First Issue of 2010's Journal du Droit International

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

It includes three articles, but one only on private international law.

It is authored by Isabelle Barrière Brousse, who lectures at Aix Marseille University, and discusses the Impact of the Lisbon Treaty on Private international law (*Le traité de Lisbonne et le droit international privé*). The English abstract reads:

> *Since the evolution of European Community law already threatens the private international law of the Member States, will these systems survive the Lisbon Treaty ?*
>
> *Despite the weakness of the legal basis of their competence, European authorities have already affected the rules concerning choice of law and of jurisdiction in many ways, and intend to exclude the Member States from the international scene by removing their right to conclude agreements with third countries. Will the Lisbon Treaty change this ? Between the affirmation of Community competence and respect of the Member States' legal systems and traditions, the treaty's influence seems to be difficult to forecast. Nevertheless, the emphasis on the role of the States and their National Parliaments and the very objective of creating a European judicial area while respecting diversity establish implied but real limitations on the expansion of Community rules in this area.*

The *Journal* also offers four casenotes on judgments of the *Cour de cassation*, including *In Zone Brands* (Professor Sandrine Clavel) and one of the recent judgments of the Court on Franco-American parallel divorce proceedings (Johanna Guillaumé), and a casenote of the Hadadi judgment of the ECJ (Professor Louis d'Avout).

French Case on Law Governing Ownership of Paintings

On February 3rd, 2010, the French *Cour de cassation* delivered a judgment on choice of law in personal property matters. This is only the fourth time the Court has directly addressed the issue in the last hundred years.

In 2000, a French born painter living in New York city had provided the defendant with 7 of his paintings. The defendant put them on the walls of the restaurant he had just opened in New York. In 2005, the painter passed away. In 2006, the restaurant closed. The defendant then took the paintings to France to auction them.

In the summer 2007, the widow of the painter sought interim relief before a French court in order to attach the paintings before the sale. The attachment was first granted, but the auction house (Camard & associés) and the defendant applied to set aside the attachment. The French court ruled in their favour in December 2007. The widow appealed to the Paris court of appeal, which dismissed the appeal. She then appealed to the *Cour de cassation*.

The central issue was of course whether the defendant was the owner of the paintings. He could have been transfered the ownership of the paintings either in New York by a valid gift, or simply by being the possessor of the property if possession was enough to transfer ownership. Under French law, a person who holds moveable property, and thinks he is the actual owner of that property, becomes the owner of the property for that sole reason. He is, for the purpose of former art. 2279 of the French Civil Code, a "good faith possessor", and this is enough in this respect.

The *Cour de cassation* confirmed its former precedents and held that French law alone governs issues of property for moveables situated in France.

> *la loi française est seule applicable aux droits réels dont sont l'objet des biens mobiliers situés en France*

In this case, this meant that article 2279 had applied since the property had reached the French soil. The widow argued that, under American law, it was up to the beneficiary to show that he had received the paintings as a gift, and that mere possession would not transfer ownership to the holder of the property. The Cour de cassation replied that given that French law had applied since the goods had reached France, article 2279 was enough of a basis to rule that ownership had been transfered by now.

Swiss Institute of Comparative Law: Programme of the Conference on the EU's Proposal on Succession

As we anticipated in a previous post, on Friday, 19th March 2010, the **Swiss Institute of Comparative Law** (ISDC) will host **the 22nd *Journée de droit international privé***, organised in collaboration with the **University of Lausanne** (Center of Comparative Law, European Law and International Law – CDCEI). The conference will analyse the **Commission's Proposal on Succession**: **"Successions internationales. Réflexions autour du futur règlement européen et de son impact pour la Suisse"**.

Here's the programme:

Première session (09h00) – La proposition de règlement européen

Ouverture de la journée: *Christina Schmid* (director a.i., ISDC)*; Andrea Bonomi* (director, CDCEI, Univ. of Lausanne)

Chair: *Lukas Heckendorn Urscheler* (Head of Legal Division, ISDC)

- *Mari Aalto* (national expert, European Commission, DG FSJ): Introduction au projet européen en matière de succession;
- *Paul Lagarde* (Univ. of Paris I): Les grandes lignes de la future réglementation européenne: l'approche unitaire et le rattachement à la résidence habituelle;
- *Andrea Bonomi* (Univ. of Lausanne): Le choix de la loi applicable à la succession;

Discussion.

Chair: *Andrea Bonomi* (Univ. of Lausanne)

- *Olivier Remien* (Univ. of Würzburg): La validité et les effets des actes à cause de mort;
- *Richard Frimston* (Partner, Russell-Cooke LLP): The scope of the law applicable to the succession, in particular the administration of the estate;
- *Eva Lein* (British Institute of International and Comparative Law): Les compétences spéciales dans la proposition de Règlement;

Discussion.

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Deuxième session (14h00) – Round Table: L'impact du futur règlement sur le droit suisse

Chair: *Andreas Bucher* (Univ. of Geneva)

- *Peter Breitschmid* (Univ. of Zurich)
- *Florence Guillaume* (Univ. of Neuchâtel) (invited)

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Troisième session (15h30) – Round Table: La reconnaissance des certificats d'héritiers

Chair: *Christina Schmid* (ISDC)

- *Andreas Fötschl* (Univ. of Bergen and ISDC)

- *Paolo Pasqualis* (notary in Venice, Council of the Notariats of the European Union – CNUE) (invited)
- *Franco del Pero* (notary in Morges)

The conference will be held in French, English and German (no translation is provided).

For further information (including fees) see the conference's programme and the registration form, available on the ISDC's website.

(Many thanks to Prof. Andrea Bonomi)

Conference on Party Autonomy in Property Law

On 27 and 28 May 2010 a conference on Party Autonomy in Property Law, organized by Erasmus School of Law and Leiden University, will be held at the Erasmus University Rotterdam, the Netherlands.

In international trade practice, the question often arises as to whether party autonomy or, more specifically, a choice of law possibility in matters of Property Law should be recommended or required. For example, can a French seller and a German buyer in a purchase agreement concerning movable or immovable assets agree that Dutch Law will be applicable in matters of ownership regarding these assets? Is party autonomy allowed or should it be allowed in other areas of Property Law, such as assignment of claims (receivables)?

This important question is not only answered differently in disparate legal systems but underneath it lie several and often conflicting legal interests. An example is the principle that legal acts in Property Law have not only an effect between the contracting parties but also against a third party.

During the Conference, these diverse aspects of 'Party Autonomy in Property Law' will be discussed by leading specialists in International Property Law. There

are four central themes:

1. General aspects of party autonomy, as seen from the perspective of Continental Law as well as of Common Law;

2. Private International (Property) Law;

3. Developments and prospects in Europe and in European Law Projects (e.g. European conflict rules for property law?);

4. Assignment in Private International Law, Financial Instruments/the Collateral Directive; Insolvency Law.

For more information on the program, speakers and to register, please click here.

RELEASE OF LAST ISSUE OF DeCITA (vol. 11)

DeCITA 11 (2009)
on international insolvency (Insolvencia internacional)

Release of the last issue of DeCITA (derecho del comercio internacional – temas y actualidades), the leading law journal on international commercial law and private international law in Latin America. The topic of this issue is international insolvency. In addition to the articles dedicated to this topic, and as usual, DeCITA offers a nourished panorama of the state of the law in different international organisations active in international commercial law.

Laura Carballo Piñeiro, Procedimientos concursales y competencia judicial internacional : anáéisi de dos conceptos clave

Louis d'Avout, Sentido y alcance de la lex fori concursus

David Morán Bovio, Secuencia de los trabajos sobre insolvencia en UNCITRAL

Beatriz Campuzano Díaz, La posición del TJCE con respecto a los problemas interpretativos que planteal el reglamento 1346/2000 en materia de insolvencia

Gioberto Boutin I, La insolvencia transfronteriza en el derecho internacional privado uniforme y en el Código Bustamente

Paula M. All/jorge R. Albornoz, La insolvencia transfronteriza en el derecho internacional privado argentino de fuente interna. Supuestos contemplados. Necessidad de reforma

Cecilia Fresnedo de Aguirre, La nueva ley uruguaya de concursos y reorganización empresarial : un importante avance en sintonía con los principios internacionales en la materia

Adriana V. Villa, El régimen de DIPr de la ley uruguaya de concursos de 2008 : sus avances con relacíon al sistema argentino actual

Luciane Klein Vieira/Carolina Gomes Chiappini, La problemática de la quiebra internacional en Brasil : ¿existen herramientas para la solucíon de conflictos internacionales ?

Among other articles on jurisprudence and development of international trade law, one should particularly noted :

Makane Moïse Mbengue, The Rise of Private Voluntary Standards in international Trade : A Brief Survey of Current Developments

The table of contents can be read here.

Dallah, Renvoi and Transnational

Law

In December, three members of the UK Supreme Court granted leave to appeal in *Dallah v. Pakistan*.

The case concerns the enforcement of an ICC arbitral award in the UK. In a nutshell, the Ministry of Religious Affairs of Pakistan had negotiated with Saudi company Dallah a contract whereby Dallah would provide services (building accomodation in particular) for Pakistani pilgrims visiting Mecca for the Hajj. But the contract was eventually signed by a Pakistani Trust which was to later on lose legal personality under Pakistani law. When the dispute arose, Dallah initiated arbitration proceedings against the Government of Pakistan.

The central issue was therefore whether the arbitral tribunal had jurisdiction over the Government of Pakistan, which was not a signatory of the contract including the arbitration clause. A distinguished arbitral tribunal sitting in Paris held that it had. Both the English High Court and the English Court of appeal disagreed and thus denied enforcement.

The debate before the English courts was and I guess will be about a variety of issues of English and international arbitration law that I will barely touch upon here, including discretion to refuse enforcement under the 1958 New York Convention or the standard of review of arbitral decisions on jurisdiction. But the case also raised a very interesting and arguably novel issue of choice of law. And it involved not only the English but also the French conflict of laws.

Choice of Law in England

The starting point of the reasoning was section 103(2)(b) of the English *Arbitration Act* 1996 , which provides that recognition or enforcement of a New York Convention award may be refused if the person against whom it is invoked proves that "*…the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made*." Section 103(2)(b) of the Act implements the second part of Article V (a)(1) of the New York Convention in English law.

In the absence of any choice by the parties, the applicable statutory provision of the forum provided that the validity of the arbitration agreement was governed by the law of the seat of the arbitration, which was Paris, France. As a consequence, the English courts applied French law to determine whether Pakistan was bound by the arbitration agreement.

Choice of Law in France

This conclusion, however, was problematic for two reasons. The first is that the arbitral tribunal had actually not applied French law in order to decide the issue. It had applied "transnational principles". Under French law, it was perfectly entitled to do so. Even in the absence of any choice of law made by the parties, Article 1496 of the French Code of Civil Procedure provides that arbitrators may apply any "rules of law" that they deem appropriate. ICC rules, which were applicable, provide the same. In other words, the English courts decided to review the decision of the arbitrators on jurisdiction pursuant to a law (French law) that the arbitrators had not meant to apply, and had no obligation to apply according to the law of the seat of the arbitration.

Furthermore, when French courts review decisions of arbitrators on jurisdiction, they do not apply French law either. For almost 20 years and the *Dalico* decision in 1993, French courts have held that arbitration agreements are not governed by any national law, and that it is only necessary to assess whether the parties have actually consented to go to arbitration. This is only a factual enquiry. No national law applies.

***Renvoi* to Transnational Law?**

So, the French and the English do not have the same choice of law rules. Is that novel in private international law? Not really. For long, conflict lawyers have advocated to take into account foreign choice of law rules in order to coordinate legal systems. For some reason, even the English call it *renvoi*. So, in this case, the issue certainly arose as to whether English courts should have considered French choice of law rules.

The question was well perceived by Aikens J. in first instance. In his judgment of August 1st, 2008, he wondered:

> *78. … Does the phrase "within the law of the country where the award was*

> *made" in section 103(2)(b) include a reference to the conflict of laws rules of that country?*

Most unfortunately, however, the two French experts had written in their Joint Memorandum:

> *"Where a French court is called upon to decide the challenge of an arbitral award rendered by a tribunal seated in France, it has not to apply French conflict of laws in order to determine whether the arbitral tribunal has jurisdiction".*

This statement was misleading. It is true that French law does not have a typical choice of law rule for the purpose of determining whether an arbitration agreement is valid. But French law cannot avoid having an answer to the question of when is an arbitration agreement valid in an international dispute. And the answer is the *Dalico* rule, which provides that no national law governs, and that it is only necessary to assess whether there was actual consent.

Indeed, the French law experts further wrote in their Joint Memorandum:

> *"Under French law, the existence, validity and effectiveness of an arbitration agreement in an international arbitration need not be assessed on the basis of national law, be it the law applicable to the main contract or any other law and can be determined according to rules of transnational law. To this extent, it is open to an international arbitral tribunal the seat of which is in Paris to find that the arbitration agreement is governed by transnational law".*

Aikens J. understood this as follows:

> *93. As I read this statement, the second sentence states a general principle of French law which permits a court to hold that an arbitration agreement is governed by a system of law other than a national law. The first sentence stipulates that, as a matter of French law, "transnational law" can be applied to issues of the specific questions of the existence, validity and effectiveness of an arbitration agreement in an international arbitration. I think that both of these principles must be regarded as French conflict of laws rules. (…)*

Aikens J.'s understanding of French private international law was perfectly sensible. There is a French choice of law rule, and it provides for the application of a non national set of rules of decision. In other words, and although Aikens J. did not say so, there was a *renvoi* from French law to transnational law.

Applying French Substantive Law?

Both Aikens J. and the Court of appeal ruled that the English court should apply French law. One reason was of course the misleading statement of the French experts on the French conflict of laws. But other reasons were offered.

For the Court of appeal, Moore-Bick LJ held that the English court "was bound by section 103(2) of the Act to apply French law to the facts as he found them" (§ 25). It is true that neither the *Act* nor the New York Convention mention *renvoi*, but none of these norms provide that courts may not apply *renvoi* either.

In first instance, Aikens J. referred to the leading commentary of Van den Berg on the New York Convention which states that conflict of laws rules of the Convention "are to be treated as uniform". Although the English judge characterized Van den Berg's book as "authoritative", it must be recognized that quite a few scholars do not share this opinion. In particular, many Swiss conflict and arbitration scholars have submitted that *renvoi* should be accepted when the choice of law rule of the seat of the arbitration is more favourable than the rule of the New York Convention, which is the case of the Swiss rule since the Swiss conflict of laws was reformed in 1987. And, indeed, given that the New York Convention includes article VII which enables states to apply more favourable regimes, it seems hard to argue that the main point of the Convention was to lay down uniform rules.

Applying French Choice of Law Rules?

So, does this mean that the English court should have taken into account French conflict of laws rules? It is submitted that, in principle, the answer is yes.

- Yet, one should not overlook the difficulties, both practical and doctrinal, that this would create.

To begin with, one would have to determine the content of those transnational rules which French courts hold applicable. Certainly, the arbitral tribunal could

do so in this case. But how easily could an English court do it? Here is what Aikens J. had to say about it:

> *93 As I read this statement, the second sentence states a general principle of French law which permits a court to hold that an arbitration agreement is governed by a system of law other than a national law. (…) The statement cannot, of course, identify any principles of "transnational law" by which to test the existence, validity and effectiveness of an arbitration agreement in an international arbitration. That, I suppose, is a matter for a "transnational law" expert; none gave evidence before the court.*

Then, it would be necessary to find a legal ground for justifying taking into account French conflict of laws rules.

The first doctrine which comes to mind is obviously *renvoi*. But the forum is an English court, and I understand that the doctrine of "total renvoi" is not widely accepted in English law. An extension to the field of arbitration would be quite a novelty.

Another solution might be to take the French rules into account for the purpose of exercising discretion under Article V of the New York Convention. Article V provides that enforcing courts "may" deny recognition to awards when one of the grounds of Article V is established. English courts have held repeatedly that this means that they have discretion to still enforce an award when such a ground can be proved. They have also ruled, including in *Dallah*, that this discretion is not open or broad, but limited. It might be appropriate to use this discretion for allowing the enforcement of an award comporting with the law of the seat of the arbitration, including its conflict of laws rules.

Annual Survey of French PIL of E-

Commerce

For several years, Professor Marie-Elodie Ancel (Paris Est Creteil Val de Marne University, formerly Paris 12) has published an annual survey on French private international law of E-commerce in the French monthly law review *Communication, Commerce Electronique*.

The survey for 2009 has just been published in the first issue of the review for 2010. It discusses a variety of issues, including jurisdiction, choice of law and foreign judgments. It reports on both cases and legislation, French and European.

Communication, Commerce Electronique is available online for lexisnexis suscribers.

BIICL event: Private International Law – Challenges for Today's Markets

The British Institute of International and Comparative Law (BIICL) hosts an event titled "Private International Law – Challenges for Today's Markets" as part of the Herbert Smith Private International Law Seminar Series at the BIICL.

What is this event about? This conference shall offer a platform to exchange views of different industry sectors on current Private International Law problems they encounter. The speakers will deal with various issues such as the difficult new rules in the Rome I regulation on financial market contracts, current Private International law problems arising in the field of Swaps and Derivatives and in the Energy sector and will look in a more general way at the pitfalls of Private International Law for business contracts between important market players.

Date: Tuesday 9 February 2010, 17:00 to 19:00

Location: British Institute of International and Comparative Law, Charles Clore House, 17 Russell Square,London, WC1B 5JP

Chair: Lord Justice Rix, Royal Courts of Justice

Speakers: 1) Joanna Perkins, Secretary to the Financial Markets Law Committee, 2) Edward Murray, Partner, Allen & Overy London; Chair of the ISDA Financial Law Reform Committee, 3) Murray Rosen QC, Partner, Herbert Smith LLP, 4) Matthew Evans, Chief Counsel, BG Group plc

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Books and Articles on Private International Law

Our readers will be interested to see that Dean Symeon Symeonides has compiled a list of books and articles published on the topic of private international law in the past year. See here for the list.

Maher v Groupama Grand Est: Law Applicable to Direct Action Against Insurer

This post was written by Mrs Jenny Papettas, a PhD Candidate and Postgraduate Teaching Assistant at the University of Birmingham.

The Court of Appeal delivered its judgment in the case of *Maher v. Groupama Grand Est*. on 12 November 2009, upholding both the decision and reasoning of Blair J. in the Queen's Bench Division. The case, concerning issues of applicable

law in a direct action against an insurer, is noteworthy because it is illustrative of the type of case that will fall to be decided under Article 18 Rome II and serves as a reminder that individual Member State reasoning on these issues is obsolete under that Regulation.

The Claimants, an English couple, Mr. and Mrs. Maher, were involved in a collision in France with a van being driven negligently by French resident M Marc Krass. M Krass was sadly killed in the collision. The claim was brought directly against M Krass' third party liability insurer. Liability and the application of French law to the substantive issues in the case were not at issue. The outstanding issues to be determined by the court were; (1) Whether damages should be assessed in accordance with French law or English law, (2) Whether pre-judgment interest on damages should be determined in accordance with French law or English law.

The Assessment of Damages

Under English law the assessment of damages in tort claims falls to be decided as a procedural issue *(Harding v. Wealands* [2007] 2 AC 1). The issue in *Maher* was whether in a direct action against the tortfeasor's insurer the issue was to be characterised as tortious, with damages being dealt with as a procedural issue under the *lex fori* or as a claim founded in contract, where assessment of damages is dealt with as a substantive issue by the applicable (French) law as stipulated in both the Rome Convention (implemented in English law by Contracts (Applicable Law) Act 1990, s.2 and Sch.1, Art.10(1)(c)) and the Rome I Regulation. Despite the Defendant's arguments that the claim only arose because it was contractually obliged to indemnify the insured and that therefore the claim was contractual in nature, the Court, citing *Macmillan Inc v. Bishopgate Investment Trust plc (No. 3) [1996]1 WLR 387,* held that it was not the claim that fell to be characterised but each individual issue. Further citing Law Com Report No. 193 (Private international Law: Choice of Law in Tort and Delict (1990)) where it was stated that direct actions against liability insurers are better seen as an extension of a tortious action (para 3.51) the Court held that since liability was admitted and the insurer therefore had to meet the tortfeasor's liability the claim was tortious with the consequence that assessment of damages was procedural and a matter for the *lex fori*.

Pre-judgment Interest

With regard to pre-judgment interest the Court found that the issue was split. The existence of a right to such interest was held to be a substantive issue whilst the calculation of any interest, being partially discretionary in nature under s 35A Supreme Court Act 1981, was procedural. However, although the quantification of interest would as a result be determined with reference to English law, s35A is flexible enough to allow the Court to apply French rates if it is necessary to achieve justice in the circumstances.

Anticipating Rome II

Article 15 of Rome II provides a lengthy list of issues which will be determined by the applicable law, largely disposing of any possibility of subjecting different issues to different laws. This extends to the assessment of damages thereby expanding the scope of Rome II into areas previously classified as procedural under the traditional English substance /procedure dichotomy. Indeed, it was acknowledged during *Maher* that the application of Rome II would have produced a different result in this regard.

However an intriguing question remains as to whether Article 18, which provides for direct actions against insurers, will be interpreted so that the injured party's choice of either the applicable law or the law of the insurance contract will govern the whole claim or simply the question of whether a direct action can be permitted. Furthermore it will be interesting to see how the issue of characterisation plays out. For example, will the insurer be able to rely on the contractual limits of the policy where the applicable law to a direct action is determined by the law applicable under the Regulation. The only certainty is that such questions will have to be answered with reference to the autonomous definitions which are yet to develop and the methods currently employed by Member State courts will be obsolete for dealing with issues which fall within the remit of Rome II.