First Issue of 2010's Revue Critique de Droit International Privé

The last issue of the *Revue critique de droit international privé* was just released. It contains three articles and several casenotes.

The first article is a survey of judicial cooperation within the European Union in civil matters (*La coopération judiciaire en matière civile dans l'Union européenne: bilan et perspectives*). It is authored by Fernando Paulino Pereira, who is in charge of judicial cooperation at the General Secretariat of the Council of the European Union. No abstract is provided, either in French or in English.

In the second article, Laurence Usunier, who lectures at the University of Luxembourg, wonders how useful the Hague Convention on Choice will be (*La Convention de la Haye du 30 juin 2005 sur les accords d'élection de for. Beaucoup de bruit pour rien ?*). The English abstract reads:

> *On June 30, 2005, the member states of the Hague Conference of Private International Law adopted the Convention on Choice of Court Agreements. At first sight, one may be disappointed by the outcome of the lengthy negotiations carried out in the Hague. As a matter of fact, there is a huge gap between the ambitions of the initial project – a worldwide convention on jurisdiction and enforcement of judgments in civil and commercial matters – and the subject matter of the Convention which was finally concluded – business-to-business choice of court agreements. However, a thorough study of the Convention scheme reveals that it is far from useless, as it seems to fulfill its main goal, as limited as it may be: making choice of court agreements as effective as possible.*

Finally, the Permanent Bureau of the Hague Conference on Private International Law has produced the third article which discusses the opportunity for the Conference of producing principles for international contracts (*Choix de la loi applicable aux contrats du commerce international : des principes de La Haye ?*). No abstract is provided, either in French or in English.

A full table of contents can be found here. The *Revue* can be downloaded here, for a fee.

The Supreme Court and Foreign Sovereign Immunity

Today, the United States Supreme Court released its decision in Samantar v. Yousef, a case involving whether a top official of Somalia was entitled to assert sovereign immunity for torture and abuse conducted by the government of Somalia on its citizens in the 1980s. The Court held that the Foreign Sovereign Immunities Act does not govern whether former foreign officials living in the United States can claim immunity from lawsuits in U.S. Courts because the text of the Act, and its legislative history, led to the conclusion that the law was not meant to protect individuals. Rather, the Act was limited to states and their agencies or instrumentalities, which, in the Court's view, did not include natural persons.

While this decision might be read to open United States courts for suits against foreign officials, the Court noted that such officials my enjoy immunity under the common law or "other valid defenses" to be examined by the district court on remand. Such cases will now provide opportunities for the United States government to offer their views on immunity, as did the United States government before the adoption of the Act. As such, the Obama Administration, and future administrations, will be more concretely involved in determining the metes and bounds of official immunity in United States courts.

Limitation Period for Enforcing Foreign Arbitration Award

In *Yugraneft Corp. v. Rexx Management Corp.*, 2010 SCC 19 (available here) the Supreme Court of Canada has upheld the decision of two lower courts that the plaintiff's claim to enforce a Russian arbitration award was brought after the expiry of the applicable provincial limitation period.

Following a contractual dispute, Yugraneft commenced arbitration proceedings before the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation. The arbitral tribunal issued its final award on September 6, 2002, ordering Rexx to pay US$952,614.43 in damages to Yugraneft. Yugraneft applied to the Alberta Court of Queen's Bench for recognition and enforcement of the award on January 27, 2006, more than three years after the award was rendered.

The court was required to interpret article 3 of the New York Convention, which provides that recognition and enforcement shall be "in accordance with the rules of procedure of the territory where the award is relied upon". This raised an issue in Canadian litigation since the Supreme Court of Canada has held (in *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022) that limitation periods are substantive and not procedural. The court rightly concludes that this does not mean that the forum's limitation period cannot be applied to the enforcement action (paras. 18-29).

The remainder of the decision deals with what the limitation period is under Alberta law. The plaintiff attempted to convince the court to apply a ten-year period, applicable to a "claim based on a judgment or order for the payment of money" (para. 43). The court, based on the clear wording of the statute, had to conclude that an arbitration award did not fall within this language (para. 44). As a result, the claim was governed by the general two-year period and so was, on the facts, time barred (para. 63).

The court does suggest that the two-year time period will not start to run until the plaintiff discovers, or should have discovered, that the defendant has assets in the place where enforcement is sought (para. 49). This fact is not strictly part of the

cause of action. Still, this statement, if accepted as correct, should provide some comfort in the face of the relatively short two-year period. However, this statement draws in part on the specific language of s. 3(1)(a)(iii) of the Alberta limitation statute, which deals with knowing whether a proceeding is "warranted" (see para. 61). If so, the analysis could be different under a statute that did not have this specific language as part of the test of discoverability (see for example the language in s. 5(1)(a)(iv) of the Ontario limitation statute).

This area would benefit from a clear legislative solution, namely a provision containing an express limitation period for claims on foreign arbitration awards. Such a period should, in recognition of the issues involved, be longer than the province's general limitation period.

Reminder Conference 'Civil Litigation in a Globalizing World'

On 17 and 18 June 2010, the Schools of Law of Erasmus University Rotterdam and the University of Maastricht (the Netherlands) will jointly organize a conference devoted to the subject "Civil Litigation in a Globalizing World; a Multidisciplinary Perspective".

Globalization of legal traffic and the inherent necessity of having to litigate in foreign courts or to enforce judgments in other countries considerably complicate civil proceedings and access to justice. This triggers the debate on the need for harmonization of civil procedure. In recent years, this debate has gained in importance because of new legislative and practical developments both at the European and the global level. These developments, amongst others the bringing about of the ALI/UNIDROIT Principles of Transnational Civil Procedure (2004) and some recent European Regulations introducing harmonized procedures, as well as problems encountered in the modernization of national civil procedure and in attempts for further harmonization, require deliberation.

Papers will be presented by renowned speakers from the perspectives of legal

history, law and economics, policy, private international law and private law. European and global projects in the field of harmonization of civil procedure will be discussed by experts involved in those projects. Furthermore, national papers on specific developments, problems relating to or views on harmonization of civil procedure will be presented by experts from that jurisdiction.

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

ASADIP (American Association of Private International Law) and CEDEP co-organize the 2nd conference on Arbitration in Latin America

CLA – CONFERENCIA LATINOAMERICANA DE ARBITRAJE – 10 – 11 de junio de 2010 – Asunción, Paraguay

On the 10th and 11th of June, the II Latin American Conference on Arbitration will be held in the city of Asunción, organized by the CEDEP with the support of the American Association of Private International Law.

Following, on June 12th, at noon, a meeting will take place, regarding "Contemporary Management Issues in International Arbitration and Dispute Resolutions Practices", organized in association with The Law Firm Management Committee of the International Bar Association, and whose agenda and direction will be in charge of Norman Clark, Head of the Law Firm Management Committee

of the IBA.

Likewise, on Saturday 12 a “pre-moot” will be held, for Latin American students, organized jointly with the Moot Madrid 2010, with the support of the Willem C. Vis International Commercial Arbitration Moot of Vienna.

In this year’s Conference themes regarding commercial and investment arbitration will be addressed, for the purpose of updating concepts, regulations and arbitral practices and bring them to discussion to the hands of arbitrators, academics and lawyers with experience on international arbitration.

COM(2009)154 final in Spanish

Just a brief post to report a “minor” error in the Spanish version of the Proposal for a Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession: see art. 27.2 in Spanish

“En particular, la aplicación de una disposición de la ley designada por el presente Reglamento *solo podrá considerarse contraria al orden público del foro si sus disposiciones relativas a la reserva hereditaria son diferentes de las disposiciones vigentes en el foro”.*

and compare it with English (French, Italian…) versions:

“In particular, the application of a rule of the law determined by this Regulation *may not be considered to be contrary to the public policy of the forum on the sole ground that its clauses regarding the reserved portion of an estate differ from those in force in the forum”.*

But, who knows, may be there is a way to reach a common understanding of the texts.

Michaels on the U.S. Conflict ofLaws

Ralf Michaels, who is a professor of law at Duke University School of law, has posted After the Revolution – Decline and Return of U.S. Conflicts of Laws on SSRN.

> *Scholars in the US have become uninterested in conflict of laws, at least in the core issues that spurred the conflict of laws revolution, especially questions of method and areas of tort and contract law. Proposals for a new (third) Restatement have not yet led very far. By contrast, new interest comes from the fringes: special political questions and interdisciplinarity. As to the first, I use the example of same?sex marriages to discuss the extent to which discussions about politics are inseparably linked with discussions over conflict of laws. Conflict of laws is here not a mere additional field in which policy interests clash; rather, conflict of laws is central to these clashes themselves. As to interdisciplinarity, I discuss (drawing on an issue of Law & Contemporary Problems co-edited with Karen Knop and Annelise Riles, Vol. 71, Summer 2008) the new interdisciplinary interest in the discipline: especially law and economics, but also political science and sociological and anthropological ideas about legal pluralism. We should welcome these developments, because the return of politics and (interdisciplinary) theory may be necessary if we want to make progress in the discipline, including if we want to start working on a new Restatement.*

The paper is forthcoming in the *Yearbook of Private International Law* 2009 (Vol. 11, pp. 11-30). It can be downloaded here.

Conference on Transnational Securities Class Actions

The British Institute of International and Comparative Law will host a conference on Transnational Securities Class Actions on July 6th, 2010.

The speaker will be Linda Silberman, the Martin Lipton Professor of Law at New York University School of Law, and a Scholar-in-Residence at Wilmer Cutler Pickering Hale and Dorr LLP.

The Conference will be chaired by The Rt Hon the Lord Collins of Mapesbury, Justice of the Supreme Court of the United Kingdom.

> *The topic is transnational securities class actions, and in particular, the problem of the "f-cubed" (foreign-cubed) securities case. The f-cubed case presents the situation where claims in state A are brought by purchasers who reside outside state A and who purchased their securities from non-state A issuers on exchanges outside state A. The United States Supreme Court has this paradigm case pending before it (Morrison v. National Australia Bank Ltd) and will shortly determine the reach of U.S. jurisdiction and application of U.S. securities law in this situation. Courts in other countries are confronting similar questions. Among the issues raised by these cases are:*
> *(1) In what circumstances should a court exercise jurisdiction over a multinational securities action? (2) Which country's securities laws should apply in such a case? (3) Will court decisions or settlements of these actions be recognized in other jurisdictions?*

Where: BIICL, Charles Clore House, 17 Russell Square, London WC1B 5JP

When: Tuesday 6 July 2010 17:30 to 19:00

More information is available here.

Recent scholarship of Professor Silberman includes an article co-authored with Stephen Choi on *Transnational Litigation and Global Securities Class-ActionLawsuits*, which can be downloaded here.

Calamita on International Parallel Proceedings

N. Jansen Calamita, who teaches at the University of Birmingham School of Law, has posted Rethinking Comity: Towards a Coherent Treatment of International Parallel Proceedings on SSRN. Here is the abstract:

The treatment of international parallel proceedings remains one of the most unsettled areas of the law of federal jurisdiction in the United States. There is no consensus in the U.S. federal courts as to the appropriate legal framework for addressing cases involving truly parallel, concurrent proceedings in the courts of a foreign country. This is true whether the U.S. court is asked to issue an anti-suit injunction or asked to stay or dismiss its own proceedings in deference to the pending foreign action. Given that the Supreme Court has never spoken to the appropriate framework to be employed in parallel proceedings cases involving the courts of foreign countries, it may be unsurprising that the federal courts are divided in their approaches. What is surprising, however, is that while the academic literature has paid considerable attention to the problem of anti-suit injunctions in international cases (i.e., cases in which a party asks a foreign court to enjoin a parallel proceeding in a U.S. court), scant attention as been paid to the alternative course available to a domestic court: the stay or dismissal of its own proceedings. Instead, the majority of the articles that have been written on the topic have merely chronicled the divergent approaches taken by federal courts in the stay/dismissal context; there has been almost no effort in these articles to propose a constitutional framework to allow the federal courts to deal with these cases.

This article seeks to begin a debate on the appropriate constitutional framework for U.S. courts faced with the question of whether to decline the exercise of their jurisdiction in international, parallel proceedings cases. Specifically, this article proposes a judicial approach rooted in and based on historic common law principles of adjudicatory comity. Principles of comity

empower the federal courts, as a matter inherent to their judicial function, to exercise discretion with respect to their jurisdiction in cases of international parallel proceedings. Moreover, in exercising this comity-based discretion, the courts are not bound by the Supreme Court's domestic abstention jurisprudence and its attendant federalism concerns, but instead are empowered to craft rules based upon the fundamental concerns both addressed by principles of comity and raised in international cases. And, as this article demonstrates, historically the courts have been able to craft sensible and workable rules for translating the theoretical concept of comity into practice in the context of federal jurisdiction.

The paper was published in the *University of Pennsylvania Journal of International Economic Law* (Vol. 27, No. 3) in 2006. It can be downloaded here.

A.G. Opinion on Pammer and Hotel Alpenhof

The Opinion of Advocate General Ms Verica Trstenjak in Case C-585 / 08 (Pammer) and Case C-144 / 09 (Hotel Alpenhof) was presented on May 18, 2010. Both cases involve the interpretation of Regulation (EC) No 44/2001. The national court asks if, in order to imply that a business or professional activity is addressed to the Member State where the consumer is domiciled within the meaning of Article 15, paragraph 1,c) of Regulation No 44/2001, access to the website in the Member State of domicile of the consumer is enough. The essential question raised is therefore how to interpret Article 15 paragraph 1 c), and specifically how to interpret the notion that a person engaged in a commercial or professional activity "directs" this activity to the Member State of domicile of the consumer, or to several Member States including that Member State. This is the first time that the ECJ will interpret the concept of "directing" trade or business to the Member State of domicile of the consumer.

As noted by the AG, interpretation of this concept is particularly important when

the direction of activity to the Member State of the consumer occurs through the Internet, since this activity has some specific characteristics which should taken into account in the interpretation of Article 15, paragraph 1 c) of Regulation nº 44/2001. The specificity of the Internet is that consumers can generally access the website of a dealer anywhere in the world; a very narrow interpretation of the concept of "direction of activity" would mean that the creation of a website could already mean that the trader directs its business to the state of domicile of the consumer. Therefore, in interpreting the concept of "directing activity", a balance must be sought between the protection of consumers entitled to special rules of jurisdiction under Regulation nº 44/2001, and the consequences for the professional, to whom these special rules of jurisdiction should only apply if he knowingly chose to direct its activity to the Member State of the consumer.

The A. G. interpretation relies initially on four pillars: the usual sense of the concept of "directing an activity"; the teleological interpretation; the historical interpretation; and the systematic interpretation of the concept. She concludes that the notion is not broad enough to cover the mere accessibility of a website. She also notes that -leaving aside the historical interpretation – in assessing the meaning of the direction of business within art. 15, the fact that the website is interactive or passive can not be an important point. On the other hand, she argues that several criteria will be relevant in assessing whether a person who pursues commercial or professional activities directs them towards the Member State of domicile of the consumer – ie, whether he invites and encourages the consumer to pass a distance contract. Among these criteria we find:

.- The information published on the site: indication of the international code before the telephone or fax number, or indication of a special telephone number for help and information of consumers abroad; information indicating the route to get from other Member States to the place where the professional operates (eg international connections by train, the names of closest airports); information on the possibility to check the availability of the stock of a commodity, or on the possibility to provide a particular service. Conversely, the only indication of an email address on the website is not enough to conclude that the merchant "directs its activity" within the meaning of Article 15, paragraph 1 c) of Regulation No 44/2001.

.- The business done in the past with consumers of other Member States: if the professional concludes traditionally distance contracts with consumers of a given

Member State, there is no doubt that he directs its activities towards that Member State. On the contrary, the conclusion of one contract with one consumer of a particular Member State will not suffice for the direction of the activity to that Member State.

.- The language used on the website – although in the twenty-fourth recital Rome I Regulation this criterion is considered not important, Ms Trstenjak nevertheless argues that the language may in some borderline cases be an index of the direction of activity towards a particular Member State or to several Member States: for example, if a website is presented in a given language, but this language can be changed. This is relevant because it is an indication that the merchant directs its activity also to other Member States. Through the possibility to change languages, the merchant shows knowingly his wish that consumers from other Member States also conclude contracts with him.

.- The using of a top level domain of a given country, primarily in cases where a trader based in a given Member State uses the domain of another Member State in which he has no seat.

– If the merchant, using the various technical possibilities offered by the Internet (eg, the email), has sought to ensure that consumers of concrete Member States are informed of the offer.

.- If a trader who has a website also directs its activities towards the Member State of domicile of the consumer through other means of publicity.

.- If the merchant explicitly includes/excludes the direction of his activity to some Member States (and actually behaves in accordance with this inclusion/exclusion).

Finally, the AG suggests the ECJ to answer that the "direction of an activity" requirement within the meaning of Article 15, paragraph 1 c) of Regulation No 44/2001, is not met merely because the website of the person who carries the activity is accessible in the State where the consumer is domiciled. The national court must, on the basis of all the circumstances of the case, judge whether the person who carries on business and professional conducts his activities to the Member State where the consumer is domiciled. The important factors for this assessment include the contents of the website, the former activity of the person conducting the trade or professional activity, the type of Internet domain used, and the using of the possibilities of advertising offered by Internet and other

media.

(The Parmer case also raises the question whether a tourist trip on board of a cargo ship can be considered as part of a contract for a fixed price combining travel and accommodation within the meaning of section15, paragraph 3 of Regulation nº 44/2001. According to Ms Trstenjak, the ECJ must answer affirmatively. She adds that in her view, the concept of a "contract which, for an inclusive price, provides for a combination of travel and accommodation" in Article 15, paragraph 3 of Regulation nº 44/2001 must be interpreted in the same way as the concept of "package" of Article 2, paragraph 1 of Directive 90/314 of 13 June 1990 on package travel, package holidays and package tours).