Kessedjian on Arbitration and Brussels I

Catherine Kessedjian, who teaches at the European College of Paris (University Paris 2), has published in the last issue of the French *Revue de l'arbitrage* an article on Arbitration and the Brussels I Regulation (*Le Règlement 44/2001 et l'arbitrage*).

The English abstract reads:

> *The arbitration exception in Regulation 44/2001 must not be altered in the future amended Regulation, at least until all questions posed by the relation between an arbitral proceeding and a judicial proceeding have been thoroughly reflected upon. This must be done, notably, bearing in mind the role of Europe as a favoured place of arbitration. In addition, the reform of 44/2001 may not be limited to intra-European cases but also deal with relations to Third States, hence an even more cautious approach to the matter is necessary. In that context, Europe should not act unilaterally, unless efforts are undertaken at a universal level and have failed. With this in mind, this paper discusses the questions which occur in practice.*

Parrish on Duplicative Foreign Litigation

Austen L. Parrish, who teaches at Southwestern Law School, has published Duplicative Foreign Litigation in the last issue of the *George Washington Law Review*. The abstract reads:

> *What should a court do when a lawsuit involving the same parties and the same issues is already pending in the court of another country? With the growth of transnational litigation, the issue of reactive, duplicative proceedings—and the*

waste inherent in such duplication—becomes a more common problem. The future does not promise change. In a modern, globalized world, litigants are increasingly tempted to forum shop among countries to find courts and law more favorably inclined to them than their opponents.

The federal courts, however, do not yet have a coherent response to the problem. They apply at least three different approaches when deciding whether to stay or dismiss U.S. litigation in the face of a first-filed foreign proceeding. All three approaches, however, are undertheorized, fail to account for the costs of duplicative actions, and uncritically assume that domestic theory applies with equal force in the international context. Relying on domestic abstention principles, courts routinely refuse to stay duplicative actions believing that doing so would constitute an abdication of their "unflagging obligation" to exercise jurisdiction. The academic community in turn has yet to give the issue sustained attention, and a dearth of scholarship addresses the problem.

This Article offers a different way of thinking about the problem of duplicative foreign litigation. After describing the shortcomings of current approaches, it argues that when courts consider stay requests they must account for the breadth of their increasingly extraterritorial jurisdictional assertions. The Article concludes that courts should adopt a modified lis pendens principle and reverse the current presumption. Absent exceptional circumstances, courts should usually stay duplicative litigation so long as the party seeking the stay can establish that the first-filed foreign action has jurisdiction under U.S. jurisdictional principles. This approach—pragmatic in its orientation, yet also more theoretically coherent than current law—would help avoid the wastes inherent in duplicative litigation, and would better serve long-term U.S. interests.

The article can be downloaded here.

New edition of leading Australian text on private international law

The eighth edition of *Nygh's Conflict of Laws in Australia* has recently been published. It is the leading text on private international law in Australia. The last edition was published in 2002. The eighth edition is the first to be published since the death of Peter Nygh in that same year. His co-author on the previous edition, Martin Davies, is joined in this edition by Andrew Bell SC of the New South Wales Bar, a leading private international law practitioner in Australia, and Justice Paul Brereton of the Supreme Court of New South Wales. It is available from LexisNexis in hardcover and softcover.

Post Doctoral Position in Brussels

The Unit of Private International Law of the *Université Libre de Bruxelles* (ULB) will recruit a post doctoral researcher in Private International Law, starting in September 2010, for a duration of 12 to 18 months.

The researcher will work on a project funded by the European Commission on Judicial Cooperation in Matters of Market Integration and Consumer Protection.

Eligible candidates must hold a doctorate degree in law or have comparable research experience. They must have an excellent command of English, but not necessarily of French (although that would be an advantage).

More details can be found here. Applications must be submitted by May 1st, 2010.

Wasserman on Transnational Class Actions

Rhonda Wasserman, who teaches at the University of Pittsburgh School of Law, has posted Transnational Class Actions and Interjurisdictional Preclusion on SSRN. Here is the abstract:

> *As global markets expand and trans-border disputes multiply, American courts are pressed to certify transnational class actions – i.e., class actions brought on behalf of large numbers of foreign citizens or against foreign defendants. Defendants typically oppose certification by arguing that European courts will not recognize or accord preclusive effect to a judgment in the defendant's favor. Thus, defendants fear repetitive litigation on the same claim in foreign courts even if they prevail in an American court.In addressing defendants' arguments, American courts carefully consider the likelihood that an American judgment will be recognized abroad. But they virtually never consider the preclusive effects, if any, that the judgment or court-approved settlement will receive or which country's preclusion law will determine those effects. The Article identifies and analyzes significant differences between American preclusion law and the preclusion laws of Europe. In light of these important differences, the Article strongly recommends that courts analyze recognition and preclusion issues separately, rather than conflating them.*

UK's Ministry of Justice Publishes Guidance on the Rome I Regulation

Yes, there are already at least two specialist works on the Rome I Regulation, but

that has not stopped the UK's Ministry of Justice from producing guidance on the main provisions anyway. Here's their reasoning:

> *The purpose of this guidance is to provide a brief summary of the most important provisions in the Regulation. The Regulation is a substantial and complex instrument in a technical area of law and the contents of this guidance is only intended to be a brief outline of some of the most significant provisions. This outline is not comprehensive in nature. For a more comprehensive view of the Regulation, and the many issues to which it will inevitably give rise to, reference should be made to specialist literature on private international law.*
>
> *The Regulation provides uniform choice of law rules applicable in contractual obligations. These rules will enable courts throughout the European Union to select the national laws appropriate for the determination of proceedings where the case has a cross-border dimension. Issues concerning the interpretation of the rules in the Regulation can only be conclusively resolved by the European Court of Justice. As a result, any interpretative indications given in this guidance should not be regarded as conclusive in this sense.*

So, brief, incomplete and (once the European Court has started 'interpreting') probably wrong. But still, it's worth a read. Download the PDF here.

French Conference on Private Military Contractors

The Faculty of law of the University of Clermont-Ferrand will host a conference on *Private Military and Security Companies* on 4 and 5 March 2010.

Speakers will include legal scholars, political scientists and a variety of actors of international humanitarian law. Professors Bérangère Taxil (University of Angers) and Mathias Audit (University of Paris Ouest – formerly Nanterre) will more

specifically discuss issues of private international law.

The full program and more details about the conference can be found here. It is free of charge. Interventions will be in French.

International Antitrust Litigation – Brussels Conference

A full-day conference, entitled "International Antitrust Litigation – Conflict of Laws and Coordination" has been organised by Jürgen Basedow (Max Planck Institut, Hamburg), Stéphanie Francq (Chair of European Law, UC Louvain) and Laurence Idot (Paris II, collège européen). It will take place on 26 March 2010 at the Hilton Hotel in Brussels.

The organisers explain the theme of the conference as follows:

> *With the decentralization of competition law enforcement and the development of private damages actions in the European Union as well as with the increasingly international character of antitrust proceedings, there is a growing need for clear and workable rules to coordinate cross-border actions of both a judicial and administrative nature. These include not only rules on jurisdiction, the applicable law and recognition of judgments, but also on sharing of evidence, protection of business secrets and interplay between administrative and judicial procedures. Those issues, which have been overlooked for so long, have been reflected upon by a group of international experts from across Europe and the United States who will identify current pitfalls and formulate concrete proposals for improving coordination of cross-border antitrust litigations.*

The topics covered include "Jurisdiction in Cross-Border Litigation – Brussels I" (Chair: Dr Karen Vanderkerckhove, European Commission), "The Applicable Law – Rome I and Rome II" (Chair Prof Jürgen Basedow), "Public Enforcement in the

EU – Coordination between Authorities" (Chair: Sir Christopher Bellamy QC) and "Antitrust Litigation in the Era of Gloabalisation" (Chair: Prof Horatia Muir Watt). A full programme is available here, with the possibility of online registration here.

Fourth Complutense Seminar on Private International Law

On 11 and 12 March, 2010, a new edition (the fourth) of the Private International Law Seminar organized by Prof. Fernández Rozas and De Miguel Asensio will take place in Madrid . This Seminar, which has proven to be one of the most important and successful in the area of Private International Law in Spain both by the extent of the audience and the quality of the speakers, will be held this time under the name "Litigación civil internacional: nuevas perspectivas europeas y de terceros Estados". As in previous editions, the meeting will bring together numerous experts, academics and lawyers from both Spain and abroad, covering different areas of Private International Law. This edition will gather representatives from Spain, several European countries (Spain, Portugal, France, Italy, Germany, United Kingdom, Luxembourg, Romania) and also from other continents (Panama, Argentina, Cuba and Japan). Spanish, English and French will be spoken -though no translation is provided.

The Congress shall have four sessions, called respectively International jurisdiction in the European Union; Cross-border effectiveness of resolutions and documents in the European Union; Third States and comparative point of view; and International commercial arbitration and State jurisdiction. Each of them involves several lectures, followed by the reading of papers and a final debate. The program and the registration form (registration is free) can be found here.

As in previous editions, most of the contents of the Seminar will be later published in the Anuario Español de Derecho Internacional Privado.

Foreign Law and Public Policy in Australia

A recent case in the Supreme Court of Victoria provides a good opportunity to point out the new statutory provisions in the State of Victoria for the proof of foreign law, and to discuss the public policy reasons for the non-enforcement of foreign law.

Paradise Enterprises Inc v Kakavas [2010] VSC 25 (16 February 2010) concerned a loan for gambling entered into in the Bahamas which the creditor (a Bahamas casino operator) then sought to enforce in Victoria as a debt claim against the Australian-resident debtor. Both parties agreed that the claim was governed by the law of the Bahamas, and expert evidence was received on that law.

Since the hearing of that case, the *Evidence Act 2008* (Vic) has come into force, which contains the same fairly liberal provisions for the proof of foreign law as apply in New South Wales, Tasmania and Commonwealth courts (ss 174-6 of the respective uniform Evidence Acts). Previously, Victoria was alone among Australian jurisdictions in not having any statutory provisions for the proof of foreign law, apart from a curious provision enabling judicial notice to be taken of the statutes of the United Kingdom, New Zealand and Fiji: *Evidence Act 1958* (Vic) ss 59–61, 77.

The Australian defendant unsuccessfully sought to resist the claim on a number of bases. The first was that the gambling contract was the product of unconscionable conduct (namely, the alleged exploitation of the debtor's pathological gambling). Two curiosities arise from the evidence taken on that point: first, in an equitable claim of that kind it is not clear whether foreign law would generally apply at all; and second, there was in any event a false conflict (Australian law being identical to Bahamas/English law on point).

A second defence concerned the lawfulness under Bahamas law of gaming and the enforceability of gambling loans.

A final defence to the claim was that the enforcement of the debt would be contrary to the public policy of the forum. That received short shrift from the judge:

> *The short answer is that the agreement was governed by the laws of the Bahamas. Reference to the law in Victoria governing the conduct of gambling here is not apposite to determining whether a gaming loan made in another country in which it is lawful and recoverable would be unenforceable as being against public policy in Victoria. (at [93])*

This reasoning seems unsatisfactory. Whatever the proper law of the gaming loan contract (or of the debt), the law of the forum can nevertheless intervene in the case of a mandatory rule or a public policy reason for non-enforcement of foreign law. Indeed, a public policy claim presupposes that foreign law would otherwise govern the matter. Of course, this is not to say that the judge should ultimately have reached a different conclusion about the enforceability of the debt, but a few more steps of reasoning were needed before one could reach that view.

Paradise Enterprises Inc v Kakavas [2010] VSC 25 (16 February 2010)