

A New Assignment for the Rome I Regulation - Update

UPDATE: THE FINAL SUBMISSION DATE FOR THE QUESTIONNAIRE HAS BEEN EXTENDED TO WEDNESDAY 15 JUNE. ALL THOSE WITH AN INTEREST IN THIS ASPECT OF THE FUNCTIONING OF THE ROME I REGULATION ARE ENCOURAGED TO RESPOND TO ANY PART OF THE QUESTIONNAIRE WHICH APPLIES TO THEM.

ALTHOUGH THE QUESTIONNAIRE IS DRAFTED WITH BUSINESSES AND LEGAL PRACTITIONERS IN MIND, OTHERS (E.G. ACADEMIC LAWYERS, GOVERNMENTAL AND NON-GOVERNMENTAL ORGANISATIONS) MAY COMPLETE PART 3 (POLICY OPTIONS) ONLY.

When the Rome I Regulation was finalised in 2008, certain questions concerning the effect of assignments upon third parties (e.g. judgment creditors, security holders, prior assignees of the same right) were left open. In this connection, the Commission undertook to prepare and submit a report on the question of the effectiveness of an assignment or subrogation of a claim against third parties, and the priority of the assigned or subrogated claim over a right of another person (Art 27(2)).

The British Institute of International and Comparative Law (BIICL) has been “Commissioned” to undertake a study upon which this report will, in part, be based. For the purposes of this study, BIICL has prepared a questionnaire concerning the role of assignments and the surrounding legal environment in transactions with a cross-border element. Answers to this questionnaire (involving requests for information about the nature and value of transactions undertaken, practical examples of the impact of legal regulation and views on policy options for a possible new EU conflicts rule in this area) will be used by BIICL in preparing its study report and submitted to the Commission as part of its impact assessment for any future proposal. Accordingly, the process is intended to enable EU businesses and members of the legal profession to make their views known at the outset of the review process.

As a member of the BIICL team, I would encourage all of you to take part in the

study by (1) downloading and completing any parts of the questionnaire which apply to you (download here) and returning the form to Dr Eva Lein at the Institute (see contact details in the questionnaire), and/or (2) by forwarding this post to any business contact whom you think may have an interest in the subject matter of the study. Please also contact Dr Lein (e.lein@biicl.org) if you have any questions concerning the project or the questionnaire.

The New Spanish Arbitration Law Reform Act

This post has been written by Miguel Gómez Jene, Senior Lecturer of Private International Law at the UNED (Universidad Nacional de Educación a Distancia)

On May 21st, the Spanish official Gazette (www.boe.es) published the reform of the Arbitration Act. This Act amends certain provisions concerning the Arbitration legislation (2003). From the point of view of international private law, the most significant changes involve the reallocation of competence in arbitration matters. Indeed, after the coming into force of the Reform (twenty days after its publication), the corresponding High Court of each “autonomous community” (Tribunales Superiores de Justicia de las Comunidades Autónomas) shall be competent for exequatur and annulment proceedings and appointment of arbitrators. Although this modification appears desirable, it should be noted that no appeal is possible against the judgment of the High Court resolving the exequatur or annulment proceedings. Therefore the Spanish Supreme Court has no competence to deal with arbitration matters.

The prima facie standard of review for the validity of arbitration agreements has also been affected. Specifically, the amendments concern the period to submit the objection to jurisdiction. This objection to jurisdiction shall be made in the first ten days of period to answer the claim.

The possibility of arbitration in relation to company disputes has been expressly affirmed. However two special requirements have been made. First, the

introduction of the arbitration agreement in the by-laws of the company requires two thirds of the votes corresponding to shares or participations. Secondly, arbitration in company disputes must be submitted to institutional arbitration. Incomprehensibly, ad hoc arbitrations are not allowed in these matters.

The Reform introduces a new regulative framework for the relationship between arbitrator and mediator. This regulation states that, unless otherwise agreed, a mediator shall not be able to become the arbitrator in the same dispute between the parties.

The expiration of a temporal limit to render an award shall not affect its validity any longer. Previously there was a six months period to render the arbitral award. Such period of time led to a contradictory case law in order to its consideration as a ground for setting aside the award. Furthermore the temporal limit was also considered a very short period of time to render an award in an international arbitration.

The reform also provides an important new amendment regarding the scope of rectification and interpretation of the award. In cases where arbitrators have decided upon matters which have not been submitted to their consideration or upon not arbitrable matters, parties may request for a rectification of “partial extra limitation” to the arbitral tribunal.

Finally, it should be noted that the Bankruptcy Act has also been amended in order to maintain the validity of the arbitral agreement in cases of declaration of bankruptcy.

New French E-Journal

The Law Faculty of Metz has launched a new e-journal *Scientia Juris*. The new Journal is not specialised, but the editors announce that it will have a clear comparative focus. The articles, which are freely available online, will not only be offered in French, but also in other European languages.


Indeed, the first issue includes articles written in English, German, Spanish and French.

One of them is authored by Marta Requejo and explores a conflict issue: *La responsabilidad de las empresas por violacion de derechos humanos - deficiencias del marco legal*. The English abstract reads:

In a globalized world the activities of multinational and transnational corporations have a profound impact on the human rights of individuals and communities, especially in developing countries. The human rights violations committed by these agents have to be dealt with. Today is commonly accepted that the optimal approach from a legal point of view should be one of international law; but so far international law has not provided satisfactory answers. Therefore, the accountability of multinational and transnational corporations requires the intervention of domestic systems, where various regulatory options seem possible: one is the use of private civil claims. Civil litigation for human rights often involves private international law problems. Traditional PIL solutions for civil liability do not suit the factual context of violations of human rights. That is why changes on issues such as the criteria of international jurisdiction are needed. In the EU the task could be addressed at this very moment, in the context of the process of review of Regulation Brussels I.

It can be downloaded here.

Mr Strauss Kahn's Handcuffs

Most readers will have heard that the IMF director was arrested a few days ago in New York City and is accused of sexual assault against a young hotel maid. Many readers will also have seen the accused waiting in court, or leaving the NYPD premises. Handcuffed. 

Well, non-French based readers should know how lucky they are. In France, it has

been forbidden since 2001 to show an accused handcuffed. The rationale for the rule is that showing the accused handcuffed damages badly his reputation at a stage of the proceedings where he is presumed to be innocent. Any person breaching this command of the law can be fined up to € 15,000 (for details on the French rules, see here).

Now, of course, the application of French criminal law is territorial. This means that the persons concerned by such prohibition should be first and foremost French newspapers and televisions. But what about websites directing their activities towards France? Or simply accessible in France?

In any case, French televisions have been showing over and over again Mr Strauss Kahn walking handcuffed out of the Police premises in NYC. French journalists have said that they have considered the prohibition, but quickly to decide that given that all other media in the world would be showing the litigious pictures, they should and would as well. And we have not heard of any prosecution.

How is that possible? Several explanations could be offered.

1. One could first think that the French media have made a simple cost-benefit analysis and realised that they might make much more than €15,000 by showing the pictures. Indeed, the audience of News at 8 main programmes have increased remarkably in the first few days following the arrest. But how could one explain, then, that enforcement authorities did not even try to enforce the relevant law.
2. Is globalisation preventing them from actually doing so? Have French authorities concluded that, given that all other laws allow these pictures, there is no point trying to enforce the local law?

Pacta Sunt Servanda and Article

22.2 of the Brussels I Regulation

This post is written by Adrian Briggs, Professor of Private International Law at the University of Oxford.

One should note the decision of the European Court in C-144/10 *BVG v JP Morgan Chase* (12th May, 2011: Third Chamber), which held that where a bank sues to enforce the obligations of a swap contract which is valid according to its governing law, and the corporate defendant raises by way of defence the contention that its constitution or constitutional law deprived it of legal power to enter into the contract, the matter is not one to which Article 22.2 of the Brussels I Regulation applies, and it does not follow that the defence must be adjudicated, or the whole action prosecuted, in the court in which the corporate entity has its seat. This is because the point of company law or company validity is to be seen as no more than incidental or ancillary to the main issue, which is a contractual one. It followed that proceedings brought by the corporate German entity in Germany, by which it sought a declaration that it was not bound by a swaps contract which it had entered into with the bank, was not one which Article 22.2 allowed or required the German courts to hear, as Article 22.2 had no application to the proceedings.

The consequence was that the attempt of the corporate entity to derail earlier-commenced proceedings brought by the bank against the corporate entity in the English courts to enforce the obligations of the contract, by bringing counter-proceedings in Germany and seeking to use Article 22.2 as a mechanism to contend that the German courts were not bound by Article 27 to yield jurisdiction to the English courts - relying for this contention on the point left open after *Overseas Union Insurance* and never since settled - fell at the first fence. There being no jurisdiction in the German court in the first place, there was no need to go on to consider the Article 27 point, which is in one respect a pity.

Some will see in this a welcome piece of common sense, entirely in accord with the manner in which the English High Court and Court of Appeal had addressed (albeit in mirror image) the same issue in the proceedings which the bank had brought: *BVG v Morgan Chase Bank NA* [2010] EWCA Civ 390. It also means that the reference made in the same proceedings by the Supreme Court of the United Kingdom at the end of last year, registered as Case C-54/11, is now practically

redundant, and the reference should now be withdrawn. It also means that the way Art 22.2 operates, in that it is triggered only when the company law point is the principal issue in the proceedings, and which it will not be where the company law point is a mere defence to a contractual claim which has been or will be asserted, is different from the way Art 22.4 works. This is because the validity of a patent, as any fule kno, is always at the heart and core of an infringement action, in the way the validity of the decision of an organ of a company is not always at the heart of a contract claim against that company, even when the company takes the point of validity as the whole of its defence.

Japan's New Act on International Jurisdiction

Professor Koji Takahashi (Doshisha University Law School, Japan), has kindly informed us about the adoption of a new Act in Japan containing provisions on international jurisdiction of the Japanese courts in civil and commercial matters (the matters of personal status are excluded from the scope), which will be inserted into the existing *Code of Civil Procedure and Civil Interim Relief Act*. There is no doubt about the significance of this step: the rules of international jurisdiction, which have so far been inferred from the judicial precedents, will for the first time be prescribed by legislation.

Professor Takahashi has also written a paper on the Act (see [here](#)), where he sets out his English translation, comments of the key provisions and presents a brief overall evaluation of the Act. Comments are expected!

Diplomatic Immunity for Mr Strauss-Kahn?

See these posts [here](#) and [here](#) at *opiniojuris*.

Which Strategy for West Tankers?

As reported yesterday, West Tankers has now won its arbitration against the insurers of Erg Petroli and obtained a judgment in England in the terms of the award.

The purpose of this last move, it seems, was to create a defense against the enforcement in England of any forthcoming Italian judgment finding in favour of the insurers. This would create a conflict of judgments in England, and West Tankers hopes that pursuant to Article 34 of the Brussels I Regulation, the English judgment (in the terms of the award) would prevail.

If this strategy was to prevail, this would mean that the Italian judgment could not be enforced in England. But West Tankers may have assets in other European jurisdictions where the Italian judgment would be recognised almost automatically. In particular, it is likely that it owns vessels which could be attached in any European harbour where they stop. It might therefore be that the Italian judgment could be enforced in France, Greece, Spain, etc...

It seems, therefore, that West Tankers has two ways forward.

The most obvious one would be to seek recognition of the arbitral award in most jurisdictions of Europe, and hope that in each of these jurisdictions, a local judgment declaring the award enforceable would be considered as a judgment in the meaning of Article 34 of the Brussels I Regulation. The insurers would then be left with Italy, that West Tankers' vessels might find wise to avoid.

Alternatively, West Tankers might want to focus on the UK and try to rely on the

English judgment to obtain restitution of any payment it would be forced to make abroad on the basis of the Italian judgment (for a similar example, see here). I have no idea whether this could work as a matter of UK law. But it might be a theoretical question, as the Italian insurers of Erg Petroli might not have assets there.

West Tankers: Will the Future Italian Judgment Ever be Recognised in the UK?

On April 6th, 2011, the English High Court delivered a new judgment in *West Tankers*.

Most readers will recall the basic facts of the case. A dispute arose after a collision between a ship, the *Front Comor*, and a pier at a refinery in Italy. The charterparty provided for arbitration in London. The charterer first initiated arbitral proceedings against the owner of ship. It then sued the defendant before Italian courts. After an English Court issued an antisuit injunction restraining the claimant from continuing the Italian proceedings, the case was referred to the European Court of Justice which held that the English court was not authorised to issue such injunction.

But on November 12th, 2008, the arbitral tribunal delivered its arbitral award and held that the defendant was under no liability to the claimant and its insurer.

The issue before the English court was essentially one of English arbitration law: whether such award could be declared enforceable in the UK. An interesting issue was whether the Brussels I regulation was relevant here, as an English judgment declaring the award enforceable in the UK might be considered as a bar to the recognition/enforcement of any inconsistent judgment rendered in another member state. And an Italian judgment ruling in favor of the claimant would be hardly conciliable with an English judgment given in the terms of the arbitral

award. But would such English judgment be a Regulation judgment in the first place?

In his judgment of April 6, Justice Field held that, as long as the Italian judgment had not been rendered, it was not necessary to decide the issue. In the meantime, however, he confirmed that judgment in the terms of the award could be entered into.

Tip-off: Sebastien Lootgieter

Cultural Legitimacy and Climate Change Policy Conference

The Surrey International Law Centre (SILC) invites you to a one-day international interdisciplinary seminar on cultural legitimacy and the international law and policy on climate change on 21 June 2011.

Climate change poses fundamental and varied challenges to all communities across the globe. The adaptation and mitigation strategies proposed by governments and non-governmental organisations (NGOs) are likely to require radical and fundamental shifts in socio-political structures, technological and economic systems, organisational forms, and modes of regulation. The sheer volume of law and policy emanating from the international level makes it uncertain which type of regulatory or policy framework is likely to have a positive impact. The success or failure of proposed measures will depend on their acceptability within the local constituencies within which they are sought to be applied. Therefore there is an urgent need to better comprehend and theorise the role of cultural legitimacy in the choice and effectiveness of international legal and policy interventions aimed at tackling the impact of climate change.

The seminar will contribute to research on the international law and policy of

climate change by focusing on the issue of cultural legitimacy. Beginning from the premise that legitimacy critiques of international climate change regulation have the capacity to positively influence policy trends and legal choices, the seminar will showcase innovative ideas from across the disciplines and investigate the link between the efficacy of international legal and policy mechanisms on climate change and cultural legitimacy or local acceptance

As said, the seminar intends to be interdisciplinary. Some of the topics that may be of interest to Private International Law lawyers are: Dr M Burcu Silaydin Aydin “Land use planning as a tool of enhancing cultural legitimacy on climate change: The case study of Turkey”; Ms Denise Margaret Matias “Electric public transport in Puerto Princesa City: local government cooperation with NGOs, Germanwatch e.V.”; Dr Xiao Recio-Blanco “Community collaboration and the improvement of fisheries’ management and governance: the case of South Baja California”; or Dr Vincenzi de Agostinho “The dangers of the environmental advertising”.

See the programme [here](#).