevron, l'enchevetrement des fors. Un combat sans issue ?*). I am grateful to the author for providing me with the following abstract:

A decade after the dismissal of their claim by US courts for forum non conveniens and the victims' return to Ecuador, a new act of the Chevron (Texaco) drama began when the local court gave judgment in early 2011 against the multinational for its role in the environmental pollution in the Amazon forest region and its harmful consequences for the health of its indigenous population. Various strategies are currently being deployed internationally with a view to resist, neutralise or invalidate this judgment (in the form of a worldwide anti-suit injunction, a RICO action, or the invocation of international investment law) before the US court or in international arbitration. In this complex game where multiple fora make simultaneous claim to autority and engage in its mutual neutralisation, the reassuring traditional liberal model of international legal order is clearly out-of-step. The lesson of Chevron case is that it is time to quit the Westphalian perspective so that private international law may assume a useful role in global governance.

Subscribers of *Dalloz* can download the *Revue* here.

ECJ Rules on Territorial Scope of Prohibitions to Infringe Community Trade Marks and Coercive Measures

On April 12, 2011, the European Court of Justice ruled in DHL Express France SAS v. Chronopost SA on the territorial scope of prohibitions of infringing Community trade marks and of coercive measures ordered for the purpose of enforcing such prohibitions.

Background

European Regulation No 40/94 establishes a Community trade mark. The substantive effects of this trade mark are governed by the rules of the Regulation, but jurisdiction to rule on infringement proceedings was vested to a limited number of national courts in each Member state. Unless otherwise provided by the Regulation, these courts logically apply their own procedure, including the Brussels Convention (as it was then).

The French Judgments

In a nutshell, the dispute arose out of the use by DHL of a trade mark, "webshipping", that French corporation Chronopost had registered both as a French and as a European trademark. Chronopost initiated infringement proceedings in France against DHL. In a judgment of November 9th, 2007, The Paris Court of appeal found that DHL had indeed infringed Chronopost's European trade mark. It thus ordered DHL to stop doing so and issued a prohibition against further infringement. The prohibition was backed with an "astreinte", a periodic penalty payment of € 1,500 per day of non-compliance, to be paid to the plaintiff. The astreinte was not liquidated, i.e. the final amount of the payment was to be determined later by the court, when it could assess whether and when the defendant had complied.

However, the Paris Court refused to rule that the prohibition covered the entirety of the European Union, and limited its territorial scope to France. The court

explained its decisions as follows. From a factual point of view, it found that only French speaking consumers could get confused by the infringement of the trade mark. But it also referred to Article 98 of Regulation No 40/94, which provides:

> ***Article 98 Sanctions***
>
> *1. Where a Community trade mark court finds that the defendant has infringed or threatened to infringe a Community trade mark, it shall, unless there are special reasons for not doing so, issue an order prohibiting the defendant from proceeding with the acts which infringed or would infringe the Community trade mark. It shall also take such measures in accordance with its national law as are aimed at ensuring that this prohibition is complied with.*
>
> *…*

The Court ruled that it could not issue an extraterritorial order without knowledge of the laws of other states offering an equivalent remedy.

Chronopost appealed to the French supreme court on private and criminal matters (*Cour de cassation*), which referred the matter to the ECJ and asked:

> *1. Must Article 98 of … Regulation [No 40/94] be interpreted as meaning that the prohibition issued by a Community trade mark court has effect as a matter of law throughout the entire area of the [European Union]?*
>
> *2. If not, is that court entitled to apply specifically that prohibition to the territories of other States in which the acts of infringement are committed or threatened?*
>
> *3. In either case, are the coercive measures which the court, by application of its national law, has attached to the prohibition issued by it applicable within the territories of the Member States in which that prohibition would have effect?*
>
> *4. In the contrary case, may that court order such a coercive measure, similar to or different from that which it adopts pursuant to its national law, by application of the national laws of the States in which that prohibition would have effect?*

The ECJ Ruling

Territorial Reach of the Prohibition

On the first question, the ECJ considered that, as a matter of principle, Community trade mark courts had jurisdiction over the entire area of the European Union. Its holding is:

> ***1. Article 98(1) of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark, as amended by Council Regulation (EC) No 3288/94 of 22 December 1994, must be interpreted as meaning that the scope of the prohibition against further infringement or threatened infringement of a Community trade mark, issued by a Community trade mark court whose jurisdiction is based on Articles 93(1) to (4) and 94(1) of that regulation, extends, as a rule, to the entire area of the European Union****.*

However, the Court also underlined that in some circumstances, Community trade mark courts should limit the reach of their decisions to some parts of the EU only.

> *48. Accordingly, if a Community trade mark court hearing a case in circumstances such as those of the main proceedings finds that the acts of infringement or threatened infringement of a Community trade mark are limited to a single Member State or to part of the territory of the European Union, in particular because the applicant for a prohibition order has restricted the territorial scope of its action in exercising its freedom to determine the extent of that action or because the defendant proves that the use of the sign at issue does not affect or is not liable to affect the functions of the trade mark, for example on linguistic grounds, that court must limit the territorial scope of the prohibition which it issues.*

The Court further insisted that, pursuant to Article 33 of the Brussels I Regulation, recognition and enforcement of such prohibitions were mandatory.

Territorial Reach of the Coercive Measure

With regard to the coercive measure, the Court ruled that such measures were governed by the lex fori, and that they should have the same reach as the

prohibitions if they were to achieve their goal. As a consequence, courts of other members states ought to recognize and enforce them, under the Brussels I Regulation.

The Court did not mention Article 49 of the Brussels I Regulation, which only provides for the enforcement of liquidated "astreintes". Is that to say that all "astreintes" ought to be enforced when used for the purpose of enforcing Community trade marks, even when unliquidated as in the present case?

In his opinion, AG Cruz Villalon had said:

> *64. The fact that a Community trade mark court draws up a periodic penalty payment does not necessarily imply that any quantification or enforcement thereof must be carried out by the same court. (…)*
>
> *65. (…) where the prohibition is infringed in a Member State other than the State of the forum, the quantification and enforcement stages must be carried out in the Member State in which that infringement occurred. Thus, whereas the Community trade mark court which heard the substance of the case must, where it finds infringement, impose a penalty payment, the quantification and subsequent enforcement thereof are a matter for the court of the Member State in which the prohibition is infringed, in accordance with the rules on recognition laid down in Regulation No 44/2001.*

His argument was that "astreintes" being punitive in character, they should be quantified and enforced in the Member state of enforcement. This seems to mean that unquantified astreintes may, and indeed must be enforced abroad. I am not sure this is fully in accordance with the Brussels I Regulation.

Finally, my understanding was that "astreinte" is, in Europe, a remedy peculiar to France, Belgium and Luxembourg, but AG Cruz Villalon stated that there are known in most Member States. In any case, an important issue is how to actually enforce a French astreinte in another Member states where it would be an unknown concept. The Court ruled that in the absence of an equivalent measure in the enforcing state, the enforcing court should attain the same objective with its own procedural machinery.

> *56. Where the national law of the Member State in which recognition and*

enforcement of the decision of a Community trade mark court is sought does not provide for a coercive measure similar to that ordered by the Community trade mark court which issued the prohibition against further infringement or threatened infringement (and coupled that prohibition with such a measure in order to ensure compliance with the prohibition), the court seised of the case in that Member State must, as the Advocate General has observed at point 67 of his Opinion, attain the objective pursued by the measure by having recourse to the relevant provisions of its national law which are such as to ensure that the prohibition originally issued is complied with in an equivalent manner.

Final holding of the Court on this second set of questions:

2. ***Article 98(1), second sentence, of Regulation No 40/94, as amended by Regulation No 3288/94, must be interpreted as meaning that a coercive measure, such as a periodic penalty payment, ordered by a Community trade mark court by application of its national law, in order to ensure compliance with a prohibition against further infringement or threatened infringement which it has issued, has effect in Member States to which the territorial scope of such a prohibition extends other than the Member State of that court, under the conditions laid down, in Chapter III of [the Brussels I Regulation], with regard to the recognition and enforcement of judgments. Where the national law of one of those other Member States does not contain a coercive measure similar to that ordered by the Community trade mark court, the objective pursued by that measure must be attained by the competent court of that other Member State by having recourse to the relevant provisions of its national law which are such as to ensure that the prohibition is complied with in an equivalent manner.***

Sanders on Due Process and the Recognition of Same-Sex Marriages

Steve Sanders, who is a Visiting Assistant Professor at the University of Michigan Law School, has posted The Constitutional Right to (Keep Your) Same-sex Marriage: Why the Due Process Clause Protects Marriages that Cross State Lines, Even if Conflict of Laws Cannot on SSRN. Here is the abstract:

Same-sex marriage is legal in six states, and nearly 50,000 same-sex couples have already married. Yet 43 states have adopted statutes or constitutional amendments banning same-sex marriage (typically called mini defense of marriage acts, or "mini-DOMAs"), and the vast majority of these measures not only forbid the creation of same-sex marriages, they also purport to void or deny recognition to the perfectly valid same-sex marriages of couples who migrate from states where such marriages are legal. These non-recognition laws effectively transform the marital parties into complete legal strangers to each other, with none of the customary rights or incidents of marriage.

In this paper I argue that an individual who legally marries in her state of domicile, then migrates to another state, has a significant liberty interest under the 14th Amendment's Due Process Clause in the ongoing existence of her marriage. This liberty interest creates a right of marriage recognition that prevents a mini-DOMA state from effectively divorcing her by operation of law. This right to marriage recognition is conceptually and doctrinally distinguishable from the constitutional "right to marry." It is a neutral principle, grounded in core Due Process Clause values: protection of reasonable expectations and of marital and family privacy; respect for established legal and social practices; and rejection of the idea that a state can sever a legal family relationship merely by operation of law. A mini-DOMA state will, of course, have interests to be considered in refusing to recognize certain marriages. But under the intermediate form of scrutiny I explain is appropriate, those interests do not rise to a sufficiently important level to justify the nullification of a migratory same-sex marriage.