

# First Issue of 2009's *Revue Critique de Droit International Privé*

The first issue of the *Revue Critique de Droit International Privé* was just released.



It contains two articles and several case notes.

The first article is authored by Dominique Bureau, a professor at Paris II University, and Horatia Muir Watt, a professor at Paris Institute of Political Science (commonly known as *Sciences Po*). The paper explores whether enforcing forum selection clauses when mandatory rules of the forum are applicable, desactivates the imperativity of such rules (*L'impérativité désactivée*?).


*The applicability of mandatory regulation or loi de police does not prevent the enforcement of a choice of forum clause in favour of a foreign court. In France, the Cour de cassation has adhered in turn to a solution already prevailing in other jurisdictions and for which arbitrability of disputes involving social or economic regulation paved the way. As with arbitration, the progressive liberalisation of requirements for the cross-border movement of the chosen court's decision may empower private actors to cross jurisdictional boundaries and benefit from a quasi-immunity from the constraints of state law. One possible response to such neutralisation of mandatory rules would be to set up a regime which would be dual from the point of view of the subject-matter of the rules involved (i.e. whether they are protective of weaker parties or whether they carry public economic regulation) and transversally applicable whatever the nature of the chosen forum (i.e. similar principles would apply to choice of arbitrator or foreign court), so as to exclude weaker parties from access to jurisdictional autonomy, including as far as arbitration of their disputes is concerned, while, on the other hand, preserving freedom of choice of forum and, correlatively, a low level of control in other cases, subject of course to the procedural precautions which Community law now mandates when the dispute falls within its scope.*

The second article is authored by Iraqi scholar Harith Al Dabbagh (Mossoul and Saint Etienne Universities). It discusses the issue of marriages between spouses of different religions (*Mariage mixte et conflit entre droits religieux et laique*). More specifically, the starting point of the discussion is a case of the Supreme Court of Iraq of March 27, 2007, which ruled on the divorce of a christian Iraqi women and a Turkish muslim man. Unfortunately, no abstract is provided.

The table of contents is not yet online. Articles of the *Revue Critique* cannot be downloaded.

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# Dirty Dancing and Stays of Proceedings

A recent judgment of the NSW Supreme Court is as noteworthy for its name and subject-matter as it is for the legal principles involved; namely stay of proceedings on the basis of a foreign exclusive jurisdiction clause. 

Dance With Mr D Limited v Dirty Dancing Investments Pty Ltd [2009] NSWSC 332 concerned a dispute between producers of, and investors in, the musical “Dirty Dancing” (based on the film of the same name). The dispute turned on the interpretation of two contracts, one of which contained English choice of law and exclusive jurisdiction clauses; the other containing an Australian arbitration clause, the interpretation of which was also in dispute.

In granting a stay, the judge observed that:

*“Where parties to a contract have agreed by an exclusive foreign jurisdiction clause to submit to the exclusive jurisdiction of a foreign court, such a clause does not operate to exclude the forum court’s jurisdiction. However, the courts of this country will hold the parties to their bargain, and grant a stay of proceedings, unless the party seeking that the proceedings be heard can show that there are strong reasons against doing so. In considering such an application the court should take into consideration all the circumstances of the*

*particular case, but the application is not to be assimilated to cases where a stay is sought on the principle of forum non conveniens, nor is it a matter of mere convenience. See Huddart Parker Ltd v The Ship "Mill Hill" (1950) 81 CLR 502 at 508 – 509; Oceanic Sun Line Special Shipping Co Inc v Fay (1988) 165 CLR 197; FAI General Insurance v Ocean Marine Mutual Protection and Indemnity Association; Akai Pty Ltd v People's Insurance Co; Incitec Ltd v Alkimos Shipping Corporation and Anor; Owners of cargo on vessel Eleftheria v Owners of Ship Eleftheria [1969] 2 All ER 641 at 645."*

The Dirty Dancing decision is especially noteworthy in light of the reluctance of Australian courts to stay proceedings on forum non conveniens grounds. It also seems to stand in contrast to the apparently more tepid attitude towards the grant of stays exhibited the High Court in Akai Pty Ltd v People's Insurance Co.

*The Australian* newspaper has more details of the commercial and personal background of the dispute here.

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## **Australian Lawyers and Overseas Clients**

An interesting and unusual case before the State Administrative Tribunal of Western Australia contains a significant discussion of the professional obligations of Australian lawyers—especially regarding confidentiality and privilege—while representing overseas clients. In so doing, the Tribunal considered, among other things, (1) the extra-territorial legislative and regulatory competence of the State of Western Australia, (2) the proper law of contracts of retainer and, it would seem, extra-contractual obligations of confidence, and (3) burdens of proof regarding foreign law.

The case concerned a Western Australian QC who was engaged by the Commonwealth government of Australia to advise Schapelle Corby, an Australian citizen, after her arrest for drug offenses on the Indonesian island of Bali. The

Tribunal found that the QC had committed unprofessional conduct by revealing, in statements to the Australian media, confidential information that had been imparted to him in Indonesia.

Legal Practitioners Complaints Committee and Trowell [2009] WASAT 42 (13 March 2009)

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# Heightened Pleading Standards in US Private International Law Cases

On Monday, the United States Supreme Court decided the case of *Ashcroft v. Iqbal*, which concerned whether current and former federal officials, including FBI Director Robert Mueller and former Attorney General John Ashcroft, are entitled to qualified immunity against allegations they knew of or condoned racial and religious discrimination against individuals detained in the wake of the September 11 attacks. The case presented the following legal issue: “Whether a conclusory allegation that a cabinet level officer or other high-ranking official knew of, condoned, or agreed to subject a plaintiff to allegedly unconstitutional acts purportedly committed by subordinate officials is sufficient to state individual-capacity claims against those officials under *Bivens*.” Pet. for Cert. I. The Court concluded in an opinion authored by Justice Kennedy, that, among other things, *Iqbal* failed to comply with the pleading standards of the Federal Rules of Civil Procedure because the complaint failed to plead sufficient facts to state a claim for purposeful and unlawful discrimination. Slip op. at 23.

Outside of its specific *Bivens* context, this case is important generally for private international law cases in the United States. The five-member majority in *Iqbal* (Justice Kennedy joined by Chief Justice Roberts and Justices Scalia, Thomas, & Alito) has made clear that the heightened standards of pleading announced in 2007 in *Bell Atlantic v. Twombly* should be applied in cases beyond the antitrust

context. In *Twombly*, the Court held that to comply with Federal Rule of Civil Procedure 8(a)(2) (requiring that a pleading contain “a short and plain statement of the claim showing that the pleader is entitled to relief”) that a complaint must contain “enough facts to state a claim to relief that is plausible on its face.” There had been some confusion in the lower federal courts as to whether that heightened pleading standard of plausibility applied in cases outside of the antitrust context. The Court in *Iqbal* has now answered that question in the affirmative, generally requiring all civil plaintiffs to meet the following standard: “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Slip op. at 14. As such, enough facts must be plead to allow “the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* A complaint must therefore show more than “a sheer possibility that the defendant has acted unlawfully.” *Id.*

The impact on private international law cases in the US federal courts will be profound. Indeed, plaintiffs in such cases will now have to allege not simply a short and plain statement of alleged illegal activities, but enough specific facts so that a court may determine that the complaint is beyond the realm of mere possibility. General recitations of alleged illegal conduct and hopes for discovery to make out claims looking towards summary judgment will now no longer be enough to allow cases to go forward in US federal district court. As such, the preliminary motion to dismiss has now been converted in most cases to a motion for summary judgment. At bottom, plaintiffs will now find it harder to stay in federal district court, and defendants will now be armed with another defensive weapon, in many cases dispositive, in resisting private international litigation.

It should be asked whether this shift from the simple notice pleading countenanced by the Federal Rules to a form of heightened pleading is a good thing. The Court appears to be taken with the belief that US courts are being deluged with frivolous claims. As such, plaintiffs should be required to plead more than the possible to stay in federal court. But, the Federal Rules themselves seem to contemplate that most cases will proceed on to summary judgement and/or trial. The Court’s rule will be especially problematic in private international law cases. Such cases often require extensive discovery to make out claims, as the acts and/or occurrences allegedly giving rise to unlawful activity occur outside the borders of the United States and present unique problems of factual

development given their transnational dimension. Under *Iqbal*, private international plaintiffs will not be able to depend on access to such discovery simply by filing a complaint.

In sum, surviving a motion to dismiss in private international law cases in US federal courts is now much harder and plaintiffs would be well served to conduct extensive and, to be sure, expensive fact development in advance of filing their complaint.

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## Tokyo symposium papers on IP available for download

The formerly announced international symposium in Tokyo on the topic of “Intellectual Property and International Civil Litigation” was held some ten days ago and several contributions from the speakers are accessible for download from the official website.

The available papers include:

1. Joinder of Jurisdiction, Provisional Measures, and International Parallel Litigation by *Professor Dai Yokomizo*
2. Legislative Proposal on Jurisdiction by *Professor Shigeki Chaen*
3. International Jurisdiction in Intellectual Property Rights Infringement Cases by *Associate Professor Tatsuhiro Ueno*
4. Applicable Law in Intellectual Property Infringement by *Associate Professor Ryu Kojima*
5. The Governing Law of Contracts for the Transfer or Licensing of Intellectual Property Rights by *Associate Professor Mari Nagata*
6. The Governing Law of Aspects of Intellectual Property Rights including Validity by *Professor Ryo Shimanami*
7. Recognition and Enforcement of Foreign Judgments Relating to Intellectual Property by *Professors Toshiyuki Kono and Nozomi Tada and Dr. Miho Shin*

In addition, there are contributions presenting the provisional text of CLIP

Principles in the part dealing with international jurisdiction and recognition/enforcement of foreign decisions in IP cases by two CLIP members, *Dr. Christian Heinze* and *Professor Pedro A. De Miguel Asensio*, respectively.

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# French Conference on Intellectual Property and PIL

✘ Professors Cyril Nourissat and Edouard Treppoz will organize a conference at the Faculty of Law of Lyon 3 University on Private International and Intellectual Property (*Droit international privé et propriété intellectuelle*) on June 4.

The morning will be dedicated to choice of law, while the afternoon will address jurisdictional issues. Speakers will be a mix of academics and practitioners.

The programme of the conference can be found here, and after the jump.

## PROGRAMME

9h10-9h30 Rapport introductif : De nouveaux outils communautaires pour le droit international privé de la propriété intellectuelle - C. NOURISSAT, Professeur agrégé des Facultés de droit, Université Jean Moulin-Lyon 3

LA LOI APPLICABLE : QUELLES STRATEGIES METTRE EN PLACE AUJOURD'HUI ?

(9h30 - 10h45)

Président de séance :

THIERRY SUEUR

Président du Groupe français de l'AIPPI

Directeur de la PI du Groupe Air Liquide

- Le principe de territorialité et la propriété intellectuelle

J.-S. BERGE, Professeur agrégé des Facultés de droit, Université Nanterre La Défense - Paris X

- Quelle loi en matière de contrats de propriété intellectuelle ?

B. UGHETTO, Avocat à la Cour, Cabinet Ratheaux, Chargé d'enseignements à l'Université Jean Moulin-Lyon 3

- Quelle loi en matière de contrefaçon ?

N. BOUCHE, Maître de conférences, Université Jean Moulin-Lyon 3  
10h45 - 11h00 Pause

Table ronde : la pratique confrontée au choix de la loi applicable  
(11h00 - 12h45)

Modérateur :

YVES REINHARD

Professeur agrégé des Facultés de droit, Université Jean Moulin- Lyon 3  
Directeur du Centre Paul Roubier

1. Choix de la loi applicable et contrats de PI transnationaux en pratique

A. MARIE, Conseil en Propriété Industrielle, Cabinet Beau de Loménie

2. Pourquoi choisir la loi française ?

C. CARON, Avocat à la Cour, Cabinet Christophe Caron, Professeur agrégé des Facultés de droit, Université Val de Marne - Paris XII

3. Pourquoi choisir la loi anglaise ?

L. BRAZELL, Solicitor - Advocate, Cabinet Bird & Bird

4. Droits d'auteur et utilisation contractuelle sur l'Internet

A. ZANGS, Directrice Business Affairs, Société Deezer

LES NOUVELLES STRATEGIES CONTENTIEUSES

(14h00 - 15h00)

Président de séance :

THIERRY MOLLET-VIEVILLE

Président de l'AIPPI

Avocat à la Cour de Paris

- Quel juge en matière de contrefaçon ?

M.-E. ANCEL, Professeur agrégé des Facultés de droit, Université Val de Marne-Paris XII

- L'exclusivité du juge du titre



J. RAYNARD, Professeur agrégé des Facultés de droit, Université de Montpellier I

- Les conflits de procédures

T. AZZI, Professeur agrégé des Facultés de droit, Université René Descartes - Paris V

Table Ronde : la pratique confrontée aux enjeux contentieux  
(15h00 - 16h45)

Modérateur :

JACQUES DE WERRA

Professeur à la Faculté de droit de l'Université de Genève

1. La gestion du contentieux international notamment en matière de brevet

P. VERON, Président d'honneur de l'European Patent Lawyers Association (EPLAW) et de l'Association des avocats en propriété industrielle (AAPI)

2. La gestion du contentieux international notamment en matière de brevet, le point de vue de l'avocat allemand

DR. MARTIN KÖHLER, Rechtsanwalt

3. L'exécution des jugements français à l'étranger et des jugements étrangers en France

J.-P. STOULS, Avocat à la Cour, Cabinet Alister Avocats.

4. Le point de vue de l'entreprise : efficacité du système juridictionnel français

J. RIZENTHALER, Directeur de la Propriété Intellectuelle, Société Schneider Electric

16h45 - 17h00 Pause

17H00 - 17h20 Un autre regard : le point de vue de l'American Law Institute sur le droit international privé de la propriété intellectuelle

E. TREPPOZ, Professeur agrégé des Facultés de droit, Université Lumière - Lyon

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17h20 Propos conclusifs, TH. MOLLET-VIEVILLE

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# **Conference: International Association of Procedural Law Toronto Conference**

From June 3-5, 2009, the International Association of Procedural Law is holding its annual conference in Toronto, Canada. Entitled "The Future of Categories-Categories of the Future," the conference will showcase "leading proceduralists from around the world" who will present "their perspectives on the ways in which procedural reform is precipitating a collapse of the traditional categories of civil and common law in response to a new range of concerns and aspirations for procedure."

More information on the conference, speakers, and program is available at <http://www.iapl2009.org/index.html>

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## **New Zealand issues first e-Apostille**

The report of the Hague Conference is here.

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## **Forum Non Conveniens in US Courts**

On May 1, 2009, the United States Court of Appeals for the Seventh Circuit issued a noteworthy opinion in the consolidated cases of *Abad v. Bayer Corp.* and *Pastor*

*v. Bridgestone/Firestone*. These consolidated appeals raise interesting issues regarding the application of the forum non conveniens doctrine in US courts.

In the *Abad* case, Argentinian plaintiffs filed products liability actions against American manufacturers for injuries sustained in Argentina. Plaintiffs alleged that they (a group of hemophiliacs or their decedents) were infected with the AIDS virus because the defendant manufacturers of the clotting factor that hemophiliacs take to minimize bleeding failed to eliminate the virus from the donors' blood from which the clotting factor was made. The *Pastor* case was a wrongful-death suit growing out of a fatal auto accident in Argentina with a car equipped with tires manufactured by Bridgestone/Firestone. In both cases, defendants moved the district court for dismissal under forum non conveniens and the district court dismissed the case in favor of the courts in Argentina. On appeal, the Seventh Circuit, with Judge Richard Posner writing, applied the abuse of discretion standard and thus affirmed.

This opinion is interesting for at least three reasons. First, appellants pressed the argument on appeal that federal district courts have the "virtually unflagging obligation . . . to exercise the jurisdiction given them." *Colorado River Conservation District v. United States*, 424 U.S. 800, 817 (1976). See slip op. at 2-3. The court rejected that argument in favor of an abuse of discretion standard of review, which affords district courts substantial leeway in deciding to send international civil cases to a foreign forum.

Second, the court reaffirmed the discretion of district courts in applying the *Gulf Oil* factors, but with an interesting twist: Judge Posner recognized that *Gulf Oil* represented an accommodation of state interests in an international world. In his words, "[a]nd so the plaintiffs . . . argue that the United States has a greater interest in the litigation than Argentina because the defendants are American companies, while the defendants argue that Argentina has a greater interest than the United States because the plaintiffs are Argentinians. *The reality is that neither country appears to have any interest in having the litigation tried in its courts rather than in the courts of the other country; certainly no one in the government of either country has expressed to us a desire to have these lawsuits litigated in its courts.*" Slip op. at 10 (emphasis added). Has the Seventh Circuit opened the door for such submissions? Should litigants, therefore, now seek to have governments file statements of interest in forum non conveniens cases? If so, one is left to wonder how such a submission will matter and whether US courts will

defer to them.

Finally, this case and others reported recently on this site confirm that forum non conveniens is being used frequently in international litigation in US courts. With the Supreme Court's recent decision in *Sinochem* (holding that district courts may determine forum non conveniens questions before ascertaining jurisdiction), are we seeing an increased usage of forum non conveniens in international civil cases? If so, is this a good thing?

At bottom, the doctrine of forum non conveniens in the United States continues to evolve.

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## Conference: “Il diritto al nome e all’identità personale nell’Unione europea”

✘ An interesting conference on issues relating to name and personal identity in private international law and EU law will be hosted by the Faculty of Law of the **University of Milan - Bicocca on 22 May 2009** (h. 9:15-13:45): “**Il diritto al nome e all’identità personale nell’Unione europea**” (*Right to Name and Personal Identity in the EU*).

Here’s the programme (*the session will be held in Italian, except otherwise specified*):

Chair: *Roberto Baratta* (University of Macerata, Permanent Representation of Italy to the European Union);

- “Il diritto al nome come espressione del principio di eguaglianza tra coniugi nella giurisprudenza italiana”: *Maria Dossetti* (University of Milan - Bicocca), *Anna Galizia Danovi* (Centro per la Riforma del Diritto di Famiglia);

- “Le droit au nom dans la jurisprudence de la Cour de Justice” (*in French*): *Jean-Yves Carlier* (Université Catholique de Louvain);
- “Le droit au nom, entre liberté de circulation et droits fondamentaux” (*in French*): *Laura Tomasi* (Registry of the European Court of Human Rights);
- “La legge applicabile al nome: conseguenze dei principi comunitari ed europei sul diritto internazionale privato”: *Giulia Rossolillo* (University of Pavia);
- “Il riconoscimento del diritto al nome nella prassi italiana”: *Sara Tonolo* (University of Insubria);
- Shorter reports and debate: *Valeria Carfì* (University of Siena), *Alessandra Lang* (University of Milan), *Diletta Tega* (University of Milan Bicocca)

Concluding remarks: *Roberto Baratta*.

(*Many thanks to Giulia Rossolillo for the tip-off*)