ILA Conference 2010

De Iure Humanitas. Peace Justice and International Law.

The 74th Conference of the International Law Association, hosted by the Netherlands Society of International Law to celebrate its 100th anniversary, will take place in The Hague from 15 to 20 August 2010. The programme includes topics intesting for PIL lawyers, e.g. sessions on international commercial arbitration, international family law, international securities regulation, international trade law and international civil litigation.

For more information on the programme and registration, please click here.

Second Issue of 2010's Journal du Droit International

The second issue of French *Journal du droit international* (*Clunet*) for 2010 was just released.

It includes four articles and several casenotes.

Remarkably, one of the articles is actually written in English. It discusses Company mobility through cross-border transfers of registered offices within the European Union – A new challenge for French law. The authors are Didier Martin, who practices at Bredin Prat, and Didier Poracchia, a professor of law at Aix-Marseilles University. Here is the abstract:

> *Freedom of establishment is recognised by the Treaty on the Fuctioning of the European Union not only for private individuals, but also for companies which are formed in accordance with the laws of a Member State and which have their registered office, central administration or principal place of business within the European Community. This freedom relates to taking up and pursuing activities as self-employed persons and to setting up and managing*

undertakings, and in particular companies within the meaning of the second paragraph of article 54 of the Treaty of the Functioning of the European Union (former article 48 of the EC Treaty), subject to the conditions laid down by the law of the country of establishment for its own nationals.

The second article (in French) is authored by Caroline Kleiner, who teaches at Geneva university. Its title is the Transfer of the Seat of Companies in PIL (*Le transfert de siège social en droit international privé*). The English abstract reads:

The international transfer of seat is confronted to a lack of regulation at the national, communautary and international levels. Far from being a benign operation, the migration of seat entails important and burdensome consequences. In some cases, it subjects a company to the rules of another legal order, implying its transformation or the attribution of a new nationality to the said company ; in other cases, by transferring its seat, a company runs the risk of disappearing. These effects – transformation and naturalisation – should however be distinguished according to the connecting factors chosen by the State of origin and the host State in order to determine the law applicable to a corporation. The effects should also be distinguished on the basis of the type of migration, since the duality of the notions of « seat » is necessarily linked to the notion of transfer. In the present state of the law, and given the incoherent position of the Court of justice of the European Union, the lack of predictability and legal security obstructs international transfers and prevents companies from using a useful tool for their restructuration.

Hélène Péroz, who lectures at Caen University, is the author of the third article, which discusses the Law Governing Registered Partnerships (*La loi applicable aux partenariats enregistrés*).

The law of may, 12th 2009 (n° 2009/526), created a conflicts rule for registered partnerships (now codified in article 515-7-1 of the Code civil). Those are governed by the law of registration authorities. Nonetheless, the scope of the applicable law remains to be defined.

Finally, David Sindres, who lectures at Paris I University, has authored an article on Third Party Claims Based upon the Breach of Contracts in PIL (*La violation du*

contrat au préjudice des tiers en droit international privé).

> *The reasonings followed by the European Court of Justice and the French Cour de cassation in private international law regarding third party claims based upon the breach of a contract concluded by the defendant remain influenced by solutions of substantive law. The underlying assumption is that insofar as these claims are characterized as tort ones in substantive law -in France, the Cour de cassation adopted this solution in its famous Bootshop decision- they must be analyzed the same way in private international law. Although neglected in the classification process, the stakes of private international law reappear when it comes to implementing the applicable rules of conflict of juridictions and of conflict of laws. Some of the difficulties entailed by the implementation of the chosen rules are thereby avoided, at the risk of ascribing these rules the role of mere formal references.*

Guest Editorial: Fentiman on "Private International Law and the Downturn"

Richard Fentiman is Reader in Private International Law at the University of Cambridge, where he teaches the postgraduate course on International Commercial Litigation. His book on *International Commercial Litigation* was published by Oxford University Press in February 2010. He is the author of *Foreign Law in English Courts* (OUP, 1998), and he gave a course at the Hague Academy of International Law on *The Appropriate Forum in International Litigation* in 2002. His recent publications include 'The Significance of Close Connection' in Ahern and Binchy*, The Rome II Regulation on the Law Applicable to Non-Contractual Obligations* (Nijhoff, 2009) , and 'Choice of Law in Europe: Uniformity and Integration' (2008) 82 Tulane LR 2021. He recently gave evidence

to the House of Lords European Union Committee on the reform of the Brussels I Regulation.

Abstract

An increase in litigation in the wake of the economic downturn was widely anticipated, and with it a rise in cross-border disputes with conflicts elements. Yet the expected flood of cases has not materialised, despite a rise in claims in commercial centres such as London. There are reasons why disputes increase in any slump. But the current downturn has special features. These suggest what kind of disputes may arise, including conflicts disputes, and they explain why the number of claims is less than expected. A surge in litigation may yet occur, as initial attempts at compromise fail. But, whatever the number of disputes, private international law may have a central role in regulating the downturn's legal effects.

Private International Law and the Downturn

1. Facts and figures

Is private international law affected by the current downturn? An intuitive answer is that commercial disputes proliferate with economic contraction. Conflicts disputes increase correspondingly because so much commercial activity is transnational. This is apparently verified by recent developments in London, venue for so many commercial disputes. With the world's leading economies in recession, 2009 saw an increase of 20% on the previous year in claims initiated in the London Commercial Court. ((Financial Times, 8 April 2010.)) 1,225 claim forms were issued, close to the average in the early years of the last decade, and the highest number since 2002. ((When 1,213 claims were initiated: Admiralty and Commercial Court Report 2002-2003, [11].)) More striking still, cases submitted to the London Court of International Arbitration reached a record high in 2009, an annual increase of almost 30%. ((Financial Times, 8 April 2010.))

Many of these claims are likely to have foreign elements. Most commercial disputes in London involve foreign parties, or foreign laws, or foreign assets, or parallel foreign proceedings, or acts or omissions abroad – often in combination. ((The Commercial and Admiralty Court Report 2005-2006 records that approximately 80% of claims in that year involved at least one non-UK party.))

Such figures need cautious handling. Of course some recent cases originate in the downturn, some with conflicts implications. ((As, for example, *Jefferies International Ltd v Landsbanki Islands HF* [2009] EWHC 894 (Comm).)) But only proper investigation will reveal the true cause (or causes) of the rise in claims in London. Nor can it be a complete explanation to attribute the increase to the recession. The risk of default may have heightened, but the number of transactions from which litigation might arise increased in the preceding years of plenty, enhancing the risk of litigation, downturn or not. Nor does the increase in claims mean that conflicts issues are at stake. How many recent actions in the Commercial Court involve contested issues of private international law remains a matter of speculation until they go to trial, as many will not, given the tendency of commercial disputes to settle. ((Commercial and Admiralty Court Report 2004-2005, 3.)) The nature of arbitrated disputes is even harder to discern, given the privacy of the process. ((Unless ancillary proceedings arise in court.))

Such caveats aside, the rise in pending disputes in London gives pause for thought, and begs intriguing questions. Has the downturn generated more disputes? Does this mean more conflicts disputes? What kind of conflicts disputes? How will they be resolved – in court, by arbitration, or by negotiation? And what of the biggest puzzle? Why has the slump not triggered still more claims? A proper response to these questions demands an empirical study, traversing the economics and sociology of litigation. The following brief remarks are no such thing, but attempt at least to capture some impressions, and suggest some possibilities.

2. Disputes and the economy

Litigation can be generated by economic growth as well as by retrenchment. Transactions multiply with economic expansion, increasing the potential for disputes. Some litigants may also be more aggressive in pursuing or defending

proceedings if cushioned by prosperity from the risk of losing. But the risk of default is surely less when times are good, when credit is cheaper, and transaction costs stable. Experience confirms that economic crises spawn litigation. This is reflected in microcosm by the spike in claims in the London Commercial Court in the late 1990s. 1,808 claims were initiated in 1999, explained in large part by the implosion of the Lloyd's insurance market. ((Admiralty and Commercial Court Report 2005-2006, 5.))

Creditors become impatient in times of diminished liquidity. They are more likely to seek recovery through litigation rather than forgive a debt or reschedule. There is also an increased risk in a downturn that counterparties will default, or seek to escape performance, as transaction costs rise with the increased price of services and materials, and the scarcity of credit. But default is not always forced on obligors by pressures beyond their control. Some may calculate that deliberate repudiation of their obligations, with the risk of litigation, is preferable to adhering to a newly onerous bargain. With credit and liquidity reduced many litigants may have a heightened sensitivity to the cost of funding litigation, and to the risk of losing in court. But economic adversity may also alter the balance of risk, making the cost of litigation seem more attractive than the cost of performance.

Excuses for non-performance, such as incapacity, mistake, fraud, duress or illegality, thus become important, with inevitable conflicts implications in cross-border transactions. Disputes about the identity of the applicable law are the consequence. But this will often be contractually agreed, forcing a defaulting party to argue that the contract is unenforceable by reference to another law. As cross-border litigation increases, so does reliance on overriding rules and public policy. A consequence may be more reliance on overriding prohibitions against onerous interest provisions or exemption clauses, coupled perhaps with pre-emptive litigation in courts where such prohibitions exist. ((A pre-downturn example of pre-emptive reliance on mandatory rules and public policy to invalidate provisions for the payment of interest is *JP Morgan Europe Ltd v Primacom AG* [2005] EWHC 508 (Comm).))

Just as economic adversity encourages default, so it precipitates collateral litigation against commercial partners, such as guarantors, insurers, and reinsurers, offering further potential for cross-border litigation. Such collateral disputes often concern whether the terms of a secondary contract incorporate

those of a primary contract, not least terms affecting jurisdiction, arbitration and choice of law. ((Fentiman, International Commercial Litigation (Oxford: OUP, 2010), [4.71] – [4.86].))

It is also more likely in straightened times that parties to a bad bargain will allege mis-selling, or blame their advisers, perhaps suing for misrepresentation, or alleging negligence against a third party such as a broker or auditor. ((A pre-downturn example, subject to English law, but involving the alleged mis-selling of investments in complex financial instruments, is *JP Morgan Chase Bank v Springwell Navigation Corporation* [2008] EWHC 1186 (Comm).)) It becomes important to establish whether the creditworthiness of a counterparty, or the value of an asset, or the risk of a transaction, was misstated – and to address any related conflicts issues. Nor are lawyers immune from such collateral litigation ((See *Haugesund Kommune v Depfa ACS Bank* [2010] EWHC 227 (Comm) (advice as to capacity to contract).)) – not least those who gave insufficiently qualified opinions as to governing law and jurisdiction.

Allegations of fraud also increase with economic stringency – as indeed does fraud – as trading conditions worsen and liquidity deteriorates. ((Mitchell and Taylor, 'The Fraud Litigation Spiral' NLJ 6 February 2010, 175.)) Sellers misrepresent their products, straightened borrowers conceal their circumstances to obtain finance, traders lacking liquidity charge their assets (often receivables) to different lenders to obtain funds. In cross-border disputes this highlights the treatment of pre-contractual fault, and the vexed question of priority between competing assignments of the same debt. Because fraud is often associated with attempts to conceal assets, applications for transnational freezing and disclosure orders also become more frequent.

Governments also tend to respond to economic crises with protective legislation, increasing the legal regulation of businesses and markets, and restricting economically sensitive transactions. The effect is to highlight the importance of conflicts rules governing discharge and illegality, and in particular the treatment of supervening illegality in the place of performance. Old questions may also arise concerning the effect of moratorium legislation, and the expropriation of assets. ((As in *Jefferies International Ltd v Landsbanki Islands HF* [2009] EWHC 894 (Comm).))

So reasons to litigate abound in troubled times. But so does the readiness to sue.

Some potential litigants may be deterred from doing so because the liquidity necessary to pursue litigation may be more limited, and the risk of failure more serious, in adverse economic conditions. But not those whose last chance to avoid closure or insolvency is a successful claim – colloquially, 'bet-all' claimants. And not liquidators, whose task is to maximize a company's assets by recovering its losses, or pursuing its debtors, or disputing disposals of its property. Liquidators are especially prone to challenge purported transfers of a company's accounts receivable – raising (again) vexed questions about the effectiveness of cross-border assignments. ((An older example is *Raiffeisen Zentralbank Osterreich AG v An Feng Steel Co Ltd.* [2001] EWCA Civ 68; [2001] QB 825.))

Such considerations explain why and how litigation follows in the wake of economic crisis. But this may not occasion more trials on the merits, still less more final judgments. Nor for that reason may choice of law disputes increase. Commercial disputes are almost always settled, often when the identity of the forum becomes clear. ((Commercial and Admiralty Court Guide 2004-2005, 3.)) True to form, any additional disputes in the London Commercial Court are likely to be interlocutory, concerning jurisdiction and interim relief, the key components in cross-border litigation. The staying of actions, the restraint of foreign proceedings, and the disclosure and freezing of foreign assets, are likely to loom large. Given the likely complexity of any disputes, orders for case-management may assume special importance – with potential cross-border implications if proceedings in different countries are involved. Moreover, at least in the European Union, where the Brussels I Regulation emphasises the importance of pre-emptive forum shopping, many disputes are likely to involve first-strike actions, often no doubt for declaratory relief. ((Fentiman, 'Parallel Proceedings and Jurisdiction Agreements in Europe', in de Vareilles-Sommières, ed, Forum Shopping in the European Judicial Area (Oxford: Hart, 2007).))

3. A different landscape

The landscape of litigation in the present downturn has novel features unconnected with the economy, which may affect the incidence and nature of disputes. Two are special to Europe but have particular significance for conflicts lawyers.

First, there are now enhanced techniques for reducing the financial risk of

litigation, making it more attractive – or less unattractive. The cost of litigation determines whether to initiate or defend proceedings, and (importantly) where to do so. But the financing of litigation has been transformed in recent years by the possibility of third party funding. ((‘Litigation finance follows credit crunch’, Financial Times 27 January 2010; Litigation and Business: Transatlantic Trends (Lloyds, 2008), 9.)) Evidence of the practice in London is scant. But a growing number of third party investors are prepared to finance claims, conditional on a share of the proceeds if the claim succeeds. In theory at least this possibility is especially appealing in a downturn, both to claimants, whose ability to finance proceedings may otherwise be compromised, and by investors, for whom the value of more conventional asset classes may seem uncertain.

Secondly, the popularity of arbitration has increased. Claims before the London Court of International Arbitration rose significantly by 131% between 2005 and 2009, a trend matched by other arbitral institutions. ((Financial Times, 16 April 2010, 11, citing figures sourced from the Singapore International Arbitration Centre. In the period 2005-2009 the international disputes administered by the other leading centres increased as follows: ICC, Paris 57%; American Arbitration Association 44%; the Singapore International Arbitration Centre 153%; the China International Economics and Trade Arbitration Commission 31%.)) At least some of those disputes would once almost certainly have been tried in court. One explanation is the perennial concern (not always justified) that commercial litigation is excessively lengthy, complex, and costly by comparison with arbitration. ((Concerns about the efficiency of lengthy cases before the London Commercial Court prompted a review of its procedures culminating in the Admiralty and Commercial Courts Guide 2009.)) Another is the increasing tendency to include arbitration clauses in species of contract which previously would have contained jurisdiction agreements. This is especially so in financial transactions. Financial institutions are less reluctant to arbitrate than convention once dictated. This partly reflects a desire to escape the inflexibility of the Brussels jurisdiction regime, preoccupied as it is with avoiding parallel proceedings even to the detriment of jurisdiction agreements. ((Sandy and O’Shea, ‘Europe, Enforcement and the English’.)) The consequence has been an increase in hybrid clauses providing in the alternative for litigation or arbitration. ((See, for example, the clause at issue in *Law Debenture Trust Corporation Plc v Elektrim Finance BV* [2005] EWHC 1412 (Ch).)) Given the prevalence of disputes between financial institutions in the downturn, the sensitivity of the transactions

involved, and concerns about media scrutiny, parties faced with that choice may well favour arbitration. The effect is not, however, to rule out litigation entirely. Arbitration often generates ancillary judicial proceedings, not least concerning the restraint of foreign proceedings commenced in defiance of an arbitration clause.

Thirdly, the downturn coincides with important changes in the European conflicts regime, with the coming into force of both the Rome I and Rome II Regulations. It is perhaps unfortunate that many of the conflicts issues which are likely to arise in the near future are governed by novel provisions, causing uncertainty, and itself generating more litigation. Foremost among these are Article 9 of Rome I (likely to become contentious as obligors plead illegality to escape performance), and Articles 4 and 12 of Rome II (regulating the likely crop of claims for mis-selling and negligent advice). It is especially regrettable that Article 14 of Rome I remains unreconstructed and ambiguous, given that the assignment of debts underlies so many contentious transactions.

Finally, any increase in litigation poses a challenge for the Brussels I Regulation, as interpreted in such recent cases as *Owusu*, ((Case C-281/02 *Owusu v Jackson* [2005] ECR I-553.)) *Gasser*, ((Case C-116/02 *Erich Gasser GmbH v MISAT Srl* [2003] ECR I-14693.)) *Turner* ((Case C-159/02 *Turner v Grovit* [2004] ECR I-3565.)) and *West Tankers*. ((C-185/07 *Allianz Spa v West Tankers Inc* [2009] 3 WLR 696.)) The inappropriateness of the Regulation for handling high-value, multi-jurisdictional disputes has often been noted, and needs no elaboration here. ((Fentiman, International Commercial Litigation (Oxford, OUP, 2010), [1.40] – [1.47].)) But a proliferation of such disputes can only impose further stress on a regime which destabilises jurisdiction and arbitration agreements, and militates against the allocation of cases to the most appropriate forum. The Brussels regime may indeed have its own role in encouraging litigation, by inciting the prudent to seise their preferred forum early so as to win the all-important battle of the courts. ((See, Fentiman, 'Parallel Proceedings and Jurisdiction Agreements in Europe', above.))

4. A different downturn

Not all slumps are the same, and the present crisis has distinctive features of

particular interest to conflicts lawyers. Most obviously, this is the first downturn to affect truly global markets. The last two decades have seen an increase in cross-border transactions, encouraged by the globalization of finance, enhanced communications, and the growth of emerging markets for trade and investment. The present crisis also follows a period of unprecedented economic expansion. The downturn was preceded by an economic boom, fuelled by plentiful credit, in which the volume of global business increased – and with it the risk of cross-border litigation even in the best of times.

Again, the first effect of the crisis was an unprecedented credit drought, triggered by paralysis in the wholesale lending markets. The effect may be disputes in which the obligor's default was triggered by the denial or withdrawal of the credit necessary to fund a project, or a purchase, or an investment. There is evidence that many recent disputes in the London Court of International Arbitration concern default prompted by a lack of credit. ((Financial Times, 8 April 2010, quoting James Clanchy, LCIA deputy director-general.)) Another effect has been remarkable volatility in the financial markets, with the value of securities, currencies and commodities not simply falling (as might be expected), but rising and falling unpredictably. (('Global Markets Turn Volatile'.)) Disputes about the assessment of loss may result. Market fluctuations also make it hard for potential litigants to predict whether their losses might evaporate with a market upswing, raising strategic problems for both obligors and obligees. Is it time to default; is it time to sue? ((This may further explain why less litigation has followed the downturn than expected.))

The dearth of credit has also prompted numerous business failures, leading to an increase in insolvency and associated disputes – often disputes with a foreign element, involving the collapse of multi-national businesses, and those with foreign creditors. At its simplest liquidators are likely to pursue unpaid debts and recover losses incurred by failed transactions. But they are equally likely to attack any disposals of the company's assets. This might involve denying the effectiveness of any assignments of a business's receivables or loan book, perhaps by challenging the proprietary effect of such disposals. Or it may involve recharacterising a transaction, by alleging perhaps that it creates a security interest, and so fails for want of form or registration. ((Fentiman, International Commercial Litigation (Oxford: OUP, 2010), [3.177] – [3.181].)) Both attacks beg choice of law questions. What law governs the effectiveness of the assignment of

a debt, and the characterisation of a transaction?

The decade before the downturn also saw an increase in the use of complex financing techniques, and increased investment in novel investment vehicles and emerging markets. The legal structure of such techniques is largely untested, and the risk associated with such investments was often unclear. ((See eg the high-risk swap transactions involved in *Haugesund Kommune v DEPFA ACS Bank* [2009] EWHC 2227 (Comm).)) Cases probing the effectiveness of such transactions might be expected, as are claims for mis-selling, in which investors allege that the risks were either concealed or unexplained. ((A precursor is the dispute in *JP Morgan Chase Bank v Springwell Navigation Corporation* [2008] EWHC 1186 (Comm), in which the claim failed.))

Of special importance has been the use of derivatives, principally as a means to mitigate the risk of fluctuating markets, and the development of products linked to the securitization of debt. That one type of derivative, the credit default swap, functions (in effect) as insurance against default under a loan or bond, suggests that such transactions are increasingly likely to be litigated. But the potential for disputes arising from securitization is especially instructive. Traditional 'vanilla' lending – finance in return for repayment and interest – depends on familiar contractual principles, against a tolerably stable conflicts background. So too does the straightforward issue of securities involving investment in the issuer's business. But the predominant financing technique of recent years has been securitization. This embraces a variety of structures with at their core the issue of securities in the form of bonds, backed by the bulk assignment of debt to the issuer, by legal vehicles whose only purpose is to hold the assigned assets and issue the securities. It has also spawned a parallel market in devices such as credit derivatives, effectively a means of betting on the value of securitized assets. Such structures provide finance to the owner of the underlying assets, profits for the issuer, and investment vehicles for those purchasing the securities and wagering on their value. But the legal implications have yet to be fully tested, certainly in a cross-border context. ((Numerous domestic disputes have arisen in the United States.))

Any litigation arising from such structures may seem familiar. Investors facing significant losses are likely to sue issuers for breach of warranty and misrepresentation, or claim from an issue's underwriters, or even pursue the debt's original owner (perhaps for fraud or negligence). So too the asset's original

owner may face claims from an issuer. But securitization may be an especially fertile source of litigation for several reasons. ((For an account of the inter-party 'frictions' underlying securitization, each a potential source of litigation, see Ashcraft and Schuermann, *Understanding the Securitization of Subprime Mortgage Credit*, Federal Reserve Bank of New York Staff Reports, no 318 (March 2008).)) First, a typical securitization involves several contracts between different parties, creating a web of potential claims and counterclaims, involving the borrowers whose debts are securitized, the asset pool's original owner, the issuer of the securities, and the disappointed investors. Secondly, each of the relationships between the several key parties is asymmetric, in so far as one party is likely to have better information than the other concerning value and risk. ((As insightfully explained by Ashcraft and Schuermann, above.)) When one party's position sours such asymmetry leads inevitably to accusations of misrepresentation and non-disclosure. Thirdly, particular difficulty arises where the effectiveness of such arrangements is questioned, and in particular the assignment of the underlying assets to the issuer. These difficulties are magnified where those assignments involve parties from different jurisdictions, creating intensely difficult (if all-too familiar) questions about the cross-border assignment of debts. ((It also lends particular urgency to the debate surrounding the future of the Article 14 of the Rome I Regulation.))

The present downturn also follows a period in which normal business prudence was to some extent ignored. Anecdotal evidence suggests that a combination of market pressure and easy profits meant that transactions were completed in haste, or with a degree of complacency about the legal implications. Of particular interest to conflicts lawyers, there is evidence of unthinking reliance on standardised documentation, of surprising inattention to the language of jurisdiction agreements, and a tendency to ignore qualified legal opinions as to the effectiveness of transactions.

5. To sue or not to sue?

Given the severity of the downturn, and the scale of the losses incurred, a substantial increase in commercial litigation was widely anticipated. ((‘Credit crisis could lead to surge in litigation’, Timesonline, 10 August 2007.)) True, the

number of claims has risen in London. But the expected deluge of litigation has not – or has not yet – materialised. As the judge responsible for the London Commercial Court has said, 'no one has encountered what I call a tidal wave of litigation'. ((Gross J, Judge in Charge of the Commercial Court, quoted in the Financial Times, 8 April 2010.)) Why is this so?

Legal obstacles may be one reason. A spate of claims related to the mis-selling of financial products has long been expected, cast as actions for fraudulent or negligent misrepresentation. But such claims are inherently problematic, and one judge recently described a sophisticated investor's case as a 'fantasy' and 'commercially unreal'. ((*JP Morgan Chase Bank v Springwell Navigation Corporation* [2008] EWHC 1186 (Comm). It has been suggested that the US fraud proceedings recently brought by the SEC against Goldman Sachs may become a template for litigation by private claimants: 'Wall Street beware: the lawyers are coming', 'Regulator's move risks opening lawsuit floodgates', Financial Times 18 April 2010.)) Certainly, corporate investors may have difficulty in establishing the reliance necessary to found liability, ((See Bankers Trust International Plc v PT Dharmala Sakti Sejahtera (No 2) [1996] CLC 518.)) just as fraud or negligence may be hard to make out against financial institutions with robust practices. ((See *Luminent Mortgage Capital Inc v Merrill Lynch & Co* (20 August 2009), USDC ED Pennsylvania (Philadelphia).)) In the context of an endemic market collapse claimants may also face difficult questions of causation and remoteness in proving loss. ((A feature of recent US litigation, illustrated by *Luminent Mortgage Capital Inc v Merrill Lynch & Co*, above.)) Moreover, and of particular importance, the parties' dealings are likely to be subject to contractual disclaimers and exemption clauses designed to forestall litigation. ((JP Morgan Chase Bank v Springwell Navigation Corporation [2008] EWHC 1186 (Comm); see further, Peekay Intermark Ltd v ANZ Banking Group Ltd [2006] EWCA Civ 386; [2006] 2 Lloyd's Rep 511.))

Nor are contractual claims for breach as likely as might be supposed. Commercial contracts are not meant to be litigated, but to regulate matters of performance and discharge autonomously. Potential claimants may be stopped short by robust exemption or force majeure clauses. Or their rights may be put beyond doubt by events of default clauses and warranties, or reinforced by indemnities, making any defence unsustainable. Such drafting obstacles may not always prevent litigation, given the creativity of lawyers, and what may be at stake. But they

make it harder, more costly, and more risky, so deterring claimants and persuading defendants to capitulate.

There are also special incentives to resolve disputes arising from the downturn commercially, by negotiation. Where this cannot be achieved there may be incentives to resolve the dispute without the full panoply of litigation, by arbitration (perhaps post-dispute arbitration) or other alternative means. One reason is that one or both parties may be financial institutions reluctant to see their differences aired in public in court. The sensitivity of the commercial information involved, and the likelihood of media attention, may incline such litigants to resolve their differences by negotiation. Especially in the financial markets, the inter-connectedness of business provides two further reasons for preferring the amicable settlement of disputes. The need to preserve commercial relations for the sake of future business may incline the parties towards compromise, without the hostility engendered by litigation. The inter-relatedness of the markets also suggests that the roles of the same two parties may be reversed in different disputes, the potential claimant in one being the potential defendant in another. Where cases involve claims and counter-claims between financial institutions there is a natural tendency to seek an accounting solution by means of a negotiated set-off.

A negotiated solution is especially attractive because of the degree to which litigation in the present climate may itself impair the parties' commercial effectiveness. A feature of the downturn is the pervasiveness of its effects. The scale of the crisis, and the number of transactions affected, makes its impact systemic, or at least ubiquitous. This has particular consequences. A party faced with default by numerous counterparties is more likely to resolve its problems by negotiation. It is one thing to pursue a single claim, quite another to embark on multiple actions involving different parties, which may come to dominate a company's business. The widespread nature of the crisis also means that the claimant in one dispute may be the defendant in another. Many potential claimants may themselves have defaulted in other transactions. To pursue and defend both actions would be to fight on two fronts. The cost and complexity of such litigation, consuming a company's business, is deeply unattractive. Companies may be willing to litigate one or even several matters where this represents a sound investment, and the benefit outweighs the cost, but not to amend their business plan by devoting their resources largely to pursuing and

defending claims.

This is not to ignore the recent increase in proceedings in London. But the rise in claims is compatible with suggesting that most will be resolved by negotiation. Whatever the incentives to achieve a commercial solution a claimant may initiate proceedings to preserve its position. To commence proceedings was once regarded as a hostile act, as a last resort as likely to impair compromise as encourage it. But, at least in Europe, Articles 27 and 28 of the Brussels Regulation compel the parties to initiate proceedings early – indeed, prematurely – by giving priority in parallel proceedings to the court first seised. Many of the claims recently initiated in the London Commercial Court (as in other Member States) may have just this pre-emptive purpose. Whether the presence of such holding claims will impair the chances of reaching a commercial solution in particular cases remains to be seen. But to sue is not at odds with a desire for compromise.

To say that fewer disputes have gone to law than many expected requires, however, three important qualifications. First, pre-dispute legal business is booming. It is apparent that many commercial parties have sought legal advice to establish their rights and liabilities in the wake of the downturn. Secondly, many companies, both sellers and investors, have set aside funds to cover the costs of potential litigation. In that sense, the legal impact of the downturn is already significant. Thirdly, what will happen next is unclear. There will be cases in which any hope of a commercial solution will evaporate as positions harden. There will be others in which such a solution is impossible because the legal position is uncertain. There may even be some where the parties' differences turn on questions of private international law. Such cases may yet become contested actions before courts or arbitrators. As this suggests, it is too early to tell what the true consequences of the downturn will be, for cross-border litigation, and for the conflict of laws. But there is growing awareness amongst practitioners that a new phase is about to begin, as it becomes clearer which disputes can be resolved amicably and which cannot – a phase of adjudication not compromise. In that sense, the story of the downturn's impact on cross-border disputes cannot yet be written.

6. Private international law and the downturn

It is important to ask whether cross-border disputes will increase with the downturn. Any rise in litigation or arbitration matters to the parties, and to the arbitrators, courts and lawyers whose business is adjudication. It has a public policy dimension, concerning the use of judicial resources. It also has economic effects. The cost of litigation and the ability of parties to recover their commercial losses are financial consequences of the downturn as much as those more commonly reported. The legal impact of any rise in cross-border cases may also be significant, not least for private international law. Litigation creates law. The more issues there are before the courts, the more the law evolves at the hands of the judges. It is perverse to wish for more cases. But when they arise old questions are answered, and new ones posed.

In the end, however, the importance of the downturn for private international law does not depend entirely on the volume of cross-border disputes. It does not turn alone on the work load of courts and arbitrators, or any increase in contentious conflicts questions, or even on whether the parties disagree at all. Which court has jurisdiction, which law governs, whether a judgment is enforceable, whether an injunction is available, are matters which may frame the parties' negotiations, or underpin the advice of lawyers to their clients. The rules of private international law have a special importance in cross-border relations in establishing both the procedural position of the parties and their rights and obligations – matters of importance whether or not they are contested, and whether or not they go to court or arbitration. One way or another, private international law has a role in managing the effects of the downturn. One way or another, that role may be central.

I am grateful to Sarah Garvey of Allen & Overy, who kindly shared her views on these issues, but is absolved from responsibility for the opinions here expressed. The following remarks are concerned only with private litigation, not with proceedings initiated by regulators.

French Courts Reject Anti-Arbitration Injunctions

The Paris first instance court rejected applications for anti-arbitration injunctions in two different cases in January and March 2010.

A full report of these judgments by Alexis Mourre and Alexandre Vagenheim over at the *Kluwer Arbitration Blog* can be found here.

It is important to notice that these applications were dismissed on grounds which are peculiar to arbitration law, namely the negative effect of the *Kompetenz-Kompetenz* principle. Under French law, this principle gives priority to arbitrators to rule on their own jurisdiction and thus prevents courts from assessing whether arbitrators have jurisdiction (subject to a very narrrow exception). It follows that it is hard to see how a French court could issue an anti-arbitration injunction, since it may not assess whether arbitrators wrongfully retained jurisdiction.

In court proceedings, there is no comparable principle (though the combination of the principle of mutual trust and of the *lis pendens* rule leads to a similar result when the Brussels I Regulation applies). Thus, the power of French court to issue injunctions enjoining a party from suing before a foreign court remains an open issue.

Journal of Private International

Law Colloquium 2010 – Call for papers

The second biannual colloquium will be held on 1 October 2010, in Brisbane, Queensland, Australia and will be hosted by the SocioLegal Research Centre at Griffith University.

The colloquium takes the form of a roundtable discussion in which participants present and discuss their papers, which will be pre-circulated. Participants will be invited to submit their papers for publication to the *Journal of Private International Law*, subject to the Journal's normal refereeing process.

There are a small number of places on the program which may be filled by the outcome of this call for papers, subject also to a reviewing process.

If you are interested in presenting a paper at the colloquium, please contact Professor Mary Keyes, m.keyes@griffith.edu.au before 1 June 2010.

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (3/2010)

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

This issue contains *inter alia* some of the papers presented at the Brussels I Conference in Heidelberg last December. The other papers were published in the previous issue.

Here is the contents:

- ***Paul Oberhammer***: "The Abolition of Exequatur"

The Commission's Report on the reform of the Brussels Regulation points out that "the abolition of the exequatur procedure in all matters covered by the Regulation" is the "main objective of the revision of the Regulation". In this context, the Green Paper raises the following two questions: "Are you of the opinion that in the internal market all judgments in civil and commercial matters should circulate freely, without any intermediate proceedings (abolition of exequatur)? And in that case, are you of the opinion that some safeguards should be maintained in order to allow for such an abolition of exequatur? And in that case, which ones?"4 In the following discussion, I will try to answer these questions. As the problem is multifaceted, I can do so only in a very sketchy fashion.

- ***Andrew Dickinson***: "Provisional Measures in the "Brussels I" Review – Disturbing the Status Quo?"

Art. 31 of the Brussels I Regulation provides: "Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter." This provision closely mirrors Art. 24 of the Brussels and Lugano Conventions. Sitting (and, perhaps, partly hidden from view) between the provisions concerning, on the one hand, substantive jurisdiction and, on the other, the recognition and enforcement of judgments, the treatment of provisional measures attracted very little attention in the early history of those Conventions, being fleetingly considered in each of the official reports. That Art. 31 emerged intact from the process leading to the conversion of the Brussels Convention into a Community Regulation at the turn of the century is, however, surprising for the following reasons. First, as the Recitals to the Regulation emphasise, the predominant concern of the Community legislator was to adopt "highly predictable" rules of jurisdiction "founded on the principle that jurisdiction is generally based on the defendant's domicile". Art. 31 achieves neither objective. The delegation to national rules of jurisdiction (including rules of the kinds prohibited by Art. 3) creates a non-uniform

landscape in which it is not possible for litigants to determine on the basis of the Regulation alone whether a particular court is competent to grant provisional measures. Secondly, the Commission itself in its 1997 Proposal for a Council Act establishing a revised Convention on jurisdiction and judgments had suggested replacing Art. 24 with a narrower provision, limiting the exorbitant power to grant provisional including protective measures (as defined) to cases of urgency in which the measure in question would be enforced within the territory of the State granting it. Thirdly, as the Commission noted in the explanatory memorandum accompanying its initial proposal for the Regulation in 1999, the Court of Justice (ECJ) had in the previous year been faced with two important references concerning Art. 24 of the Brussels Convention (Van Uden v. Firma Deco Line and Mietz v. Intership Yachting). In those decisions, the ECJ had recognised Art. 24 as an anomalous provision whose propensity to disturb the scheme established by the Brussels Convention needed to be curtailed. In response, the Court revisited Art. 24's place in the jurisdictional scheme established by the Convention and reshaped it in ways that the Court found to be implicit in its wording and objectives but which are not readily apparent from a study of the text alone. A codification of some aspects, at least, of these rulings therefore appeared desirable. The need for caution in applying Art. 31 of the Regulation and its counterpart in Art. 31 of the Lugano II Convention (the successor instrument to the Lugano Convention) is highlighted by the commentary in the Heidelberg Report on the functioning of the Brussels I Regulation, in the Commission's recent Report and Green Paper on the review of the Regulation and in the Explanatory Report on the Lugano II Convention by Professor Fausto Pocar. Although, for rather unsatisfactory reasons, the text of Art. 31 has been left intact in the Lugano II Convention, its revision is long overdue and this should be one of the objectives of the Brussels I review. By way of background, this article considers, briefly, the ECJ's decisions in Denilauler, Van Uden and Mietz (Section II.) and the proposals advanced by the authors of the Heidelberg Report and the Commission (Sections III. and IV.) before turning to address the issues raised by Art. 31 in its present form and possible solutions (Section V.).

- ***Stephan Rammeloo***: "Chartervertrag cum annexis – Art. 4 Abs. 2, 4 und 5 EVÜ" – the English abstract reads as follows:

October 6, 2009, the ECJ gave interpretative rulings in case C-133/08 on Article

4 of the EC Convention on the Law Applicable to Contractual Obligations (Rome, 1980). The questions in preliminary proceedings centered round the applicable law to a charter-party contract cum annexis in the absence of choice by the parties ("objective proper law test"), the seperability of the contract, and the connecting criteria of Article 4, subsection 4 in relation to subsections 1, 2 and 5. The main proceedings and the essential observations of the ECJ judgment are followed by a critical analysis as well as some considerations on its potential effects on the interpretation of Article 4 (objective proper law test) and Article 5 (contract on the carriage of goods) of EC Regulation 593/2008 which on 27 December 2009 replaced the 1980 Convention.

- ***Florian Eichel***: "Inhaltskontrolle von AGB-Schiedsklauseln im internationalen Handelsverkehr" – the English abstract reads as follows:

This essay discusses a recent decision of a German Oberlandesgericht (Court of Appeal) which denied enforcement of a US arbitral award on the ground of Art. V (1)(a) New York Convention (NYC). The court deemed a B2B-arbitration clause invalid for substantive unconscionability (s. 307 German Civil Code – BGB). The clause was contained in a Dutch-German franchise form and determined New York as place of arbitration. The essay argues that substantive unconscionability may not simply be based on the remoteness of the place of arbitration from the weaker party's domicile. Rather, in considering the validity of the clause a court should follow a twofold examination: First, it has to consider the formal unconscionability by means of s. 305c (1) BGB. According to this provision, a clause is invalid if it is of a surprising character, i.e. in no way connected to the negotiations or the execution of the contract. The reference to s. 305c (1) BGB is permissible even under the regime of the NYC as the latter only provides formal requirements for the arbitration agreement itself, but not for the procedural agreement in question designating the place of arbitration and the lex arbitri. If the party fails to prove the surprising character, one can in a second step deem the clause unconscionable pursuant to s. 307 BGB. However, this verdict requires a thorough examination as to whether the arbitral procedure in a whole, and not just the place of arbitration, deprived the defendant of his day in court.

- ***Reinhold Geimer*** on the judgment of the ECJ of 11 June 2009

(C-564/07) as well as the decisions of the German Federal Court of Justice of 5 March 2009 (IX ZB 192/07) and of 20 January 2009 (VIII ZB 47/08): "Einige Facetten des internationalen Zustellungsrechts und anderes mehr im Rückspiegel der neueren Rechtsprechung"

- ***Nina Trunk:*** "Anwendbarkeit der Wanderarbeitnehmerverordnung auf die Haftungsbefreiung bei Arbeitsunfällen" – the English abstract reads as follows:

In its ruling VI ZR 105/07 of 15th July 2008 the German Federal Court of Justice had to decide on a case, where an employee of a dutch employer has been injured in a car accident caused by his driving German colleague on a weekend visit to Germany. The crucial question is, if in this case the German regulations, which determine that the civil liability of the employer and/or its employees is excluded in cases of work accidents, applies or if Dutch law, which does not know a corresponding exclusion of liability, is applicable. This recension deals with the mandatory Character of the provisions of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community and their applicability. In accordance with the decision of the German Federal Court of Justice it comes to the conclusion that concerning the question of exclusion of liability, Dutch law applies and explains why this result is compatible with the freedom of services provided in Art. 49 EU Treaty.

- ***Peter Behrens***: "Anwendung des deutschen Eigenkapitalersatzrechts auf Scheinauslandsgesellschaften" – the English abstract reads as follows:

This is the first decision of a German insolvency court applying the new German legal rules on shareholder loans in case of insolvency of a pseudo-foreign company (i.e. an English private company limited by shares doing business exclusively in Germany). The court based its jurisdiction correctly on Article 3(1)(1) of the European Insolvency Regulation (EIR), because the debtor company's centre of main interests was clearly situated in Germany. The reasoning on the private international law issues was less convincing however. The court simply applied German law and held the insolvent company's shareholder liable towards the insolvent company for repayment of a sum which the shareholder had received from the company as redemption of a loan granted by the shareholder to the company. The redemption had occurred in

2007 at a time when the company was already insolvent. Until October 2008, the shareholder-creditor's liability towards the company resulted from relevant provisions in the GmbHG (Limited Liability Companies Act). Since November 2008, these provisions are, however, transferred to the Insolvency Act and they now establish the voidability of the redemption of a shareholder-creditor's loan which occurred within one year before the petition for insolvency proceedings was filed. This change of the law may have had an impact upon the highly disputed characterisation of a shareholder-creditor's liability towards an insolvent company. Before November 2008, it could have been characterised as a matter of company law which should be subject to the "proper law" of the company (in this case: English law). Since November 2008, there may be better reasons for a characterisation as a matter of insolvency law. The court preferred the latter characterization for both, the old and the new law, without justifying its position by adequate reasoning and, what is more, without taking any notice of European Union law. According to Article 4(2)(m) EIR, voidability of a transaction is clearly a question of insolvency law, but Article 13 EIR limits the application of Article 4(2)(m) EIR under certain circumstances which may or may not have been present in this case. The court's decision therefore suffers from insufficient reasoning.

- ***Hans Hoyer*** on the judgment of the Higher Regional Court Munich of 5 December 2008 (33 Wx 266/08): "Nachlassverwaltung durch Betreuer im deutsch-österreichischen Rechtsverkehr""
- ***Philipp Sticherling***: "Türkisches Erbrecht und deutscher Erbschein" – the English abstract reads as follows:

The author discusses a decision of the Braunschweig district court (Landgericht) in a proceeding concerning the grant of an inheritance certificate. The bequeather has been an Turkish citizen with movable estate in Germany. The District Court has decided that German courts also have jurisdiction for the grant of the inheritance certificate. According to the decision of the District Court, the estate agreement in the consular agreement of 28 May 1929 between the German Empire and Turkey does not command the exclusive jurisdiction of Turkish courts for proceedings concerning the grant of inheritance certificates. The decision has been taken under the provisions of the Act on Voluntary Jurisdiction (Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit – FGG) that was in effect until 31 August 2009.

With the Act on the Reform of the Act on Voluntary Jurisdiction, as from 1 September 2009 the Act on Proceedings in Family Matters and in Matters of Voluntary Jurisdiction (Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit – FamFG) has replaced the Act on Voluntary Jurisdiction. The question of international jurisdiction remains relevant under the new legislation. The author shows the differences between the new procedural rules under the reformed act and the old Act on Voluntary Jurisdiction.

- ***Zeynep Derya Tarman***: "Das neue Staatsangehörigkeitsgesetz in der Türkei" – the English abstract reads as follows:

The article will firstly give an overview of the new Turkish Nationality Act from 29.5.2009, with an emphasis on the reasons for the need of this new Act. Secondly, it will analyze the provisions of the new Turkish Nationality Act pertaining to the acquisition and loss of nationality, and thirdly it will give an insight to the multiple nationality under the new code.

- ***Hakan Albas/Serdar Nart*** on the acquisition of real estate by non-residents in Turkey: "Neues zum Erwerb von Grundstücken durch Ausländer in der Türkei"
- ***Christel Mindach***: "Weiterentwicklung des Zivilrechts und Internationalen Privatrechts in Russland" – the English abstract reads as follows:

The "Web portal of Private International Law of Russia" published a range of documents for further development of civil legislation including private international law of Russian Federation. The initiative goes back to two Decrees of the Russian President No. 1108 and No. 1105, dated July 18th, 2008. These Presidential Decrees obliged the "Council for Codification and Improvement of Civil Legislation" jointly with the "Research Centre for Private Law" both attached the President, to prepare a draft for development of civil legislation up to June 1, 2009. This article gives first information especially about this part of draft, dealing with amendment of some provisions of private international law.

- ***Sergej Kopylov/Marcus A. Hofmann***: "Das Verfahren vor dem

Wirtschaftsgericht (Arbitragegericht) der Russischen Föderation" – the English abstract reads as follows:

This paper deals with a presentation of the proceedings before the national economic court (arbitration court) of the Russian Federation (RF) in the first instance. Frequently, a Russian and a foreign business partner contract under Russian law and agree on a venue in Russia. Especially in times of financial crisis, the contractors are trying – whether because of liquidity or economic reasons – to turn away from the long-term contracts that have often been entered into before the crisis, which is usually only possible by judicial decision. As a result, the European companies that are active in the Russian Federation are commonly sued by their Russian partners. The emphasis of this paper is based on a view from the perspective of the German defendants, describing the process and details of the procedure and explaining a useful approach in cases where a defendant finds himself before the arbitrage court.

- ***Peter Kindler*** on the monograph by Günther H. Roth, Vorgaben der Niederlassungsfreiheit für das Kapitalgesellschaftsrecht. Exigences de la liberté d'établissement pour le droit des sociétés de capitaux, 2010 (including a French translation): "'Cadbury-Schweppes': Eine Nachlese zum internationalen Gesellschaftsrecht"
- ***Heinz-Peter Mansel*** on the 80th birthday of Richard M. Buxbaum: "Richard M. Buxbaum zum 80. Geburtstag"
- ***Erik Jayme/Carl Friedrich Nordmeier*** on the 2009 meeting of the German-Lusitanian lawyers' association in Brasília: "Grenzüberschreitende Dimensionen des Privatrechts – Tagung der Deutsch-Lusitanischen Juristenvereinigung in Brasília"
- ***Zou Guoyong:*** obituary in honour of Han Depei

Pending Cases at the U.S.

Supreme Court

As the current term of the United States Supreme Court winds-down, two decisions remain outstanding that are of some interest to the readers of this site.

The first pending case is *Abbott v. Abbott*, which was argued in January. As previewed at length on this site (here and here), *Abbott* is a rare family-law case before the Supreme Court involving an American child taken to Texas from his home in Chile by his mother, without his father's consent. Under the 1980 Hague Convention on the Civil Aspects of Child Abduction, children must be automatically returned to the country from which they are taken, so long as the removal was "in breach of rights of custody." The Supreme Court is asked to decide whether the father had a "right of custody" under the treaty, because at the time of the divorce the Chilean family court—and Chilean law as a matter of course—entered a "*ne exeat*" order prohibiting either parent from removing the child from the country without the consent of the other. A discussion of the argument, and the issues raised by the justices, have been previously discussed on this site here.

The second pending case is *Morrison, et al., v. National Australia Bank, et al.* (08-1191), which was argued in March. As some commentators have "read[] the tea leaves" in *Morrison*, it looks as though the United States Supreme Court could be on the verge of deciding one of the more significant cases on the presumption against extraterritoriality in recent memory, and restricting the prescriptive jurisdiction of the Securities and Exchange Act of 1934 in the process. The case involves a class action brought by foreign plaintiffs against a foreign stock issuer on a foreign exchange for alleged fraud that occurred on foreign soil. At oral argument, the justices strongly questioned whether the Act should extend to reach such conduct, and gave strong indications that it was prepared to apply the territorial limitations of *Hoffman-La Rouche v. Empagran* to the securities fraud context.

The case at one time had an American investor in it, but as it reached the Court, only three Australians who bought stock in that country's largest private bank, and did so on Australia's stock market, remained involved as plaintiffs. That set of facts alone seemed to bother the Justices. "This case," Justice Ruth Bader Ginsburg said, "has Australia written all over it.…Isn't the most appropriate

choice of law that of Australia, not the United States? . . . What conflict of laws is all about is you have two jurisdictions, both with an interest in applying their own law, but sometimes one defers to the other." Other justices, too, acknowledged that conflicts is the root of this issue. Justice Alito asked the plaintiffs to "assume that on the facts of this case they could not prevail under Australian law in the Australian court system. Then what United States interest is there that should override that?" According to Justice Scalia, plaintiffs "are talking about a misrepresentation … made in Australia to Australian purchasers; it ought to be up to [Australia] to decide . . . whether there has been a misrepresentation, point one; and whether it's been relied upon by the … plaintiffs, point two . . . And here you are dragging the American courts into it."

Others, like Justice Breyer, had also keenly noticed the fact that the governments of Australia, Britain and France had submitted briefs urging the Court not to let American courts enforcing U.S. law tread on other countries' sovereign territory and right to regulate their internal markets. Defendants' lawyer built-on these sentiments at argument, charging that the plaintiffs were trying to use their lawsuit to carry off "a massive transfer of wealth" outside of Australia, involv[ing] "the kind of financial imperialism" that seriously offends foreign governments. Indeed, most of the Justices reacted with more sympathy to the foreign governments' submissions than they did to those of the U.S. government's lawyer at the lectern. The full transcript of the argument is available here.

Unlike *Abbott*, the outcome of *Morrison* seems predictable—that the prescriptive reach of the Act will be pulled-back—but there remains a live issue of whether the Court would put up a bar only to investors' lawsuits, or whether it will also restrict the Securities and Exchange Commission's powers to reach trans-national frauds. The federal government tried to persuade the Court to leave open its ability to enforce the Securities Exchange Act in some trans-national fraud cases—if it decides to reach that question. Both decisions are expected no later than June.

Publication on Oregon's New Choice-of-Law Codification for Torts

Professor Symeon Symeonides, principal draftsman of Oregon's new choice-of-law codification for torts and other non-contractual claims, which went into effect on January 1, 2010, published an article on these rules. This is the first codification of this interesting but difficult subject in a common-law state of the United States, and the second one after the 1991 codification of the civil-law state of Louisiana. The article is entitled *Choice-of-Law. Codification for Torts Conflicts: An Exegesis* (Oregon Law Review 2010) and can be downloaded on SSRN.

Issue 2010/1 Nederlands Internationaal Privaatrecht

The first issue of 2010 of the Dutch PIL journal *Nederlands Internationaal Privaatrecht* includes the following contributions:

Xandra Kramer – Editorial (Lissabon, Stockholm, Boek 10 BW en andere IPR-beloften voor 2010), p. 1-2

J-G Knot – Europees internationaal erfrecht op komst: het voorstel voor een Europese Erfrechtverordening nader belicht (on the Proposal for a European Regulation on Succession and Wills), p. 3-13; here is the English abstract:

> *On 14 October 2009 the European Commission published a proposal for a regulation on succession. This new instrument will harmonise all private international law rules regarding succession, viz. jurisdiction, applicable law and recognition and enforcement, on a European Union level. Furthermore, the Regulation creates a European Certificate of Succession. The rules of this*

Regulation will, after its entry into force, replace the current Dutch private international rules on succession. The Regulation grants general jurisdiction to the courts (a term which entails judicial as well as non-judicial authorities, such as notaries) of the Member State in which the deceased had his or her last habitual residence. Under certain circumstances it is possible to refer to courts of a Member State whose law has been chosen and who are better placed to hear the case. Courts may also have jurisdiction based on the fact that property of the deceased is located in that Member State, if the last habitual residence of the deceased was not in a Member State. The law applicable to the whole of the succession is that of the Member State of the last habitual residence of the deceased. A testator can also expressly choose the application of the law of his or her nationality to the succession of the estate. In this article the rules of the proposal are examined extensively. Differences between the proposal and the existing Dutch rules on private international law of succession are commented upon. One of the biggest changes will be that the different approach with regard to the devolution and the administration of estates in private international law, as currently employed in the Netherlands, will disappear under the European Regulation. The conclusion reads that, notwithstanding the fact that the proposal still needs several improvements, the introduction of a European Succession Regulation will in my opinion contribute to an easier and more effective administration of cross-border successions within Europe.

S.F.G. Rammeloo – Op de valreep… Eenvormige interpretatie door Hof van Justitie EG van artikel 4 EVO (case note on ICF/MIC, ECJ C-133/08), p. 20-26); here is the English abstract:

On 6 October 2009, the ECJ gave an interpretative ruling in case C-133/08 on Article 4 of the EC Convention on the Law Applicable to Contractual Obligations (Rome, 1980). The questions in the preliminary proceedings relate to the applicable law to a charter-party contract cum annexis in the absence of choice by the parties ('objective proper law test'), the seperability of the contract, and the connecting criteria of Article 4, subsection 4 in conjunction with subsections 1, 2 and 5. The main proceedings and the essential observations of the ECJ judgment are followed by a critical analysis as well as some considerations on its potential effects on the interpretation of Article 4 (objective proper law test) and Article 5 (contract on the carriage of goods) of EC Regulation 593/2008 which on 27 December 2009 replaced the

1980 Convention.

L.R. Kiestra – De betekenis van het EVRM voor de internationale gerechtelijke vaststelling van het vaderschap (case note on three Dutch judgments concerning 8 ECHR and the judicial establishment of paternity), p. 27-30; here is the English abstract:

This case note discusses three Dutch cases concerning the meaning of Article 8 ECHR for the judicial establishment of paternity ('gerechtelijke vaststelling van het vaderschap'). All three cases concerned a mother who wanted to establish the paternity of a man over her child(ren). In all three cases a foreign law was applicable to the situation, according to the relevant Dutch choice of law rules ('Wet conflictenrecht afstamming'). Under the applicable foreign laws in the three cases, it was not possible to judicially establish paternity over the child(ren). The Dutch judge had to decide whether this would result in a violation of the ECHR and consequently whether the applicable law had to be set aside on the basis of
the public policy exception. In two of the three cases, the judge came to the conclusion that the normally applicable foreign law had to be set aside, while in one of the cases the judge decided that this was not
necessary. This case note discusses the different outcomes in these three cases and examines a number of issues related to the possible impact of the ECHR on private international law. These include whether or not the ECHR can in fact be at all applicable to such private international law matters and the relationship between the public policy exception and the ECHR.

Richard Fentiman – Book presentation: 'International Commercial Litigation', Oxford University Press 2010, p. 31-32.

Trevor Hartley – Book presentation: 'International Commercial Litigation: Text, Cases and Materials on Private International Law', Cambridge University Press 2009, p. 32-33.

Program on International Commercial Contracts in Ravenna

The Faculty of Law of the University of Bologna and the Center for International Legal Education (CILE) of the University of Pittsburgh School of Law have announced their Summer School program in International Commercial Contracts, which will take place on June 7-11, 2010 at the Ravenna campus of the University of Bologna. The Summer School aims at providing participants with an in-depth understanding of drafting, managing and litigating international contracts under different sources of law, with a focus on selected contracts that are of particular relevance in international practice. Instructors will include academics from the University of Bologna, the University of Pittsburgh, New York University, as well as academics from other top-level European and US institutions and professionals specifically involved in international contract practice. The brochure with all relevant information on applications, fees, schedules and CLE credits, is available here.