New Title of De Conflictu Legum Collection

Prof. Laura Carballo Piñeiro (University of Santiago de Compostela) has just published her monograph entitled *Las acciones colectivas y su eficacia extraterritorial. Problemas de recepción y transplante de las class actions en Europa* (Collective actions and their extraterritorial effectiveness. Issues on the reception and adaptation of class actions in Europe).

The book, the last one of the Collection De Conflictu Legum directed by Prof. Santiago Álvarez, deals with PIL problems of collective actions. Most of the proceedings implying collective actions take place in the United States, whilst in Europe there is still an ongoing debate concerning whether to introduce or to improve collective litigation in each single national legislation, and whether to develop some specific Community instrument on the subject (as suggested by the White Paper on damages actions for breach of the EC antitrust rules, and by the Green Paper on Consumer Collective Redress). Nevertheless, PIL problems are also of importance for European countries: an American class action may need to be served or enforced in Europe. From now on, as a result of the increasing number of States dealing with collective actions, international jurisdiction and conflict of laws issues are also at stake .

The book starts with a thorough identification of the procedural problems arising from collective actions. Prof. Carballo makes clear how the many misunderstandings on the topic -mostly due to mistrust of US-American class actions- are a hurdle in itself, not only for the introduction of collective justice in many States, but also for its practical application. Spain provides a good exemple: although collective-friendly, Spanish rules on collective actions on consumer matters lack clarity and basic guarantees are not laid down.

PIL issues follow this procedural introduction. Prof. Carballo studies if and how the international jurisdiction criteria laid down by Regulation *Brussels I* may apply when the action is collective; the application of international and community instruments in order to identify and notify absent class members; if it is necessary to create special conflict rules for collective actions in the European area of justice; and recognition and enforceability issues.

Surprise? Yes and No

I am grateful to Horatia Muir Watt, a professor of private international and comparative law at the Paris Institute of Political Science, to have accepted to comment on the recent In Zone Brands *decision of the* Cour de cassation *ruling that an American anti-suit injunction could be declared enforceable in France*.

To my mind, this case was well decided. But did it really come as such a surprise, as Gilles' and Raphael's comments seem to imply? Well, yes and no. But before explaining why, I want to start with two parentheses about legal comparison.

1. Firstly, it is wise before drawing conclusions from a decision of the Cour de cassation to consulting the accompanying preparatory documents (the "Rapport" of the juge-rapporteur, whose name figures at the bottom of the decision and from whom the Report can be obtained directly, when it is not published spontaneously on the Cour de cassation's website, and/or the "avis" of the Advocate general). The attention of the common law world has often been drawn to the importance of these documents, particularly since Mitch Lasser's magnificent "Judicial Self-Portraits" [1], in which he explains that behind the concise one-sentenced syllogism which constitutes an "arrêt", the various rapports and avis which accompany the decision are functional equivalents to the longer motivation of judgments in the common law tradition – and may indeed reveal dissenting opinions within the court ¨[2]. In this particular case, the thoughtful Report of Madame Pascal makes it easier to understand, for instance, how the procedure developed before the lower courts and, perhaps more importantly, the position of the Cour de cassation in respect of the implications of West Tankers.
2. Secondly, countries belonging to the civilian legal tradition do not constitute a homogeneous block with a single legal perspective on such institutions as anti-suit injunctions. Of course, the coexistence of the civilian and common law cultures within the European common judicial area has now revealed profound divergences on jurisdictional issues – unsurprisingly, since such issues are linked to conceptions about the very

> function of adjudication – , and it may well have been that before the antisuit/forum non conveniens crisis, such differences were underestimated on the civilian side, either through the inadequacy of comparative legal studies, or in a misguided quest for legal uniformity. However, while the epistemological and methodological divide between these two legal traditions is undisputable, it does not mean that within the civilian "camp", there are not equally significant differences in legal reasoning or indeed in judicial policy. In the particular case of anti-suit injunctions (and much could also be said in the same vein about forum non conveniens), the French courts cannot be said to have been hostile to anti-suit injunctions (beyond the dictum in the Stolzenberg decision, to which I shall come back) and their position on this point certainly cannot be inferred from the often cited German or Belgian cases which have explicitly refused to recognize or enforce anti-suit injunctions. Moreover, legal scholarship on this point, to which the Rapport is extremely attentive, has been far from antagonistic.

This having been said, the content of the arrêt of 14th October 2009 appears to me to conform to the general orientation of the Cour de cassation's case-law. Firstly, as the report itself emphasises, the Cour has itself, in a pre-Regulation insolvency case, awarded something that looks very like an anti-suit injunction, in the form of an order to desist from judicial proceedings abroad sanctioned by an "astreinte" (a sum of money by way of a private penalty to be paid to the claimant per day of non-performance/obedience to the order): see Banque Worms (Cass civ 1re, 19 nov. 2002). In that case, the Advocate general's Conclusions and the Report, which cite Gilles Cuniberti's own work on this point, show that the Court was paying particular attention to the risks attendant to the use of such injunctions insofar as they might be perceived to intrude on the jurisdiction of foreign courts, and is careful to emphasize that the French courts were themselves asserting jurisdiction in this case on grounds which justified their attempt to retain the proceedings before them. Secondly, the Cour de cassation was recently willing to allow effect to be given to an American judgment awarding a large penalty against a company director for contempt of court (Cass civ 28 janvier 2009, n° 07-11.729 Bull civ. I, n°15), sweeping aside the argument according to which contempt of court is quasi-penal in nature and therefore contrary to French public policy. This was already the Cour de cassation's position in Stolzenberg (Cass civ 1re, 30 juin 2004, which the French challenger

invokes here). The latter case, however, contained an obiter dictum (interestingly characterized as such in Mme Pascal's Report) according to which anti-suit injunctions (as opposed to freezing orders) "affect the jurisdiction of foreign courts". This dictum must however be interpreted in the light of Banque Worms, also cited by the Report , and, beyond the fact that the Stolzenberg case actually gave effect to a Mareva injunction, seems mainly to have been designed to draw the attention of the lower courts once again to the potential risks involved in enjoining foreign proceedings – but does not necessarily exclude the use of such measures when protecting choice of forum agreements, or at least, when protecting the jurisdiction of the chosen court to decide on the validity of the clause.

This latter consideration seems to have been decisive in the present case. The Report underlines, citing various scholarly opinions on this point, that in circumstances such as this, the injunction is merely designed to ensure the performance of the parties' contract (which of course includes the choice of forum clause). And, as Adrian Briggs has already pointed out, this is excellent judicial policy. The recognition of the American judgment here means that the French courts seized in apparent violation of the clause have refrained from ruling on its validity, in favour of the decision of the chosen court on this point. True, one might wonder why the detour via the enforcement of the American injunction was necessary: did it not suffice that the French court, whose jurisdiction was challenged on the basis of the choice of forum agreement, decline to exercise such jurisdiction, at least pending the decision of the American court? The explanation appears to be that the American judgment was presented very quickly with a view to obtain an exequatur, and, on appeal, the Court of Versailles had not yet had the opportunity to hear the appeal on the jurisdictional issue. If one takes the sole issue of jurisdiction, it might of course have made more practical sense for the Court to stay the exequatur proceedings until it had decided on the (lack of) jurisdiction of the French courts under the choice of forum clause (or at least, ruled on the basis of Kompetenz-Kompetenz). But since the American judgment appears to have contained both the injunction and a decision on the merits, allowing enforcement meant that the jurisdictional issue and the issue of the French distributor's debt were on fact resolved in one fell swoop. Of course, as Raphael points out, enforcing the injunction may mean that the Cour de cassation is ready to go further than English courts, which stop short of enforcing foreign judicial orders which are not purely monetary. However, this point needs to be

clarified in future cases, since the injunction came as a package with the judgment on the merits.

Perhaps the most interesting aspect of the Cour de cassation's decision, here again enlightened by the report, concerns its reading of the implications of West Tankers. The report clearly opines that while the Cour de cassation is now bound not to allow recognition of, say, an English anti-suit injunction when the enjoined proceedings are in France (or indeed before an arbitrator in France) , it remains free to recognize injunctions issued by the courts of third states. This of course is where things become sticky. Of course, the choice of forum agreement concerns the court of a third state and is as such apparently outside the bounds of the Brussels Regulation. But then, of course, so were the arbitration proceedings in West Tankers. In that case, the fact that the party in apparent breach of the arbitration clause had seized the court of a Member State (with jurisdiction under the Regulation? this requirement is no doubt superfluous) was enough to prohibit the use of the injunction by the English courts, under the "effet utile" and mutual trust doctrines. Do the latter apply here? Could such principles prevent the court of a Member State from declining its own jurisdiction in favour of the courts of a third state? Surely not? But this very question shows that the problem may well not lie in the anti-suit aspect of things at all, but in Owusu and its (unclear) implications as to the scope of the Regulation as far as choice of law agreements in favour of the courts of third states are concerned, when the defendant is domiciled in a Member State. Does it really make any difference here where the French court declines jurisdiction on the basis of a choice of forum agreement (either because it says it is valid under principles of common French private international law or because it decides to apply the Kompentez-Kompetenz principle in favour of the chosen court's jurisdiction to rule on its own jurisdiction under the agreement) or because it decides to recognise an American anti-suit injunction? For the moment, as the Cour de cassation's decision shows (cf Konkola Mines), national courts are resisting the expansion of the Regulation into the relationship between a Member state and a third state, as far as choice of law agreements are concerned. But current work in progress within the European institutions and study groups is now envisaging this relationship, which may make a case for the ratification of the 2005 Hague Convention. In the meantime, if priority was recognised to the (presumptively) chosen forum to rule on its own jurisdiction, whether it be a court or an arbitrator, or in a Member State or not, life would no doubt be a little simpler.

[1] “Judicial (Self-)Portraits: Judicial Discourse in the French Legal System,” 104 *Yale Law Journal* 1325-410 (1995).

[2] It is also important, of course, not to underestimate the procedural constraints which weigh on the Cour de cassation (and which are high-lighted by the report when it discusses the legal arguments raised by the parties), which is bound by the way in which the legal issue is framed before it (by virtue of what is known here as the “linguistic police” of the judiciary), and whose decisions may not have the same significance according to whether the Court quashes the decision of the lower court or merely dismisses the “pourvoi”.

Dr Krombach’s Final (?) Contribution to the European Judicial Area

Last week-end, Dr. Dieter Krombach was found in the street, tied up, in front of a court in Mulhouse, France, in the middle of the night.

What was he doing there, you may wonder?

Well, André Bamberski has now revealed that he had the 74 year old German doctor kidnapped in Germany and brought to France. The French police had been alerted that Dr. Krombach could be found in Mulhouse by an anonymous phone call from someone speaking French with a strong Russian accent.

Of course, many readers will know what Bamberski has against Krombach from the famous *Krombach* cases of the European Court of Justice and the European Court of Human Rights. Krombach allegedly raped and killed Bamberski’s 14 year old daughter in 1982. He was sentenced by a French court in abstentia in 1995 to 15 years of prison. But he never served them, as German authorities did not prosecute him, nor extradited him. So Bamberski, it might be argued, was thinking that he would soon die without serving his sentence. One logical theory

is that he did not really trust the German legal system, so he decided to take the necessary steps to ensure that justice would done. It has been suggested that he thus involved a couple of Russian associates he had met in Munich earlier this month.

If that is true (and we offer no formal opinion either way here), he may or may not have been aware that what he was doing was illegal. Possibly, he had not heard about *West Tankers* and mutual trust. At the same time, one doubts that Dr Krombach was a stronger believer in mutual trust, since the European Court of Human Rigths recognized that he had not been afforded a fair trial by French criminal courts.

In any case, Bambersky has now been arrested in France and charged on Tuesday with kidnapping, among other criminal offences.

Professor Hess informed me that the Bavarian ministry of justice has issued earlier today a press declaration insisting that States have the monopoly of violence, that private individuals may substitute neither judges nor enforcement authorities, and that this abduction was wholly unacceptable.

Krombach was first brought to a hospital in Mulhouse, then transferred to Paris so that he could be heard by a French judge on Wednesday night. Bamberski's lawyer is calling for a new criminal trial in France.

US Court Refuses to Enforce Nicaraguan Judgment

On October 20, 2009, the United States District Court for the Southern District of Florida issued an order in the case of *Osorio v. Dole Food Company* denying recognition of a $97 million Nicaraguan judgment under the Florida Uniform Out-of-country Foreign Money-Judgments Recognition Act (Florida Recognition Act). Fla. Stat. §§ 55.601-55.607 (2009). The Nicaraguan judgment involved 150 Nicaraguan citizens alleged to have worked on banana plantations in Nicaragua

between 1970 and 1982, during which time they were exposed to the chemical compound dibromochloropropane (DBCP). DBCP is an agricultural pesticide that was banned in the United States after it was linked to sterility in factory workers in 1977. Nicaragua banned DBCP in 1993.

Plaintiffs sued Dole Food Company and The Dow Chemical Company, both Delaware corporations, on account of personal injuries allegedly resulting from the use of DBCP. The judgment in this case was rendered by a trial court in Chinandega, Nicaragua. The court awarded plaintiffs $97 million under "Special Law 364," enacted by the Nicaraguan legislature in 2000 specifically to handle DBCP claims. The average award was approximately $647,000 per plaintiff. According to the Nicaraguan trial court, these sums were awarded to compensate plaintiffs for DBCP-induced infertility and its accompanying adverse psychological effects.

Plaintiffs sought enforcement of the judgment in Florida state court, and defendants removed the case to federal court. Defendants then raised several objections to domesticating the judgment. They contended that under the Florida Recognition Act the federal court could not enforce the judgment because (1) the Nicaraguan trial court lacked personal and/or subject matter jurisdiction under Special Law 364, (2) the judgment was rendered under a system which does not provide procedures compatible with due process of law, (3) enforcing the judgment would violate Florida public policy, and (4) the judgment was rendered under a judicial system that lacks impartial tribunals.

In a lengthy opinion, Judge Paul C. Huck concluded that "the evidence before the Court is that the judgment in this case did not arise out of proceedings that comported with the international concept of due process. It arose out of proceedings that the Nicaraguan trial court did not have jurisdiction to conduct. During those proceedings, the court applied a law that unfairly discriminates against a handful of foreign defendants with extraordinary procedures and presumptions found nowhere else in Nicaraguan law. Both the substantive law under which this case was tried, Special Law 364, and the Judgment itself, purport to establish facts that do not, and cannot, exist in reality. As a result, the law under which this case was tried stripped Defendants of their basic right in any adversarial proceeding to produce evidence in their favor and rebut the plaintiffs' claims. Finally, the judgment was rendered under a system in which political strongmen exert their control over a weak and corrupt judiciary, such

that Nicaragua does not possess a 'system of jurisprudence likely to secure an impartial administration of justice.'" (citation omitted)

In light of these findings, the Court held that "Defendants have established multiple, independent grounds under the Florida Recognition Act that compel non-recognition of the $97 million Nicaraguan judgment. Because the judgment was 'rendered under a system which does not provide impartial tribunal or procedures compatible with the requirements of due process of law,' and the rendering court did not have jurisdiction over Defendants, the judgment is not considered conclusive, and cannot be enforced under the Florida Recognition Act. Fla. Stat. § 55.605(1)(a)-(c). Additionally, the judgment will not be enforced because 'the cause of action or claim for relief on which the judgment is based is repugnant to the public policy of this state.' Fla. Stat. § 55.605(2)(c). The Court, therefore, orders that Plaintiffs' judgment shall be neither recognized nor enforced."

This case is interesting on multiple levels. *First*, the district court applied an "international concept of due process." Slip. op. at 23. This standard was seen to be in concert with, but different than, US notions of due process. *Id*. at 35-36. *Second*, the court found that Nicaragua does not have impartial tribunals. *Id*. at 54-58. In so doing, the court relied not only on US State Department pronouncements but also on expert testimony regarding what law is like on the ground in Nicaragua "on paper and in practice." *Id*. at 57. *Finally*, this case is perhaps most interesting because the general understanding is that it is hard to resist enforcement. This case shows that US courts, if presented with appropriate evidence, are willing to ascertain the validity of foreign judgments, especially in countries facing political and social turmoil that may negatively impact the administration of justice in those countries.

Arbitration of reinsurance

disputes in Australia

In Australia, arbitration clauses in most contracts of insurance (other than marine insurance) are rendered void by s 43 of the federal *Insurance Contracts Act 1984*. However, that Act expressly excludes reinsurance contracts. Accordingly, for many years, practitioners assumed that arbitration clauses in reinsurance contracts were enforceable in Australia.

This changed with the decision of the New South Wales Supreme Court in *HIH Casualty & General Insurance Ltd (in liq) v Wallace* [2006] NSWSC 1150; (2006) 68 NSWLR 603. The Court held that s 19 of the New South Wales *Insurance Act 1902*, which provides that arbitration clauses in insurance contracts do not bind the insured, applied to reinsurance contracts, as there was no express exclusion of reinsurance contracts. (There is a good summary of this and other remedial provisions in the NSW Act, and further matters arising from the decision in *Wallace,* in this paper presented by Allens Arthur Robinson partner Michael Quinlan in 2007.)

In light of concerns expressed by practitioners and reinsurers, by the Insurance Regulation 2009, the NSW government has now excluded reinsurance contracts from the remedial provisions of the NSW Act, including s 19.

However, some uncertainty remains. Section 28 of the Victorian *Instruments Act 1958* is an equivalent provision to s 19 of the NSW Act: it allows an insured to institute court proceedings notwithstanding an arbitration clause and reinsurance contracts are not excluded from the provision. There does not appear to be any case law on this provision. However, following *Wallace*, it would apply to reinsurance contracts. Arbitration clauses in reinsurance contracts governed by Victorian law could therefore still be ignored by reinsureds. Moreover, it was stated in *obiter* in *Wallace* that s 19 of the NSW Act is a mandatory law of the forum. If this view is correct and applicable to s 28 of the Victorian Act, whatever the law of the reinsurance contract, a reinsured could institute court proceedings in Victoria in the face of an otherwise binding arbitration clause.

Conference on Human Rights and Tort Law

The Institute for European Tort Law (Vienna) organises a **Conference on Human Rights and Tort Law** which will take place on **1 December 2009** in **Vienna**.

The conference programme and detailed information on booking etc. as well as a registration form can be found here.

The Execution of the Anti-Suit Injunction

I am grateful to Thomas Raphael, a barrister at 20 Essex Street and the author of a major work on The Anti-Suit Injunction*, to have accepted to comment on the recent* In Zone Brands *decision of the* Cour de cassation.

King Duncan:
Is execution done on Cawdor? Are not
Those in commission yet return'd?

Malcolm:
My liege,
They are not yet come back. But I have spoke
With one that saw him die; who did report
That very frankly he confessed his treasons,
Implor'd your Highness' pardon, and set forth
A deep repentance. Nothing in his life
Became him like the leaving it.

Macbeth Act 1, scene 4, 1–8

In a judgment of 14 October 2009 (Decision no 1017 of 14 October 2009) the Première Chambre Civile of the Cour de Cassation refused to set aside a decision of the Versailles Court of Appeal which gave "exequatur" to an anti-suit injunction granted by the Superior Court of Georgia to enforce an exclusive jurisdiction clause in favour of the Courts of the State of Georgia (USA). The Georgian anti-suit injunction had restrained litigation before the Tribunal de Commerce of Nanterre, which was apparently civil and commercial litigation.

In loose translation the Première Chambre Civile concluded:

> *But given that the decision [of the Versailles Court of Appeal] records precisely, in the first place, that in the light of the jurisdiction clause freely agreed by the parties, no fraud could result from the invocation by the American company of the jurisdiction expressly designated as the competent jurisdiction;*
>
> *and given that there could not be any deprivation of the right of access to a court, since the aim of the decision taken by the Georgian judge was specifically to rule on his own competence and, for the purposes of finality, to cause the jurisdiction clause undertaken by the parties to be respected;*
>
> *and given there is no inconsistency between public international law and an anti-suit injunction whose aim, as in the present case, is solely, outside the field of application of the operation of the conventions and community law, to punish the violation of a pre-existing contractual obligation; and given that therefore the decision is legally justified; for these reasons, [the Première Chambre Civile] rejects the appeal."*

To understand private international law a strong sense of irony is often helpful, and here there are three ironies I would like to highlight.

First, one of the paradoxical results of the *West Tankers* imbroglio is that the bright light it shone on the anti-suit injunction may have led to a greater degree of understanding, and in some cases sympathy, for this particular English vice among our continental colleagues – just as the European Court of Justice was limbering up to deliver what it may have hoped was a final blow to the remedy. So while "civilian" academic opinion was once (it seems) overwhelmingly hostile, the mood has changed. Recently a number of distinguished civilian voices have

supported the use of anti-suit injunction in certain circumstances (see e.g. Kessedjian on West Tankers). And while previous decisions from continental courts, including the Cour de Cassation itself (*Stolzenberg v Daimler Chrysler Canada*, Cour de Cassation, 30 June 2004 [2005] Il Pr 24; see also in Belgium Civ Bruxelles, 18 December 1989, RW 1990-1991), had been opposed to the anti-suit injunction, the Cour de Cassation now seems to find the enforcement of a contractual anti-suit injunction entirely unproblematic. So we can say that, like the Thane of Cawdor, nothing in the anti-suit injunction's life "*became him like the leaving it.*"

Second, execution may have been done in (and on) Cawdor, but reports of the anti-suit injunction's death are greatly exaggerated; and now execution of it is done in France. There was a degree of crowing in certain quarters after *West Tankers*. But the anti-suit injunction is alive and kicking in respect of litigation outside Europe. Even within Europe the anti-suit injunction is not entirely dead – it is difficult to see how the European Court could prohibit an anti-suit injunction to restrain proceedings in another state where the "targeted" proceedings are themselves outside the scope of the regulation.

And now, rather surprisingly, the Cour de Cassation apparently shows us that *Turner* and *West Tankers* can be circumvented by executing a non-Brussels Lugano state's anti-suit injunction, at least in some states. If right, and if other European national courts take a similar course, this opens up contrasting possibilities. On the one hand, Lord Hoffmann's warnings in *West Tankers* prohibiting the English courts from granting anti-suit injunctions would drive business off-shore may now be given renewed vigour, if you can rely on your American anti-suit injunction by enforcing it in France. On the other hand, the possibility of obtaining anti-suit injunctions from a *third party court* to enforce an *English* arbitration clause (as the Bermuda and Eastern Caribbean Courts have done, although the Singapore High Court thinks that this is a bad idea as you become an "*international busybody*"), suddenly takes on far greater practical utility.

Third, perhaps most ironically of all, the Cour de Cassation has apparently gone further than the English courts ever would – which may explain why English lawyers had not thought of this particular dodge before. It is a basic principle of common law enforcement that only money judgments are enforceable at common law; and therefore anti-suit injunctions, like other injunctions, are not enforceable

at common law.

A good example of this is the *Airbus v Patel* litigation, which concerned the crash of an airliner made by Airbus at Bangalore airport. An action had initially been commenced against Airbus in India, but the victim's families later started duplicative claims in Texas. The dispute had no connection with Texas, but Texas at that time had no doctrine of *forum non conveniens*. The Indian courts granted an anti-suit injunction to restrain litigation in Texas, on the grounds that the Texas litigation was vexatious and oppressive. But the Indian anti-suit injunction had insufficient teeth in practice, and so an attempt was made to replicate it in England. Colman J held that the Indian injunction could not be enforced in England either under the common law or the English enforcement legislation, and that it did not create a right to an English anti-suit injunction either: *Airbus v Patel* [1996] ILPr 465. The only question was whether he could and should independently grant an anti-suit injunction to protect the Indian proceedings. He said no. The Court of Appeal disagreed: *Airbus v Patel* [1997] 2 Lloyds Rep 8; but then the House of Lords agreed with Colman J, holding in effect that the English courts should not act as the world's policemen where a non-contractual anti-suit injunction was sought, as this would be contrary to the principle of comity: *Airbus v Patel* [1999] 1 AC 119. (Lord Goff took care to make clear that he was not necessarily prohibiting a contractual injunction to protect the contractual jurisdiction of another state, a loophole the Bermuda and Caribbean case law mentioned above has exploited.)

So the Georgian injunction would not have been enforceable as a judgment in England, yet it is enforceable in France. A prophet is not without honour save in his own country (Matthew, 13:57).

But will the Cour de Cassation's new decision stand? I can't comment on what it means as a matter of French law, so it will be for others to say whether the Cour de Cassation has, in Shakespeare's words, "*set forth a deep repentance*" of its earlier comment in *Stolzenberg v Daimler Chrysler Canada*, Cour de Cassation, 30 June 2004 [2005] Il Pr 24 that a Mareva injunction is acceptable because it "*does not prejudice any of the debtor's fundamental rights or (even indirectly) foreign sovereignty*" because it "*unlike the so-called "anti-suit" injunctions, does not affect the jurisdiction of the State in which enforcement is sought*."

I do suspect, however, that there will be some, at least in Luxembourg, who will

consider the Cour de Cassation's new decision a form of "*treason*" for which pardon should be asked.

As a matter of formality there is probably nothing directly inconsistent between it and *West Tankers*. It is a matter for the French legal system to decide what third state judgments it will enforce and its exequatur decision will not directly render the Georgian judgment enforceable in other member states under the Brussels-Lugano regime.

But there is no doubt that as a matter of principle the two decisions are very uncomfortable bedfellows. The Cour de Cassation is telling us that there is nothing wrong with a foreign court ordering someone not to litigate before the French courts, at least where this is done to enforce an exclusive jurisdiction clause in favour of the foreign court. Apparently, this does not interfere with the French court's judicial sovereignty. What matters is "*to punish the violation of a pre-existing contractual obligation.*" So the French court is content for the Georgian court to assess, and directly interfere with, the French court's jurisdiction. And this is so even though the jurisdiction of the Tribunal de Commerce of Nanterre over the substantive proceedings in France which the Georgian injunction restrained would have been a jurisdiction under the Brussels-Lugano regime. All this is completely alien to the mode of thought in Luxembourg, under which it is wholly unacceptable for the English courts, even when acting *outside* the scope of the regulation, to assess, and indirectly interfere with, the Brussels-Lugano jurisdiction of other member or contracting state courts; and the importance of enforcing contractual obligations binding the parties to litigate in a particular forum is simply irrelevant.

Indeed, it might even be argued that the Cour de Cassation's decision is inconsistent with implied principles of the Brussels-Lugano regime, as it "*necessarily amounts to stripping [the Nanterre Tribunal de Commerce] of the power to rule on its own jurisdiction under Regulation 44/2001*" (contrary to *West Tankers*, §28). The Cour de Cassation did not make a reference, and there is no obvious reason why the Courts of other member states would be interested, so it is difficult to see how the point would get to Luxembourg. But perhaps one final irony awaits.

French Court Agrees with U.S. Anti-suit Injunction

After the *West Tankers* decision, common lawyers might have thought that continental lawyers had found the final support they needed to conclude that anti-suit injunctions are evil remedies and that they now have a license to chase them.

Well, that would not be true, as this judgment delivered by the French Supreme court for private and commercial matters (*Cour de cassation*) on 14 October 2009 demonstrates.

The dispute had arisen out of a distribution contract whereby a French company, In Zone Brands Europe, distributed children interactive beverage (see picture above) in Europe for an American corporation, In Zone Brands Inc. The contract included a choice of law clause which provided for the application of the laws of Georgia, and a choice of court agreement providing for the jurisdiction of Georgian courts.

When the American party terminated the contract, the French company and its director sued before a French commercial court (*Tribunal de commerce*) in Nanterre. The American challenged the jurisdiction of the French court, and initiated judicial proceedings in Georgia. In March 2006, the Superior Court of the Cobb county issued an anti-suit injunction enjoining the French parties to dismiss the French proceedings, and recognized the liability of the French party (the judgment of the *Cour de cassation* is unclear as to what this second part of the judgment really is, but it might have been a summary judgment).

The American party then sought a declaration of enforceability of the American judgment, that is, I understand, of both the anti-suit injunction and the summary judgment. As could be expected, the French parties argued that the anti-suit injunction infringed French sovereignty and their right of access to court as recognized by Article 6 ECHR and should thus be denied recognition. They could rely on a dicta of the *Cour de cassation* in the *Stoltzenberg* case, where the Court

had ruled that, while Mareva orders could be declared enforceable in France, anti-suit injunctions could not, as they infringe the sovereignty of the jurisdiction the courts of which are indirectly targeted by the injunction.

Last week, the *Cour de cassation* most surprisingly confirmed the declaration of enforceability of the American judgment. It held:

1. as the parties had agreed to the jurisdiction of the American court, the decision of the American party to sue before that court could not be considered strategic behavior (*fraude*).
2. there was no issue of being denied access to court, as the American court was ruling on its own jurisdiction and only enforcing a choice of court which had been agreed by the parties.
3. anti-suit injunctions are not contrary to public policy as long as they only aim at enforcing a preexisting contractual obligation, and no treaty or European regulation applies.

The case is not available online as of yet. Here is the most relevant part of the decision:

> *Mais attendu que l'arrêt retient exactement, en premier lieu, par motif propre, qu'eu égard à la clause attributive de compétence librement acceptée par les parties, aucune fraude ne pouvait résulter de la saisine par la société américaine de la juridiction expressément désignée comme compétente et, en second lieu, par motif propre et adopté, qu'il ne peut y avoir privation de l'accès au juge, dès lors que la décision prise par le juge georgien a précisément pour objet de statuer sur sa propre compétence et pour finalité de faire respecter la convention attributive de compétence souscrite par les parties ; que n'est pas contraire à l'ordre public international l'"anti suit injunction" dont, hors champ d'application de conventions ou du droit communautaire, l'objet consiste seulement, comme en l'espèce, à sanctionner la violation d'une obligation contractuelle préexistante ; que l'arrêt est légalement justifié ;*

UPDATE: see loose translation of Thomas Raphael here.

ERA Conference on Stockholm Programme

The Academy of European Law (ERA) will host another interesting conference titled

New Horizons for Civil Justice in Europe: Towards the "Stockholm Programme"

The conference will discuss the key issues for the Stockholm Programme in terms of cooperation in civil matters as presented in the Commission communication COM (2009) 262 of 10 June 2009, such as

- mutual recognition
- abolishment of exequatur
- speeding up cross-border debt recovery
- an optional European contract law (a 'twenty-eighth' system)
- e-justice

The conference will take place in Trier (Germany) from 5th – 6th November 2009.

More information on fees and registration can be found at the ERA website.

Update: *The conference is programme is now available and can be found here.*

Latest Issue of "Rabels Zeitschrift"

The latest issue of the **Rabels Zeitschrift** (Vol. 73, No. 4, October 2009) is a special issue on the occasion of the 60th birthday of *Professor Jürgen Basedow*

and contains the following articles:

- ***Dietmar Baetge:*** Contingency Fees – An Economic Analysis of the Federal Constitutional Court's Decision Authorising Attorney Contingency Fees – the English abstract reads as follows:

In Germany, until recently, contingency fees were prohibited. In December 2006, the legal ban on contingency fees was declared unconstitutional by the Federal Constitutional Court (Bundesverfassungsgericht). Implementing the Court's ruling, the German legislator, in 2008, legalised contingency fees on a limited basis. This paper attempts to analyse the Constitutional Court's decision from an economic vantage point. The main constitutional reasons given to justify the legal ban on contingency fees are translated into economic terms and further elaborated. Points of discussion include the problem of moral hazard between the lawyer and the judge on the one hand and the lawyer and his client on the other. A third question dealt with in the paper is the extent to which contingency fees may influence the efficient allocation of resources. The paper concludes that access to the instrument of contingency fees should not be limited to poor clients but also extended to affluent persons.

- ***Moritz Bälz***: Japan's Accession to the CISG – the English abstract reads as follows:

On 1 July 2008 Japan, as the 71st state, acceded to the United Nations Convention on the International Sale of Goods (CISG). As of 1 August 2009, the most important convention in the field of uniform private law will thus enter into force in Japan, leaving Great Britain as the sole major trading nation not yet party to the convention. The article examines the complex reasons why Japan did not accede earlier as well as why this step was finally now undertaken. It, furthermore, offers an assessment of the importance of the CISG for Japan prior to the accession and the impact to be expected from the convention on the reform of the Japanese Civil Code which is currently under way. Finally, it is argued that Japan's accession nourishes the hope that the CISG will spread further in Asia, thus not only extending its reach to one of the world's most dynamic regions, but also opening up opportunities for a future harmonisation of Asian contract law.

- ***Friedrich Wenzel Bulst***: The Application of Art. 82 EC to Abusive Exclusionary Conduct – the English abstract reads as follows:

The article addresses recent developments in the application of the prohibition of abuse of dominance in EC competition law. The European Commission has published a communication providing guidance on its enforcement priorities in applying Art. 82 EC to abusive exclusionary conduct of dominant undertakings. Under this more effects-based approach which focuses on ensuring consistency in the application of Arts. 81 and 82 EC as well as the Merger Regulation, priority will be given to cases where the conduct in question is liable to have harmful effects on consumers. After a brief introduction (section I), the author outlines the main elements of the communication and illustrates how the Commission's approach to providing guidance in this area has evolved since the publication of its 2005 discussion paper on exclusionary abuses (section II). The author then addresses the scope of the communication against the background of the case law on the Commission's discretion (not) to pursue cases (section III). The central concept of the communication is that of »foreclosure leading to consumer harm«. Against this background the author discusses, in the context of refusal to supply abuses both in and outside an IP context, the operationalisation of the criterion of harm to consumers (section IV) before concluding (section V).

- ***Anatol Dutta:*** The Death of the Shareholder in the Conflict of Laws – the English abstract reads as follows:

The death of the shareholder raises the question how the law applicable to the company and the law governing the succession in the deceased shareholder's estate have to be delimitated. This borderline becomes more and more relevant against the background of recent jurisprudence of the European Court of Justice (ECJ) in Centros, Überseering and Inspire Art concerning the freedom of movement of companies in the Community. On the one hand, as a consequence of this jurisprudence the laws governing the company and the succession often differ. On the other hand, the ECJ's jurisprudence might further blur the boundaries between the laws governing companies and successions. The article tries to draw the border between the relevant choice-of-law rules. It comes to the conclusion that the consequences of the shareholder's death for the company and his share are subject to the conflict rules for companies (supra

III.). More problematic, though, is the characterisation of the succession in the share of the deceased shareholder. Some legal systems contain special succession regimes for shares in certain private companies and partnerships. The article argues (supra IV.) that the succession in shares has to be dually-characterised and subjected to both, the law governing the company and the succession. Yet clashes between the applicable company and succession laws are to be solved by giving precedence to the applicable company law. The precedence of company law should be clarified by the legislator – by the German legislator when codifying the conflict rules for companies and by the European legislator when codifying the conflict rules for successions upon death (supra V.).

- ***Franco Ferrari***: From Rome to Rome via Brussels: Remarks on the Law Applicable to Contractual Obligations Absent a Choice by the Parties (Art. 4 of the Rome I Regulation)
- ***Christian Heinze***: Industrial Action in the Conflict of Laws – the English abstract reads as follows:

The introduction of a special conflicts rule for industrial action in Art. 9 Rome II Regulation can be considered as a felicitous innovation of European Private International Law. The application of the law of the country where the industrial action is to be taken or has been taken is founded on the public (social) policy concerns of the country where the action takes place and will therefore, in general, obviate the need for any enforcement of this country's strike laws by means of the ordre public or as internationally mandatory provisions (at least as far as intra-European cases are concerned). The major drawback of Art. 9 does not derive from the rule itself but rather from its restriction to »non-contractual liability«. Article 9 Rome II Regulation may therefore designate a substantive law applicable to the non-contractual liability for the industrial action which is different from the law applicable to the individual employment contract (Art. 8 Rome I Regulation) or a collective labour agreement. This may be unfortunate because the industrial action will usually have consequences for at least the individual employment contract (e.g. a suspension of contractual obligations) which might be governed by a different law (Art. 8 Rome I Regulation) than the industrial action itself (Art. 9 Rome II Regulation). Possible conflicts between these laws can be resolved by extending

the scope of Art. 9 Rome II Regulation to the legality of the industrial action in general, thus subjecting any preliminary or incidental questions of legality of industrial actions to Art. 9 Rome II Regulation while applying the lex contractus to the contractual consequences of the action.

- ***Eva-Maria Kieninger***: The Full Harmonisation of Standard Contract Terms – a Utopia? – the English abstract reads as follows:

The article discusses the proposal for a consumer rights directive of October 2008, in which the European Commission suggests to move from minimum to full harmonisation of specific areas of consumer contract law. The article specifically examines whether full harmonisation of the law relating to the judicial control of unfair contract terms, even if politically desirable, will be feasible in the context of non-harmonised national contract law. Examples are presented for cases which were decided differently by national courts on the basis of divergent rules of general contract law. The article discusses whether the Draft Common Frame of Reference (DCFR) can be used by the European Court of Justice (ECJ) and the national courts as a common yardstick to measure the unfairness of a contractual term. Two problems present themselves: one is the question of legitimacy because, until now, the DCFR is no more than a scientific endeavour which in part rests on the autonomous decisions of its drafters and does not merely present a comparative restatement of Member States' laws; second, the DCFR makes excessive use of the term »reasonableness« so that, in many instances, its ability to give guidance in the assessment of the unfairness of a specific contract term is considerably reduced. The question of legitimacy could be solved by an optional instrument which could be chosen by the parties as the applicable law.

- ***Jan Kleinheisterkamp***: Internationally Mandatory Rules and Arbitration – A Practical Attempt – the English abstract reads as follows:

This article treats the impact that internationally mandatory rules of the forum state may have on the effectiveness of arbitration agreements if the claims are based on such internationally mandatory rules but the parties had submitted their contract to a foreign law. The specific problems of conflicts of economic regulation are illustrated and discussed on the basis of Belgian and German court decisions on disputes relating to commercial distribution and agency

agreements. European courts have adopted a restrictive practice of denying the efficacy of such tandems of choice-of-law and arbitration clauses if there is a strong probability that their internationally mandatory rules will not be applied in foreign procedures. This article shows that neither this approach nor the much more pro-arbitration biased solutions proposed by critics are convincing. It elaborates a third solution which allows national courts both to reconcile their legislator's intention to enforce a given public policy with the parties' original intention to arbitrate and to optimize the effectiveness of public interests as well as that of arbitration.

- ***Axel Metzger***: Warranties against Third Party Claims under Arts. 41, 42 CISG – the English abstract reads as follows:

The United Nations Convention on Contracts for the International Sale of Goods (CISG) provides two regimes for warranties against third party claims. The general rule of Art. 41 establishes a strict liability rule for all third party claims not covered by Art. 42. Article 42 limits the seller's liability for infringement claims based on intellectual property. A seller under the CISG warrants only against third party intellectual property claims he »knew or could not have been unaware« at the time of the conclusion of the contract. In addition, his liability is territorially restricted to claims based on third party intellectual property rights in the countries contemplated by the parties at the conclusion of the contract. This article provides an overview of seller's warranties under Arts. 41 and 42. It examines, more specifically, whether the limited scope of seller's warranties for third party intellectual property claims is efficient and whether it is expedient from a comparative law perspective. Under a traditional economic analysis of law approach, the party who can avoid third party claims most cheaply should bear the risk of infringement claims. This will often be the seller, especially if he has produced the goods or has specific knowledge of the industry. But it may also occur that the buyer is in the superior position to investigate intellectual property rights, e.g. if the buyer is a specialized player in the industry and the seller is a mere vendor without specific knowledge in the field. Article 42 allows an efficient allocation of the risk by the court. The party charged with the risk, be it seller or buyer, should not only warrant against third party rights he knew but also for those he could have been aware of after investigation in the patent and trademark offices of the relevant countries or through other resources. Such a duty to investigate may also exist

with regard to unregistered rights like copyrights. A strict interpretation of the seller's (or buyer's) duty is in accordance with international standards. Seller's warranties are strict liabilities rules in many countries with an exception in case of bad faith on the part of the buyer.

- ***Ralf Michaels***: Rethinking the UNIDROIT Principles: From a law to be chosen by the parties towards a general part of transnational contract law – the English abstract reads as follows:

1. The most talked-about purpose of the UNIDROIT Principles of International and Commercial Contracts (PICC) is their applicability as the law chosen by the parties. However, focusing on this purpose in isolation is erroneous. The PICC are not a good candidate for a chosen law – they are conceived not as a result of the exercise of freedom of contract, but instead as a framework to enable such exercise. Their real potential is to serve as objective law – as the general part of transnational contract law. 2. This is obvious in practice. Actually, choice of the PICC is widely possible. National courts accept their incorporation into the contract; arbitrators frequently accept their choice as applicable law. However, in practice, the PICC are rarely chosen. The most important reason is that they are incomplete. They contain no rules on specific contracts. Further, they refer to national law for mandatory rules and for standards of illegality and immorality. This makes their choice unattractive. 3. The nature of the PICC is much closer to that of the U.S. Restatement of the law. The U.S. Restatement becomes applicable not through party choice but rather as an articulation of background law. Actually, this describes the way in which the PICC are typically used in practice. 4. This use as background law cannot be justified with an asserted legal nature of the PICC (their »law function«). Rather, the use is justified insofar as they fulfill two other functions: the »restatement function« (PICC as description of a common core of legal rules) and the »model function« (PICC as model for a superior law). 5. From a choice-of-law perspective, such use cannot be justified under traditional European choice of law, which designates legal orders, not incomplete codifications, as applicable. 6. By contrast, application could be justified under U.S. choice of law. Under the governmental interest analysis, the PICC could be applicable to situations in which no state is interested in the application of its own law. Their international character qualifies the PICC for the Restatement (2d) Conflict of laws. Finally,

for the better-law theory, according to which the substantive quality of a law is a criterion for choice of law, the PICC are a candidate insofar as they perform a model function. 7. In result, the PICC are comparable to general common law or the ius commune, within which regulatory rules of national, supranational and international origin act like islands. 8. Altogether, this results in a complex picture of transnational contract law, which combines national, international and non-national rules. The PICC can be no more, but no less, than a general part of this contract law.

- ***Hannes Rösler***: Protection of the Weaker Party in European Contract Law – Standardised and Individual Inferiority in Multi-Level Private Law – the English abstract reads as follows:

It is a permanent challenge to accomplish freedom of contract effectively and not just to provide its formal guarantee. Indeed, 19th century private law already included elements guaranteeing the protection of this »material« freedom of contract. However, consensus has been reached about the necessity for a private law system which also provides for real chances of self-determination. An example can be found in EC consumer law. Admittedly, this law is restrained – for reasons of legal certainty – by its personal and situational typicality and bound to formal prerequisites. However, the new rules against discrimination are dominated by approaches which strongly focus on the protection of the individual. It is supplemented by national provisions, which especially counter individual weaknesses. The autonomy of national law can be explained by the different traditions with regard to »social« contract law in the Member States. The differences are especially apparent regarding public policy, good faith or breach of duty before or at the time of contracting (culpa in contrahendo). They form another argument against the undifferentiated saltation from partial to total harmonisation of contract law.

- ***Giesela Rühl***: The Presumption of Non-Conformity in Consumer Sales Law – The Jurisprudence of the Federal Court of Justice in comparative perspective – the English abstract reads as follows:

The Law on the Modernisation of the Law of Obligations has introduced a large number of provisions into the German Civil Code. One of these provisions has kept German courts particularly busy during the last years: § 476. The provision

implements Art. 5 III of the Consumer Sales Directive and provides that any lack of conformity which becomes apparent within six months of delivery of the goods is presumed to have existed at the time of delivery unless this presumption is incompatible with the nature of the goods or the nature of the lack of conformity. The presumption has proved to be difficult to apply in practice: the German Federal Court of Justice (Bundesgerichtshof; hereinafter BGH) alone as issued eight – highly controversial – decisions. And numerous articles, case notes and commentaries have analysed and criticised each and every one of them. It is therefore surprising to see that both the BGH and the German literature refrain from exploiting one very obvious source of information that might help to deal with § 476: comparative law. Even though Art. 5 III of the Consumer Sales Directive has been implemented in all Member States except for Lithuania nobody has endeavoured to analyse its application in other countries to this date. The above article tries to fill this gap and looks at § 476 from a comparative perspective. It finds that courts across Europe apply the provision in the same way as the BGH regarding the exclusion and the rebuttal of the presumption. However, regarding the scope of the presumption, the BGH stands alone with its strict interpretation. In fact, no other court in Europe refuses to apply the presumption in cases in which a defect that occurs after delivery might be the result of a basic defect present at the time of delivery. The article, therefore, concludes that the BGH should rethink its position regarding the scope of the presumption and refer the next case to the European Court of Justice.

- ***Jens M. Scherpe:*** Children Born out of Wedlock, their Fathers, and the European Convention on Human Rights – the English abstract reads as follows:

Unlike in many European countries, only a father married to the mother will automatically have parental custody (elterliche Sorge) in Germany. A father not married to the mother is effectively barred from obtaining parental custody unless the mother agrees, and there is not even the possibility – unlike e.g. in England – for the courts to interfere with the mother's decision, cf. §§ 1626a, 1672 BGB. The legal rules are based on the – somewhat questionable – assumption that the mother's motives for refusal of parental custody are based on the welfare of the child. The German statutory provisions have been challenged unsuccessfully in the German Constitutional Court

(Bundesverfassungsgericht; BVerfG). However, the BVerfG voiced some doubt as to the premises upon which these rules rested and has demanded that further development be monitored closely. The vast majority of German academic authors also doubts the constitutionality of § 1626a BGB and are in favour of reforming the law. The matter is now the subject of a case pending at the European Court of Human Rights (ECtHR), Zaunegger v. Germany, in which the applicant claims, inter alia, that his right of respect for family life under Art. 8 ECHR is being violated. In previous cases, McMichael v. United Kingdom and Balbontin v. United Kingdom, challenges of Scots and English law on parental responsibility for fathers not married to the mother have failed. This article critically analyses the legal rules in England and Germany and, based on the differences between them and the relevant case law of the ECtHR, suggests that the Court will find that the German rules are indeed in breach of the European Convention. The article concludes with suggestions for reform.

- ***Wolfgang Wurmnest***: Unilateral Restrictions of Parallel Trade by Dominant Pharmaceutical Companies – Protection of Innovation or Anti-competitive Market Foreclosure? – the English abstract reads as follows:

The elimination of cross-border barriers to trade as means of encouraging competition in the single market lies at the heart of EC-competition policy. Limitations of parallel trade were therefore treated as restrictions of competition. With regard to the pharmaceutical sector the merit of such a competition policy has been called into question. It is said that the unique features of the market for pharmaceuticals, namely the existence of price regulation at the national level for prescription medicines, makes parallel trade socially undesirable as it does not foster real price competition and undermines investment in R&D to the detriment of the consumer. Hence, unilaterally imposed restrictions of parallel trade by dominant producers, such as supply quota systems, should not be regarded as a violation of Art. 82 EC. This article discusses the legal and economic arguments in favour of a policy shift in light of the recent case Lélos v. GlaxoSmithKline. In this case the European Court of Justice (ECJ) has held that a pharmaceutical company in a dominant position cannot be allowed to cease honouring the ordinary orders of an existing customer for the sole reason that the customer engages in parallel trade, but that Art. 82 EC does not prohibit a dominant undertaking from refusing to fill orders that are out of the ordinary in terms of quantity in order to protect its

commercial interests. It is argued that the ECJ was right in denying pharmaceutical companies a general right to limit the flow of pharmaceutical products by unilateral measures as the pro-competitive effects of parallel trade are greater than often assumed.

- ***Nadjma Yassari:*** The Reform of the Spousal Share under Iranian Succession Law – An example of the transformability of Islamic law – the English abstract reads as follows:

It is generally held that Islamic law is a static system of rules, unable to accommodate change. This is especially thought true of family and succession laws that are firmly rooted in a religious foundation. Nonetheless, one can observe in the last decades how active the Iranian legislator has been in reforming its family laws, with the result that a number of traditional provisions have undergone remarkable changes. Most recently, the Iranian Parliament ventured into the field of succession law by amending the inheritance portion received by the surviving wife, which so far had been limited to movables. Under the new regulations, she takes her portion also from immovable property. The previous limitations placed on the inheritance portion of the widow have no base in the Koran, the primary source of Islamic shi'i law, and were deduced from another primary source of law, notably the traditions of the twelve Imams. This article examines the religious foundations of the inheritance rule on the spousal share, its codification in the Iranian Civil Code and the proposed amendments by the Iranian Parliament. It shows how the Iranian Parliament by emphasising another interpretation of the sources has been successful in changing a rule that has prevailed in Iranian law for over 80 years. Without doubt, this reform is a significant step towards the harmonisation of the widow's inheritance share and the elimination of the harsh economic consequences of the rule as it stood. Beyond this effect however it can also be taken as an illustration of the way legal development can be set within an Islamic framework. Moreover, it shows that it is ultimately the intrinsic structure of the sources of Islamic law and the methods by which law is deduced from them that makes reform possible.