New Zealand issues first e-Apostille

The report of the Hague Conference is here.

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 Argentines. *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.

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, Permament 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)

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (3/2009)

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

It contains the following **articles/case notes (including the reviewed decisions)**:

- ***Peter Kindler***: "Internationales Gesellschaftsrecht 2009: MoMiG, Trabrennbahn, Cartesio und die Folgen" – the English abstract reads as follows:

The article summarizes, in a European as well as in a German perspective, the recent developments for corporations in private international law in 2008. In German legislation, the law aiming at the modernization of the private company limited by shares ("MoMiG") has abandoned the requirement for German companies of having a real seat in Germany, introducing at the same time stricter disclosure requirements in respect of branches of foreign companies in Germany. The German Federal Court, in a ruling of October 2008 ("Trabrennbahn"), has applied the real seat doctrine to companies incorporated outside the EU – in this case in Switzerland –, thus confirming the traditional approach of German courts since the 19th century. Finally, in a European perspective, the article addresses the judgment of the EJC in case C-210/06 ("Cartesio") referring to the extent of freedom of establishment in case of transfer of a company seat to a EU Member State other than the EU Member State of incorporation. The article concludes with the statement, inter alia, that EU Member States are free to use the real seat as a connecting factor in private international company law.

- ***Marc-Philippe Weller:*** "Die Rechtsquellendogmatik des

Gesellschaftskollisionsrechts" – the English abstract reads as follows:

This article deals with the International Company Law in the aftermath of the judgments "Cartesio" from the ECJ and "Trabrennbahn" from the German Federal Court of Justice. There are three different sources of International Company Law. The sources have to be applied in the specific order of precedence stated by Art. 3 EGBGB:

(1.) The European International Company Law is based on the freedom of establishment according to Art. 43, 48 EC. The freedom of establishment contains a hidden conflict of law rule known as "Incorporation Theory" for companies that relocate their real seat in another EC-member state.

(2.) As part of Public International Company Law the "Incorporation Theory" is derived from various international treaties such as the German-US-American-Friendship-Agreement.

(3.) The German Autonomous International Company Law follows the "Real Seat Theory" when it is applied in cases with third state companies (e.g. Swiss companies). Therefore, substantive German Company Law is applicable to third state companies with an inland real seat. According to the so called "Wechselbalgtheorie" (Goette), foreign corporations are converted into domestic partnerships.

The German jurisdiction is bound to the German Autonomous International Company Law (i.e. the real seat theory) to the extent of which the European and the Public International Company Law is not applicable.

- ***Alexander Schall:*** "Die neue englische floating charge im Internationalen Privat- und Verfahrensrechts" – the English abstract reads as follows:

After Inspire Art, thousands of English letter box companies have come to Germany. But may they also bring in their domestic security, the qualified floating charge? The answer depends on the classification of the floating charge under the German conflict laws. Since German law does not acknowledge

global securities on undertakings, the traditional approach was to split up the floating charge and to subject its various effects (e.g. security over assets, the right to appoint a receiver/administrator) to the respective conflict rules. That meant in particular that property in Germany could not be covered by a floating charge (lex rei sitae). This treatment seems overly complicated and not up to the needs of an efficient internal market. The better approach is to understand the floating charge as a company law tool, a kind of universal assignment. This allows valid floating charges on the assets of UK companies based in Germany. And while the new right to appoint an administrator under the Enterprise Act 2002 is part of English insolvency law, the article shows that this does not preclude the traditional right to appoint a (contractual or – rather – administrative) receiver for an English company with a CoMI in Germany.

- ***Stefan Perner:*** "Das internationale Versicherungsvertragsrecht nach Rom I" – the English abstract reads as follows:

Unlike its predecessor – the Rome Convention –, the recently adopted Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) covers the entire insurance contract law. The following article outlines the new legal framework.

- ***Jens Rogler:*** "Die Entscheidung des BVerfG vom 24.1.2007 zur Zustellung einer US-amerikanischen Klage auf Strafschadensersatz: – Ist das Ende des transatlantischen Justizkonflikts erreicht?"
  This article deals with the service of actions for punitive damages under the Hague Service Convention. The author refers first to a decision of the Higher Regional Court Koblenz of 27.06.2005: In this case, the German defendant should be ordered to pay treble damages in a class action based on the Sherman Act. Here, the Regional Court held that the Hague Service Convention was not applicable since the case did not constitute a civil or commercial matter in terms of Art. 1 (1) Hague Service Convention. The author, however, argues in favour of an autonomous interpretation of the term "civil or commercial matter" according to which class actions directed at punitive/treble damages can be regarded as civil matters in terms of Art. 1 Hague Service Convention.Further, the

author turns to Art. 13 Hague Service Convention according to which the State addressed may refuse to comply with a request for service if it deems that complicance would infringe its sovereignty or security. There have been several decisions dealing with the applicability of Art. 13 Hague Service Convention with regard to class actions aiming at punitive/treble damages. Those decisions discussed in particular whether Art. 13 corresponds to public policy. In this respect, most courts held that Art. 13 has to be interpreted more narrowly than the public policy clause. In this context, the author refers in particular to a decision of the German Federal Constitutional Court of 24 January 2007 (2 BvR 1133/04): In this decision, the Constitutional Court has held that the mere possibility of an imposition of punitive damages does not violate indispensable constitutional principles. According to the court, the service may be irreconcilable with fundamental principles of a constitutional state in case of punitive damages threatening the economic existence of the defendant or in case of class actions *if* – i.e. only then – those claims deem to be a manifest abuse of right. Thus, as the author shows, the Constitutional Court agrees with a restrictive interpretation of Art. 13 Hague Service Convention.

- ***Christian Heinze*:** "Der europäische Deliktsgerichtsstand bei Lauterkeitsverstößen"
  The article examines the impact of the new choice of law rule on unfair competition and acts restricting free competition (Art. 6 Rome II Regulation) on Art. 5 No. 3 Brussels I Regulation: The author argues that it should be adhered to the principle of ubiquity according to which the claimant has a choice between the courts at the place where the damage occurred and the courts of the place of the event giving rise to it. In view of Art. 6 Rome II Regulation he suggests, however, to locate the place where the damage occurred with regard to Art. 5 No. 3 Brussels I Regulation in case of obligations arising out of an act of unfair competition at the place where the competitive relations are impaired or where the collective interests of consumers are affected – if the respective measure had intended effects there. In case an act of unfair competition affects exclusively the interests of a specific competitor, the place should be determined where the damaging effects occur, which is usually the place where the affected establishment has its seat. With regard to the

determination of the place of the event giving rise to the damage, the author suggests to apply a centralised concept according to which the place of the event giving rise to the damage is, as a rule, the place where the infringing party has its seat.

- ***Peter Mankowski:*** "Neues zum 'Ausrichten' unternehmerischer Tätigkeit unter Art. 15 Abs. 1 lit. c EuGVVO" – the English abstract reads as follows:

"Targeted activity" in Art. 15 (1) lit. c Brussels I Regulation and in Art. 6 (1) lit. b Rome I Regulation aims at extending consumer protection. Accordingly, it at least comprises the ground which was already covered by "advertising" under Arts. 13 (1) pt. 3 lit. a Brussels Convention; 5 (2) 1st indent Rome Convention. "Targeted activity" is a technologically neutral criterion. Any distinction between active of passive websites has to be opposed for the purposes of international consumer protection since it would fit ill with the paramount importance of the commercial goal pursued by the marketer's activities. Any kind of more or less unreflected import of concepts from the United States should be denied in particular. Any switch in the mode of communication does not play a significant role, either.

Activities by other persons ought to be deemed to be the marketer's activities insofar as he has ordered or enticed such activities. In principle, registration in lists for mere communication purposes do not fall within this category. If only part of the overall programme of an enterprise is advertised "targeted activity" does not exclude contracts for other parts of that programme if and insofar as such advertising has prompted the consumer to get into contact with the professional.

- ***Dirk Looschelders:*** "Begrenzung des ordre public durch den Willen des Erblassers" – the English abstract reads as follows:

When applying the Islamic law of succession, in many cases conflicts occur with the fundamental principles of German law, especially with the German fundamental rights. In particular problems arise in view of the Islamic rule that the right of succession is excluded when the potential heir and the deceased belong to different religions. The Higher Regional Court of Berlin ascertains that such a rule is basically inconsistent with the German "ordre public",

regulated in Article 6 EGBGB. In this particular case, however, the court refused the recourse to Article 6 EGBGB, because the consequence of the application of the Egypt law and the will of the deceased – the exclusion of the illegitimate son of Christian faith from the succession – comply with each other. In the present case, this conclusion is strengthened by the fact that the deceased has manifested his will in a holographic will, which is effective under German law. Nevertheless, with regard to the testamentary freedom (Art. 14 Abs. 1 S. 1 GG), the same conclusion would be necessary, if a corresponding will of the deceased could be discovered in any other way. Insofar, the "ordre public" is limited by the will of the deceased.

- ***Boris Kasolowsky/Magdalene Steup:*** "Ordre-public-Widrigkeit kartellrechtlicher Schiedssprüche – der flagrante, effective et concrète -Test der französischen Cour de cassation" – the English abstract reads as follows:

The Cour de Cassation decision in SNF v. Cytec is the first case in which a final appeal court of an EU Member State dealt with the enforcement of an arbitration award allegedly in breach of EC competition law. On the basis of the breach of EC competition law, one of the parties argued that the enforcement of the award would – pursuant to Eco Swiss – be contrary to public policy within the meaning of Article V. 2 (b) of the New York Convention.

The Cour de Cassation considered in particular the intensity of the courts' review when dealing with a party resisting enforcement of an award for being contrary to competition law and public policy. In its decision it reconfirmed the view of the Cour d'appel that the review out to be rather limited.

The article suggests by reference to the Cour de Cassation in SNF v Cytec, but also to the decisions rendered in other jurisdictions, that (i) a rather limited standard level of review of arbitration awards for breach of EC competition law giving rise to a breach of public policy is being developed and (ii) only the most obvious breaches may result in a challenge succeeding or enforcement being refused. Consequently, there should (increasingly) be a level playing field within Europe. Further, given the rather limited review – which is now becoming accepted – there should in most cases also be no significant additional risks in enforcing arbitration awards in EU Member State jurisdictions rather than in non-EU Member State jurisdictions.

- ***Sebastian Mock:*** "Spruchverfahren im europäischen Zivilverfahrensrecht" – the English

abstract reads as follows:

Austrian and German corporate law provide a special proceeding for minority shareholders to review the appraisal granted by the majority shareholder on certain occasions (Spruchverfahren). This proceeding stands separate from other proceedings regarding the squeeze out of the minority shareholders and does not legally affect the validity of the decision. In contrast to Austrian and German civil procedure law the application of the Brussels regulation does not generally lead to jurisdiction of the court of the state where the seat of the company is located. Neither the rule on exclusive jurisdiction of Art. 22 no. 2 Brussels regulation nor the rules on special jurisdiction of Art. 5 no. 5 Brussels regulation apply for the Spruchverfahren. As the consequence the international jurisdiction under the Brussels regulation is only determined by the domicile respectively the seat of the defendant in the procedure (Art. 2 Brussels regulation). However, a corporation can ensure the concentration of all proceedings in the Member state of their seat by implementing a prorogation of jurisdiction according to Art. 23 Brussels regulation in their corporate charter.

- ***Arno Wohlgemuth**:* "Internationales Erbrecht Turkmenistans" – the English abstract reads as follows:

The law governing intestate and testamentary succession in Turkmenistan is dispersed in different bodies of law such as the Turkmenistan Civil Code of 1998, the rules surviving as ratio scripta of the abrogated Civil Code of the Turkmen SSR of 1963, the Law on Public Notary of 1999, and the Minsk CIS Convention on legal assistance and legal relations in civil, family and criminal matters of 1993, as amended. Whereas in principle movables are distributed as provided by the law in force at the place where the decedent was domiciled at the time of his death, immovable property will pass in accordance with the law prevailing at the place where it is located.

- ***Christian Kohler*** on the meeting of the European Group for Private International Law (EGPIL) in Bergen on 19-21 September 2008: "Erstreckung der europäischen Zuständigkeitsordnung auf drittstaatsverknüpfte Streitigkeiten – Tagung der Europäischen Gruppe für Internationales Privatrecht in Bergen"

  The consultation's focus was on the proposed amendments of Regulation 44/2001 in order to apply it to external situations. The introduction of this proposal – which can be found (besides in this issue of the IPRax) also at the EGPIL's website – reads as

follows:

> *At its meeting in Bergen, on 19-21 September 2008, the European Group for Private International Law, giving effect to the conclusions of its meeting in Hamburg in 2007, which took into account the growth of the external powers of the Union in civil and commercial matters, considered the question of enlarging the scope of Regulation 44/2001 ("Brussels I") to cover cases having links to third countries, cases to which the common rules on jurisdiction do not apply. On this basis, it proposes, as its initial suggestion, and as one possibility among others, the amendment of the Regulation for the purpose of applying its rules of jurisdiction to all external situations. These proposals are without prejudice to the examination of other possible solutions – in particular, conventions adopted by the Hague Conference on Private International Law – or a similar analysis of other instruments, such as Regulation 2201/2003 ("Brussels II bis") or the new Lugano Convention of 30 October 2007. Other questions still remain to be considered – in particular the adaptation of Article 6 of Brussels I and the extension of Brussels I to cover the recognition and enforcement of judgments given in a third country.*

- ***Erik Jayme/Michael Nehmer*** on a symposium hosted by the Law Faculty of the University of Salerno on the international aspects of intellectual property: "Urheberrecht und Kulturgüterschutz im Internationalen Privat- und Verfahrensrecht – Studientag an der Universität Salerno"

Publication: Raphael on The Anti-Suit Injunction

The latest in a long line of private international law monographs from OUP is *The Anti-Suit Injunction* by Thomas Raphael. The description from the OUP site:

- *The first major treatment of anti-suit injunctions, a complex area of private international law*
- *Concise chapters and a clearly laid out structure with a selection of useful precedents and templates, designed to assist practitioners when preparing applications under pressure*
- *Comprehensive analysis of relevant cases, including Turner v Grovit and The Front Comor*
- *Separate chapters dealing with history and fundamental topics of controversy allow a detailed exploration of difficult questions in complicated cases*

Questions relating to anti-suit injunctions arise frequently in commercial practice, as commercial litigation is often disputed in several jurisdictions simultaneously. In these circumstances, a party preferring to conduct its litigation in England would need to determine whether it might be possible and effective to obtain an anti-suit injunction to restrain the other party from conducting its proceedings in another jurisdiction.
This book provides a comprehensive but concise analysis of all the relevant principles and case-law surrounding anti-suit injunctions. Particular emphasis is given to addressing the many practical problems that are likely to confront a practitioner applying for or resisting an anti-suit injunction in urgent circumstances. There are also chapters on related topics such as claims for damages in respect of foreign litigation and other practical remedies that can be used when an anti-suit injunction is not available. The effect of European Jurisdictional Law on the power to grant anti-suit injunctions is considered in detail. This book is the first major treatment of anti-suit injunctions and examines in detail those effects, and evaluates the case law as it has developed.

Believe me, at £95 it's very competitively priced; it's worth that for the comprehensive footnoting alone. You can purchase it from our secure, Amazon-powered bookshop, or from the OUP website.

Postdoctoral Research Position in Louvain

The Chair of European Law of the Université Catholique de Louvain is seeking to recruit a postdoctoral fellow for next academic year.

This post is opened in the context of a research project on the relationship between private international law and competition law, which is financed by the European Commission. The work will predominantly focus on collective action/redress issues in civil litigation related to breach of competition law.

The application deadline is June 30, 2009 and the contract would start in September 2009.

The Université Catholique de Louvain (UCL) was established in 1425 and continues to be committed today to the highest standards in education and research. Located in Louvain-la-Neuve and Brussels, the UCL campuses welcome 21.000 students and employ 5.000 academics, researchers and support staff. In that respect, UCL is by far the largest French-speaking university of Belgium and one of the largest in the world. The UCL law school (located in Louvain-la-Neuve) is as old as the university and offers a full range of law degrees. Many of its faculty members are leaders in their respective fields and are part of European and international research networks.

The Chair of European Law was established in 2007 to further strengthen the law school's resources in the area of European Union law. In terms of research, the Chair focuses on the study of tools and techniques developed at EU level to manage legal diversity and promote integration. Recently, the Chair has received significant funding from the European Commission to explore and offer solutions to various coordination issues raised by the implementation of EC competition law (Regulation 1/2003) and antitrust litigation, in particular damages claims. The project is carried out in partnership with the "Collège européen" of University Paris II Panthéon-Assas (Professors L. Idot and C. Kessedjian) and the Max Planck Institute for International and Comparative Law (Prof. J. Basedow).

In that framework, the Chair of European Law is seeking to recruit a fulltime Postdoctoral Researcher for a one-year period starting in September 2009. The postdoctoral researcher will be attached administratively to the Charles De Visscher Center for International and European Law, a team of about 15 academics whose research interests cover a broad range of international and European law topics. In practice, he/she will work in close contact with Professor Stéphanie Francq, the holder of the Chair of European Law, and other researchers involved in the project financed by the European Commission.

The position is open for a promising researcher in law of English mother tongue (or fluent in English) interested in undertaking in-depth research in relation to collective action/redress issues in the field of competition law (aside from his/her own research projects). Preference will be given to researchers who have already worked on competition and/or conflict-of-laws issues in the context of the European Union. The position will involve some management tasks (assistance in the organization of a research seminar and an international conference) but no teaching or tutorial assignment.

Candidates for the position must evidence the following qualifications:
- *A doctorate or equivalent degree in law (or a doctoral manuscript approved before the application deadline)*
- *Research experience and publications commensurate with the stage at which the candidate finds him- or herself in his or her career;*
- *Interest and ability to carry out inter-disciplinary and collective research;*
- *Languages: English mother tongue (or fluency demonstrated by prior professional experience); French (at least passive knowledge) and ideally German (at least passive knowledge).*

***Terms of employment**. Post-graduate research grants at UCL amount to approximately (but not less than) €2000/month (net), depending on seniority, and, depending on the nationality of the recipient, include access to the Belgian welfare system and thus health benefits. The post-graduate researcher will also benefit from private office space, access to modern computing facilities and to the library and other academic resources generally available to faculty members and the scientific staff. In addition, he/she will benefit from the daily interactions with other members of the Charles De Visscher Center for International and European Law and, generally, from access to the whole UCL*

legal community.

***Applications**. Applications and accompanying documents should be submitted before June 30, 2009 to the following three addressees: Prof. Stéphanie Francq (Holder of the*
Chair of European Law – Stephanie.Francq@uclouvain.be), Prof. March Fallon (President of the Charles De Visscher Center for International and European Law –
Marc.Fallon@uclouvain.be) and Damien Gerard (Research Fellow at the Chair of European Law – Damien.Gerard@uclouvain.be). Applications should indicate how the
candidate meets the requirements set out above and should include a curriculum vitae, copies of sample articles and/or papers and two letters of references. The most promising
candidates will be contacted for a meeting or a telephone interview in early July 2009.

***Information**. For further questions please contact Ms. Rita Vandenplas, secretary of the Chair of European Law at Rita.Vandenplas@uclouvain.be or +32 (0)10 474773 or Mr*
Damien Gerard, Research Fellow at the Chair of European Law: Damien.Gerard@uclouvain.be or +32 (0)10 474768.

West Tankers and Indian Courts

What is the territorial scope of *West Tankers*? It certainly applies within the European Union, but does it prevent English Courts from enjoining parties to litigate outside of Europe?

In a judgment published yesterday (*Shashou & Ors v Sharma* ([2009] EWHC 957 (Comm)), Cook J. ruled that *West Tankers* is irrelevant when the injunction enjoins the parties from litigating in India in contravention with an agreement providing for ICC arbitration in London.

Since India has not acceded to the EU (and is not, so far as I am aware, expected ever to do so), why was West Tankers even mentioned ?

The case was about a shareholders agreement for a venture in India between Indian parties. It provided for the substantive law of the contract to be Indian Law.

Cook J. held:

23 It is common ground between the parties that the basis for this court's grant of an anti-suit injunction of the kind sought depends upon the seat of the arbitration. The significance of this has been explored in a number of authorities including in particular ABB Lummus Global v Keppel Fels Ltd [1999] 2 LLR 24, C v D [2007] EWHC 1541 (at first instance) and [2007] EWCA CIV 1282 (in the Court of Appeal), Dubai Islamic Bank PJSC v Paymentech [2001] 1 LLR 65 and Braes of Doune v Alfred McAlpine [2008] EWHC 426. The effect of my decision at paragraphs 23-29 in C v D, relying on earlier authorities and confirmed by the judgment of the Court of Appeal at paragraph 16 and 17 is that an agreement as to the seat of an arbitration brings in the law of that country as the curial law and is analogous to an exclusive jurisdiction clause. Not only is there agreement to the curial law of the seat, but also to the courts of the seat having supervisory jurisdiction over the arbitration, so that, by agreeing to the seat, the parties agree that any challenge to an interim or final award is to be made only in the courts of the place designated as the seat of the arbitration. Subject to the Front Comor argument which I consider later in this judgment, the Court of Appeal's decision in C v D is to be taken as correctly stating the law.

...

35 Mr Timothy Charlton QC on behalf of the defendant submitted that the landscape of anti-suit injunctions had now been changed from the position set out by the Court of Appeal in C v D by the decision of the European Court of Justice in the Front Comor – Case C185/07 ECJ [2009] 1 AER 435. There, an English anti-suit injunction to restrain an Italian action on the grounds that the dispute in those actions had to be arbitrated in London was found to be incompatible with Regulation 44/2001. Although it was conceded that the decision specifically related to countries which were subject to Community law, it was submitted that the reasoning of both the Advocate General and the court should apply to countries which were parties to a convention such as the New York Convention. Reliance was placed on paragraph 33 of the European Court's judgment where, having found that an anti-suit injunction preventing proceedings being pursued in the court of a Member State was not compatible with Regulation No 44/2001, the court went onto say that the finding was supported by Article II(3) of the New York Convention, according to which it is the court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an arbitration agreement, that will at the request of one of the parties refer the parties to arbitration, unless it finds that

the said agreement is null and void, inoperative or incapable of being performed. The Advocate General, in her Opinion said "incidentally, it is consistent with the New York Convention for a court which has jurisdiction over the subject matter of the proceedings under Regulation No 44/2001 to examine the preliminary issue of the existence and scope of the arbitration clause itself

36. It is plain from the way in which the matter is put both by the European Court of Justice and the Advocate General, that their concern was to show that there was no incompatibility or inconsistency between the position as they stated it to be, as a matter of European Law, and the New York Convention. This does not however mean that the rationale for that decision, which is binding in Member States, applies to the position between England on the one hand and a country which is not a Member State, whether or not that State is a party to the New York Convention. An examination of the reasoning of the European Court, and the Advocate General reveals that the basis of the decision is the uniform application of the Regulation across the Member States and the mutual trust and confidence that each state should repose in the courts of the other states which are to be granted full autonomy to decide their own jurisdiction and to apply the provisions of the Regulation themselves. Articles 27 and 28 provide a code for dealing with issues of jurisdiction and the courts of one Member State must not interfere with the decisions of the court of another Member State in its application of those provisions. Thus, although the House of Lords was able to find that anti-suit injunctions were permitted because of the exception in Article 1(2)(d) of the Regulation which excludes arbitration from the scope of it, the European Court held that, even though the English proceedings did not come within the scope of the Regulation, the anti-suit injunction granted by the English court had the effect of undermining the effectiveness of the Regulation by preventing the attainment of the objects of unification of the rules of conflict of jurisdiction in civil and commercial matters and the free movement of decisions in those matters, because it had the effect of preventing a court of another member state from exercising the jurisdiction conferred on it by the Regulation (paragraph 24).

37. None of this has any application to the position as between England and India. The body of law which establishes that an agreement to the seat of an arbitration is akin to an exclusive jurisdiction clause remains good law. If the defendant is right, C v D would now have to be decided differently. Both the USA (with which C v D was concerned) and India are parties to the New York Convention, but the basis of the Convention, as explained in C v D, as applied in England in accordance with its own principles on the conflict of laws, is that the courts of the seat of arbitration are the only courts where the award can be challenged whilst, of course, under Article V of the Convention there are limited grounds upon which other contracting states can refuse to recognise or enforce the award once made.

38. The Regulation provides a detailed framework for determining the jurisdiction of member courts where the New York Convention does not, since it is concerned with recognition and enforcement at a later stage. There are no "Convention rights" of the kind with which the European Court was concerned at issue in the present case. The defendant is not seeking to enforce any such rights but merely to outflank the agreed supervisory jurisdiction of this court. What the defendant is seeking to do in India is to challenge the award

(the section 34 IACA Petition) in circumstances where he has failed in a challenge in the courts of the country which is the seat of the arbitration (the ss.68 and 69 Arbitration Act applications). Whilst of course the defendant is entitled to resist enforcement in India on any of the grounds set out in Article V of the New York Convention, what he has done so far is to seek to set aside the Costs Award and to prevent enforcement of the Costs Award in England, in relation to a charging order over a house in England, when the English courts have already decided the matters, which plainly fall within their remit. The defendant is seeking to persuade the Indian courts to interfere with the English courts' enforcement proceedings whilst at the same time arguing that the English courts should not interfere with the Indian courts, which he would like to replace the English courts as the supervisory jurisdiction to which the parties have contractually agreed.

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39. In my judgment therefore there is nothing in the European Court decision in Front Comor which impacts upon the law as developed in this country in relation to anti-suit injunctions which prevent parties from pursuing proceedings in the courts of a country which is not a Member State of the European Community, whether on the basis of an exclusive jurisdiction clause, or an agreement to arbitrate (in accordance with the decision in the Angelic Grace [1995] 1 LLR 87) or the agreement of the parties to the supervisory powers of this court by agreeing London as the seat of the arbitration (in accordance with the decision in C v D).

Hat tip: Hew Dundas, Jacob van de Velden

Article on Google Book Search Settlement

Yesterday's issue of the *Frankfurter Allgemeine Zeitung* (***FAZ***) contains an interesting article on the Google Book Search Settlement written by ***Prof. Burkhard Hess:***

The settlement concerns a class action lawsuit between Google and – as plaintiffs – the Authors Guild, the Association of American Publishers as well as individual authors and publishers about books scanned for the Google Book Search without the authors' consent. Basically, the proposal for the settlement provides on the one side the payment of compensation for class members and the establishment of a registry of rights to books while it contains on the other side an authorisation of Google to scan books, maintain an electronic database and to make worldwide commercial uses of books.

The problematic issue the present article is dealing with, is the opt-out-mechanism provided by the settlement: Authors who do not object within the opt-out deadline (which has been extended until 4 September 2009) will be bound by

the settlement. Thus, authors are "compelled" to take action if they don't want to be bound by the settlement. In other words – the opt-out mechanism is meant to substitute the authors' consent in the digitalisation and marketing of their books.

Hess points out in his article that the strategy of an opt-out mechanism might involve difficulties in view of the Berne Convention for the Protection of Literary and Artistic Works since this Convention guarantees a certain minimum standard of protection: In his article, *Hess* raises doubts whether the opt-out mechanism – which would lead to an automatic deprivation of the authors' copyright – meets the requirements of this protection standard.

With regard to the fairness hearing – which will take place in New York on 3 September – *Hess* suggests that it is not only the concerned authors who should intervene – rather he suggests that also the German Federal Government could do so, as an amicus curiae, in order to submit the reservations against the settlement.

The article titled "Es wird Zeit, dass die Bundesregierung eingreift" can be found (in German) also online on the website of the FAZ.

China Antitrust Gets Global

In an interesting Editorial, the *Financial Times* discussed yesterday recent rulings of Chinese authorities demonstrating their willingness to enforce Chinese anti-monopoly law in respect of global deals. Indeed, the *FT* reports that two out of three of the deals had only secondary implications in China (other reports on the deals can be found here and here).

As the *Editorial* notes, an interesting consequence is that Chinese law will only be another legislation purporting to reach global deals:

> *The three rulings … show that Beijing will not hesitate to intervene in largely extra-territorial deals. That means China has joined the US and the European Union as a global competition referee, providing M&A lawyers with a fresh set*

of problems to wrestle with.

What is too bad for M&A lawyers, of course, is that you cannot really pick up one of the relevant laws. The traditional choice of law methodology does not work. Each forum is concerned with the protection of its own market, and does not really consider applying foreign law. You could give a variety of rationales for that result, but the most common is probably that antitrust laws are mandatory rules.

So your options are either to develop a regime for the resolution of conflicts of mandatory rules, or hope that the authorities of the relevant markets will conclude agreements on the application of their laws, as the U.S. and the E.U. have done. I wonder whether there is any similar agreement with China.

BIICL Seminar on West Tankers

The British Institute for International & Comparative Law are hosting a seminar on Tuesday 12th May (17.30-19.30) entitled *Enforcing Arbitration Agreements: West Tankers – Where are we? Where do we go from here?* Here's the synopsis:

> *The February 2009* West Tankers *ruling of the European Court of Justice has the unintended consequence of disrupting the flow of arbitrators' powers. The precise extent to which these are affected remains unclear, however. In its ruling, the Court stated:*
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> ***"It is incompatible with Council Regulation (EC) No 44/2001 … for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement."***
>
> *Following this ruling essentially two questions arise: "Where are we?" and "Where do we go from here?". The former question involves an assessment of West Tankers' immediate implications. The second turns on an emerging consensus, encompassing comments from at least Germany, France and the*

> *United Kingdom, that legislative change is needed to attend to the unsatisfactory state of the law in this context. The Heidelberg Report 2007 on the Brussels I Regulation proposes amendments bringing proceedings ancillary to arbitration within the Regulation's scope, and to confer exclusive jurisdiction on the courts of the state of the arbitration. Should this proposal be supported?*
>
> *The Institute has convened leading practitioners and academics, including one of the authors of the Heidelberg Report, to rise to the challenge of answering these questions. There will be ample occasion for discussion, so those attending are encouraged to share their thoughts and ideas.*
>
> ***2 CPD hours may be claimed by both solicitors and barristers through attendance at this event.***

Chair: The Hon Sir Anthony Colman, Essex Court Chambers

Speakers:
Alex Layton QC, 20 Essex Street; Chairman of the Board of Trustees, British Institute of International and Comparative Law
Professor Adrian Briggs, Oxford University
Professor Julian Lew QC, Head of the School of International Arbitration (Queen Mary), 20 Essex Street
Professor Thomas Pfeiffer, Heidelberg University; co-author of the Heidelberg Report 2007
Adam Johnson, Herbert Smith
Professor Jonathan Harris, Birmingham University and Brick Court Chambers

Details on prices and booking can be found on the BIICL website.

If you want to do your homework before the event, you might want to visit (or revisit) our West Tankers symposium, not least because four of the speakers at the BIICL seminar were also involved in our symposium.