Brussels I Review – The Abolition of Exequatur?

This is the first of a series of posts soliciting comment on the proposals for reform of the Brussels I Regulation in the Commission's recent Report and Green Paper. It concerns the possible abolition of all intermediate measures to recognise and enforce judgments (*exequatur*).

According to the Commission in its Green Paper:

> *The existing exequatur procedure in the Regulation simplified the procedure for recognition and enforcement of judgments compared to the previous system under the 1968 Brussels Convention. Nevertheless, it is difficult to justify, in an internal market without frontiers, that citizens and businesses have to undergo the expenses in terms of costs and time to assert their rights abroad. If applications for declarations of enforceability are almost always successful and recognition and enforcement of foreign judgments is very rarely refused, aiming for the objective of abolishing the exequatur procedure in all civil and commercial matters should be realistic. In practice, this would apply principally to contested claims. The abolition of exequatur should, however, be accompanied by the necessary safeguards.*
>
> *In the area of uncontested claims, intermediate measures have been abolished on the basis of a control, in the Member State of origin, of minimum standards relating to the service of the document instituting proceedings and to the provision of information about the claim and the procedure to the defendant. In addition, an exceptional review should remedy situations where the defendant was not served personally in a way to enable him/her to arrange for his/her defence or where he/she could not object to the claim by reason of force majeure or extraordinary circumstances ('special review'). Under this system, the claimant must still go through a certification procedure, be it that this procedure takes place in the Member State of origin rather than in the Member State of enforcement.*
>
> *In the area of contested and uncontested claims, on the other hand, Regulation 4/2009 on maintenance obligations abolishes exequatur on the basis of*

harmonised rules on applicable law and the protection of the rights of the defence is ensured through the special review procedure which applies once the judgment has been issued. Regulation 4/2009 thus takes the view that, in the light of the low number of "problematic" judgments presented for recognition and enforcement, a free circulation is possible as long as the defendant has an effective redress a posteriori (special review). If a similar approach were followed in civil and commercial matters generally, the lack of harmonisation of such a special review procedure might introduce a certain degree of uncertainty in the few situations where the defendant was not able to defend him/herself in the foreign court. It should therefore be reflected whether a more harmonised review procedure might not be desirable.

In light of this analysis, the Commission asks the following questions:

Question 1:
Do you consider that in the internal market all judgments in civil and commercial matters should circulate freely, without any intermediate proceedings (abolition of exequatur)?

If so, do you consider that some safeguards should be maintained in order to allow for such an abolition of exequatur? And if so, which ones?

One may, without too much difficulty, accept the proposition that that abolition the requirement to obtain a declaration of enforceability of a judgment obtained in another Member State would represent the logical end of the process that began with the 1968 Brussels Convention, aimed at ensuring the free movement of judgments within the Member States.

Nevertheless, it may be questioned whether this step would, in fact, produce practical benefits for the Community and might, indeed, increase the complexity and cost of enforcement, and create additional legal and political difficulties.The object of any cross-border enforcement regime in the EC must be to assimilate a judgment from one Member State as efficiently and effectively as possible into the legal order of one or more other Member States.

In this connection, it could well remain advantageous for the import of judgments initially to be channelled through a court or courts designated for this purpose

(i.e. as specified in Annex II to the Regulation), rather than proceeding directly to measures of execution, which may take place in a local court with little or no experience of cross-border matters. It must be recalled that the Brussels I Regulation does not apply only to money judgments, and the process for obtaining (and challenging) a declaration of enforceability provides an opportunity for any queries as to the nature and content of the judgment to be addressed before time and expense have been incurred in attempts to enforce that judgment.

That is not to say that the present enforcement process cannot be improved with the object of reducing cost and delay. Information technology could play an important part, most obviously by creating an online, central "clearing system" through which applications to enforce in several Member States could be lodged simultaneously, transmitted to the Member States' responsible authorities, and their progress monitored, with standardised fees and communication between Member State courts and the judgment creditor by e-mail. Other posssible improvements to the enforcement regime put forward by the Commission elsewhere in the Green Paper (i.e. creation of a standard form containing all relevant information as to the nature and terms of the judgment and removal of the requirement in Art. 40(2) of the Regulation to have an address for service within the jurisdiction) also appear sensible.

As to reform of the grounds for refusal of enforcement, it may be argued that (with the possible exception of the special treatment in Art. 34(2) of judgments in default of appearance, which could equally be dealt with as an aspect of public policy) the existing grounds should remain. As to the public policy ground, there appears no obvious reason why the "free movement of judgments" should be any the less open to qualification on the overriding grounds of national interest than any of the freedoms explicitly established by the EC Treaty. The circumstances in which this ground may be invoked have, in any event, been greatly circumscribed by the ECJ (see, recently, the judgments in *Gambazzi v. Daimler Chrysler* and *Apostolides v. Orams*). As to the effect of irreconcilability between judgments, it does not appear to be an adequate answer for the Commission to assert that "[i]rreconcileability between judgments is to a great extent avoided, at least at European level, by the operation of the Regulation's rules on *lis pendens* and related actions". That may be so, but those rules cannot guarantee that there will be no irreconcileable decisions, and they do not apply to situations involving judgments from third countries.

Accordingly, and subject to the views of others, Question 1 could receive the following answer:

> *No, but the process for obtaining a declaration of enforceability should be streamlined, with the use of information technology where appropriate.*

Brussels I Review – Online Focus Group

Many will, by now, have had the opportunity to consider the Commission's Report and Green Paper on the review of the Brussels I Regulation, if not also the detailed Studies by Professors Hess, Pfeiffer and Schlosser and Nuyts, on which they were based. As the Commission's initial deadline for consultation concludes at the end of this month, this seems an appropriate time at which to invite conflictoflaws.net users to participate in an online discussion on the Report and Green Paper, with a view to debating some or all of the Commission's proposals.

Over the next few days, therefore, a series of posts will invite comments (see the Post a Comment box below) on particular aspects of the proposed reform of the Brussels I Regulation. These will follow the order of topics in the Green Paper, that is to say (links will be added to each topic as the relevant post is published):

- the abolition of intermediate measures to recognise and enforce foreign judgments (*exequatur*) (Question 1);
- the operation of the Regulation in the international legal order (Question 2);
- choice of court agreements (Question 3);
- industrial property (Question 4);
- *lis pendens* and related actions (Question 5);
- provisional measures (Question 6);
- the interface between the Regulation and arbitration (Question 7); and
- other issues (Question 8).

Responses (that are published as posts, rather than comments) to any or all of the initial posts:

- Jonathan Hill
- Illmer and Steinbrück on the Interface Between Brussels I and Arbitration

Each post will contain relevant extracts from the text of the Green Paper, together with a preliminary reaction and suggestions as to the way forward. This commentary (based on the author's personal views) is intended as a spur for debate of the Green Paper, rather than to define the areas for discussion or criticism of its proposals (or any counter-proposals). It is hoped that the debate will be as wide-ranging, in terms of subject matter and contributors, as possible. Comments from all site users, whether general or limited to a single point, are actively encouraged.

Before opening the discussion with the first of these posts, it seems appropriate to make a few introductory comments on the Green Paper and Report.

First, the response to the Green Paper and the Report should be only the start, and not the end, of consultation with stakeholders of these important matters. The Commission has had 18 months to consider the Studies referred to above, and to develop its own analysis and proposals. It is disappointing, therefore, that a period of only 2 months (up to 30 June 2009) has been allowed for responses to the Green Paper, especially as an extended period over the summer vacation could not conceivably have materially delayed progress in formulating a draft updating Regulation. Mechanisms must be found, whether directly or through the Member States, to ensure that the views of individuals, interest groups and academic and practising lawyers are fully taken into account at all stages of the legislative process.

Secondly, it is vital that consideration should also be given as a matter of priority to structural changes within the European Court of Justice, so far as compatible with the EC Treaty, that will enable the Court to deal with preliminary references concerning the Regulation and other EC private international law instruments in a manner befitting their significance for the parties and the Member States' systems for dispensing civil justice. As the content of the Commission's Report demonstrates, the ECJ has regularly provided answers to questions put by Member State courts that are unsatisfactory in their reasoning or practical

application, or both. In particular, the Court, particularly in its recent case law, has shown a worrying disregard of arguments founded on the commercial consequences or justice of a particular interpretation in favour of an approach driven, apparently, solely by considerations of legal certainty and the exclusion of other considerations by the text of the Regulation.

As a result, there is (whether justified or not) a perception among legal practitioners that the ECJ in its current constitution lacks the all-round expertise to deal with references in the area of civil justice and, at least in England and Wales, that it is insensitive to the traditions and methods of the common law. It is, of course, a matter of fundamental importance that the citizens and courts of the Member States should have trust and confidence in the ECJ to exercise its overriding interpretive power responsibly. Against this background, and mindful of the possible expansion of the ECJ's caseload if the Lisbon Treaty is ratified, the creation of a specialist chamber (with its own Judges and Advocates-General) to deal with references relating to the several instruments adopted under Title IV of the EC Treaty would be a significant advance, and would appear to be within the powers conferred on the Community legislature by Art 225a of the Treaty. If this, or equivalent steps, are not taken at this stage, reform of the Brussels I Regulation in isolation is likely to be a case of "swallowing a spider to catch a fly" and to lead to further complications (and the need for further reform) as a result of the ECJ's future jurisprudence interpreting any new rules.

Thirdly, to increase the accessibility of the Regulation to non-experts, deregulation (i.e. reduction in the complexity or number of jurisdictional rules) should be preferred to increased regulation in the Brussels I reform process. Any modification of an existing instrument carries with it an inherent degree of legal uncertainty, by requiring existing case law and commentary to be re-appraised in light of the change. That effect must be taken into account in deciding which issues to tackle, and how, in the review process.

Finally, as to the Commission's comments in its Report on the functioning of the Brussels I Regulation, it seems fair to conclude that the Regulation, and its predecessor convention, have offered significant advantages for business, by promoting the free circulation of judgments in the EC and (in many situations) increasing predictability and consistency as to the criteria to be applied by Member State courts in accepting jurisdiction. There is, however, no doubt that the Commission is also correct to conclude that functioning of the Regulation is

open to improvement. It would be surprising if that were not the case. Further, it may be doubted whether (as the Commission suggests) the Regulation is "highly appreciated among practitioners". Many legal practitioners, whose practices concern only domestic matters, are untroubled by the Regulation. For others, the overall impression of the Regulation is, frequently, coloured by situations in which its operation is perceived as giving rise to inconvenient or uncommercial results. For example, in the United Kingdom, widespread (adverse) publicity in the legal profession followed the English High Court's decision in *J P Morgan v. Primacom* (following the earlier ECJ decision in *Gasser v. MISAT Srl*), that proceedings brought by a borrower in Mainz, Germany with the evident intention of frustrating proceedings to enforce a loan agreement in England (the jurisdiction chosen by the parties) must take priority under Art. 27 of the Regulation. One UK legal newspaper described the Primacom case "an intercreditor nightmare" that was "playing havoc with exclusive jurisdiction clauses and is threatening to derail cross-border restructurings in Europe". Criticism in UK legal circles has also followed the recent ECJ decision in *Allianz v. West Tankers*. Commenting on that decision, the Chief Executive of the Law Society, the representative body for solicitors in England and Wales, argued that the ruling "does Europe no favours as a place to do business" (see here).

Against this background, it is vital that any reform of the Brussels I Regulation should address, and be seen to address, the problems that EC litigants and their legal advisers actually face in practice, rather than pursuing the holy grails of "mutual recognition" and "legal certainty". Whether pragmatism will prevail over ideology remains, however, to be seen.

To conclude on a personal note, I should add that I was delighted to receive and accept an invitation to join conflictoflaws.net as a Consultant Editor. Through the breadth and quality of submissions by its editorial team and other contributors, the site has established itself as an essential point of reference for all practising and academic lawyers with an interest in private international law. I look forward to reading the reaction to this, and future posts on the site, concerning the European private international instruments and related matters.

The Results of the JHA Council (4-5 June 2009): Bilateral Agreements with Third Countries in PIL matters and Common Frame of Reference (CFR)

On 4 and 5 June the Justice and Home Affairs Council held its 2946th session in Luxembourg, the last one under the Czech Presidency. Among the "Justice" issues, discussed on Friday 5th, two main points are of particular importance as regards the development of European private law and private international law. Here's an excerpt of the press release (doc. n. 10551/09):

> ***Civil Law: Bilateral agreements with Third Countries***
>
> *The Council agreed on procedures for the negotiation and conclusion of bilateral agreements between member states and third countries concerning:*
>
> - *jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, parental responsibility and maintenance obligations, and applicable law in matters relating to maintenance; and*
> - *applicable law in contractual and non-contractual obligations.*
>
> *The aim of the agreed regulations is to authorise a member state to amend an existing agreement or to negotiate and conclude a new agreement with a third country in certain areas of civil justice through a functional and simplified arrangement, while ensuring that the "acquis communautaire" will be safeguarded.*
>
> *[The initial Commission's Proposals can be found in documents COM(2008) 893 fin. of 19 December 2008 (contractual and non-contractual obligations, subject to the codecision procedure) and COM(2008) 894 fin. of 19 December 2008 (family matters, subject to the consultation procedure). The latest available texts of the proposed regulations are those resulting from the Parliament's legislative resolutions at first reading, approved on 7 May 2009 (EP doc. n.*

T6-0380(2009) on contractual and non-contractual obligations, and EP doc. n. T6-0383(2009) on family matters): the amendments voted by the EP were agreed with the Council and the Commission, with a view to reaching an adoption of the dossiers at first reading (see Council doc. n. 9338/09 of 13 May 2009, and further statements by the Council and the Commission in doc. n. 10250/09 of 26 May 2009).

Ireland and the United Kingdom have formally notified their opt-in (see doc. n. 8529/09 of 7 April 2009 and doc. n. 8728/09 of 16 April 2009).

***The regulations will be formally adopted by the Council in a forthcoming session**. Further information can be found in press release n. 10697/09, currently available only in French.]*

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Common Frame of Reference for European Contract Law

The Council adopted the following guidelines:

I. Introduction

1. In April 2007, the JHA Council decided to mandate the Committee on Civil Law Matters to define a Council position on fundamental aspects of a future common frame of reference [doc. n. 8548/07 of 17 April 2007].

2. In accordance with that mandate, the JHA Council on 18 April 2008 approved a position on four fundamental aspects of the common frame of reference (i.e. purpose, scope, content and legal effect) [doc. n. 8286/08 of 11 April 2008].

3. Further to this position, the JHA Council on 28 November 2008 adopted a set of conclusions setting out some major guidelines for future work (covering structure, scope, respect for diversity and the involvement of the Council, the European Parliament and the Commission in the setting up of the Common Frame of Reference) [doc. n. 15306/08 of 7 november 2008 and doc. n. 5784/09 of 27 January 2009, currently not available]. Both the position and the conclusions provide that the Committee on Civil Law Matters will follow the work of the Commission on the Common Frame of Reference (hereinafter "CFR") on a regular basis.

*4. To ensure regular follow-up to the discussions and to enlarge on and clarify the guidelines previously adopted, the Presidency submitted a questionnaire to delegations on 8 January 2009 [*doc. n. 5116/09* of 15 January 2009] and invited them to reply in writing.*

5. In the light of the comments made and the discussions held, the Committee on Civil Law Matters invites Coreper to recommend to the Council that it approve the guidelines set out below and suggest that the Commission take them into account in its future work.

II. Points Considered

6. The Council indicated that it wished ***the CFR to have a three-part structure: one containing definitions of key concepts in contract law, one setting out common fundamental principles of contract law and one containing model rules****.*

7. The replies to the questionnaire and the subsequent discussions held within the Committee on Civil Law Matters consequently focused specifically on ***(a) the fundamental principles to be adopted, (b) the definitions which should be included and (c) the model rules to be provided for. The Committee also considered (d) the relationship that the CFR should have with the*** **proposed Directive on consumer rights** ***and (e) the form that the instrument establishing the CFR might take****.*

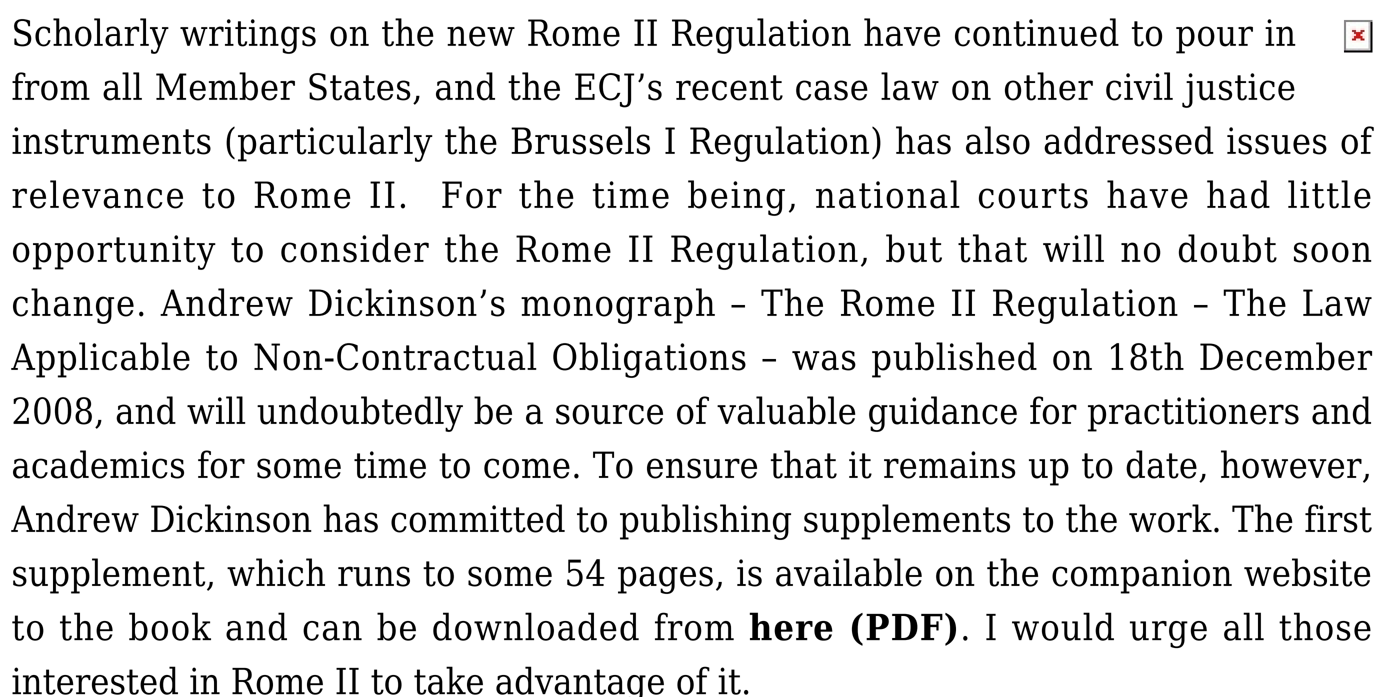
*[The Council's position on each of these points can be found in the press release "*Guidelines on the setting up of a Common Frame of Reference for European contract law*", n. 108340 of 5 June 2009.]*

Conference: Enlargement of the

European Judicial Area to the CEFTA Countries

This year, the traditional private international law conference in the South Eastern Europe is hosted by the Faculty of Law of the University of Novi Sad, Serbia. Focusing primarily on the topics related to the enlargement of the European Judicial Area to the CEFTA countries, this conference will also address the newest developments in private international law in the region. The conference will be held on 25 September 2009 and the program as well as the list of participants are available here.
The most recent conference in this series was announced here.

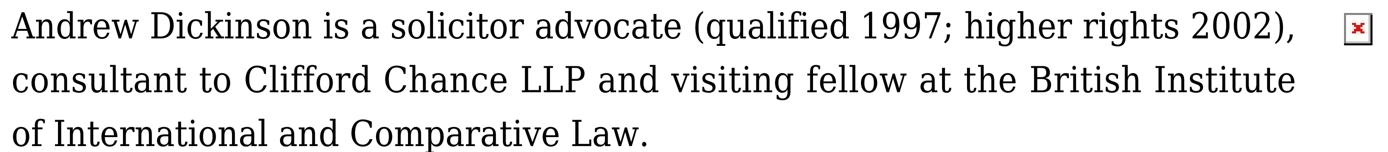
Dickinson: Rome II Regulation Monograph Supplement, and our New Consultant Editor



Scholarly writings on the new Rome II Regulation have continued to pour in from all Member States, and the ECJ's recent case law on other civil justice instruments (particularly the Brussels I Regulation) has also addressed issues of relevance to Rome II. For the time being, national courts have had little opportunity to consider the Rome II Regulation, but that will no doubt soon change. Andrew Dickinson's monograph – The Rome II Regulation – The Law Applicable to Non-Contractual Obligations – was published on 18th December 2008, and will undoubtedly be a source of valuable guidance for practitioners and academics for some time to come. To ensure that it remains up to date, however, Andrew Dickinson has committed to publishing supplements to the work. The first supplement, which runs to some 54 pages, is available on the companion website to the book and can be downloaded from **here (PDF)**. I would urge all those interested in Rome II to take advantage of it.

It will, following from the above, come as no surprise that I am delighted to announce that Andrew will be joining the Conflict of Laws .net team as a Consultant Editor, posting primarily on developments in European civil and commercial matters. A short biography appears below, and I am sure everyone who uses this site will be pleased that he will be contributing to the website on a regular basis.

Biography



Andrew Dickinson is a solicitor advocate (qualified 1997; higher rights 2002), consultant to Clifford Chance LLP and visiting fellow at the British Institute of International and Comparative Law.

Andrew is a member of the North Committee (the Ministry of Justice's advisory committee on private international law) and of the editorial board of the Journal of Private International Law. He has recently joined the editorial team of Dicey, Morris and Collins on the Conflict of Laws.

Andrew's main area of legal practice and research interest is private international law, but his practice also covers civil litigation, commercial and banking law and public international law. He is the author of The Rome II Regulation: The Law Applicable to Non-Contractual Obligations (OUP, 2008) (romeii.eu), co-author of State Immunity: Selected Materials and Commentary (OUP, 2004) and an editor of the International Commercial Litigation Handbook (LexisNexis, 2006). His published papers include "European Private International Law: Embracing New Horizons or Mourning the Past? " (2005) 1 J Priv Int L 197 and "Third Country Mandatory Rules in the Law Applicable to Contractual Obligations: So Long, Farewell, Auf Wiedersehen, Adieu?" (2007) 3 J Priv Int L 53.

The New Solicitor General and

Private International Law Cases: 2008 Term Round-Up

Elena Kagan, the new Solicitor General of the United States, had a few notable private international law cases on her desk when she arrived at her new job this past March. By then, the Court had invited the views of the Solicitor General in the first Hague Convention case to garner serious attention since *Schlunk* and *Aerospatialle* in the late 1980's, and had done the same regarding a case which sought to clarify the scope of specific personal jurisdiction over foreign nationals for their tortuous acts abroad. Just this week, she presented the views of the United States regarding those petitions.

In *Abbott v. Abbott*, the Hague Convention case which was previously discussed at length on this site, the United States recommended the Court grant the petition. In very plain terms, the Solicitor General concludes that the court of appeals erred in concluding that a ne exeat right is not a right of custody under the Convention; that there is disagreement among states party to this Convention, as well as among domestic circuits on this issue; and that it is an important question that merits the Supreme Court's review. The Court will decide whether to take the Solicitor General's advice at its June 25 conference. As the SCOTUSBlog aptly notes, if the Court takes this case, it will indirectly be reviewing the work of its newest (proposed) member in Judge Sonia Sotomayor. The Second Circuit was the first court of appeals to consider this question, in *Croll v. Croll*, 229 F.3d 133 (2000), cert. denied, 534 U.S. 949 (2001), where the panel majority held that a ne exeat clause was not a right of custody for purposes of the Hague Convention. Judge Sotomayor wrote a dissenting opinion indicating that she would have held – as the Solicitor General now argues – that the ne exeat clause constitutes a right of custody. The full brief of the United States is available here.

Nearly contemporaneously, the Solicitor General recommended the Court deny the petition in *Federal Ins. Co. v. Kingdom of Saudi Arabia*. This case, which was also previewed on this site in the past, presented not only some important issues regarding the Foreign Sovereign Immunities Act, but also the very open question of when U.S. courts may exercise personal jurisdiction over civil claims against foreign nationals on the ground that those individuals engaged in acts abroad

which had foreseeable consequences in the United States. The Second Circuit held that the Constitution permits the assertion of personal jurisdiction under these statutes only over foreign actors who "directed" or "commanded" terrorist attacks on U.S. soil, but bars such jurisdiction over persons who merely "fores[aw] that recipients of their donations would attack targets in the United States." The Solicitor General, however, thought it was "unclear precisely what legal standard the court of appeals" was applying. Br. at 19. Here is why she sees the issue as not worthy of the Court's attention (and how the Unites States views foreseeability as a function of personal jurisdiction):

> *To the extent that the court of appeals language suggests that a defendant must specifically intend to cause injury to residents in the forum before a court there may exercise jurisdiction over him, that is incorrect. It is sufficient that a defendant took "intentional . . . tortuous actions" and "knew that the brunt of the injury would be felt" in the foreign forum. Calder, 465 U.S. at 789-90. The court of appeals decision, however, is subject to a more limited construction, which focuses on the inadequacy of the particular allegations before it. At several points, the court of appeals stressed that the petitioners' claims were based on the "the [defendants] alleged indirect funding of al Quaeda." Where the connection between the defendant and the direct tortfeasor is separated by intervening actors, the requirement of showing an "intentional . . . tortuous act[]" on the part of the defendant demands more than a simple allegation. Petitioners would need to allege facts that could support the conclusion that the defendant acted with the requisite intention and knowledge. See Ashcroft v. Iqbal, No. 07-1015 (May 18, 2009, slip op. 16-19 [(previewed here)]. . . . . The court's case-specific holdings [that these allegations were not sufficiently plead] do not warrant review by this Court.*

Br. at 19-20. On similar grounds, the Solicitor General also downplays the circuit conflict alleged in the Petition, saying that the "in each of the three appellate cases cited by petitioners evidencing a conflict, the defendant was a primary wrongdoer—not, as here, a person whose alleged tortuous act consisted of providing material support to another party engaged in tortuous activity." Br. at 20-21. The full brief of the United States is available here. Again, we'll likely know whether the Court takes this advice by June 29.

And, just as she was clearing her desk of private international law matters, the

Court sent her another invitation: it asked for the views of the United States regarding a new Petition which asks whether the antifraud provisions of the U.S. securities laws extends to transnational frauds. The case is *Morrison v. National Australia Bank, Ltd.*, which presents the deep and long-running split of federal authority over the application of the "conduct and effects test," which courts typically use to determine the scope of their jurisdiction not only in federal securities fraud cases, but in cases that implicate other federal statutes (like civil RICO) as well. The Petition is available here. We'll see this brief from the Solicitor General over the summer, or early next Term, which could shape-up to be an interesting one for private international law matters.

Forum Shopping before International Tribunals

As the number of international tribunals increases, the issue of forum shopping is begining to arise quite frequently in public international law. How should it be handled? Are doctrines of private international law useful? If so, which one?

It seems that the most common practice, and received wisdom, is to apply the doctrine of *lis pendens*. But why should the doctrine regulating parallel jurisdiction in the civil law world be made the applicable doctrine in the international arena? In case public international scholars have not noted, there is another legal tradition which deals with the issue differently (although it has been harder to see in Europe in recent years).

So what about exploring whether *forum non conveniens* could be an interesting option for regulating parallel litigation before international courts?

This is what a recent Article by Professor Joost Pauwelyn (HEI, Geneva) and Brazilian scholar Luiz Eduardo Salles on Forum Shopping Before International Tribunals: (Real) Concerns, (Im)Possible Solutions undertakes.

There is no abstract, but here is one of the first paragraphs of the introduction:

The article examines the nature and potential concerns of the relatively new phenomenon of forum shopping among international tribunals. Further, it asks the question whether domestic law principles such as res judicata, lis pendens, and forum non conveniens could be used to alleviate such concerns. The article finds that, to the extent these principles apply before international tribunals, they fail to address the problem. Instead, states should regulate forum shopping explicitly in their treaty regimes, and international tribunals should defer to such explicit treaty clauses. The article identifies the distinction between questions of a tribunal's jurisdiction and questions of admissibility of claims as key to the implementation of jurisdictional coordination— be it through general principles of law or treaty rules on forum selection. This distinction is generally applicable before international tribunals but has been overlooked in the WTO context. The article also argues that to deal with the rise of forum shopping in international adjudication, more thought should be given to the question of whether tribunals have or should have some margin of judicial discretion not to exercise jurisdiction in cases in which forum shopping is at stake. To put these proposals in dynamic context, the article uses four variables, or scales, that will impact the assessment of both concerns and solutions for forum shopping among international tribunals, namely (1) a regime vs. system approach to international tribunals, (2) a partyfocus vs. legality-focus, (3) consensual vs. compulsory jurisdiction, and (4) specific vs. general jurisdiction.

The Article is forthcoming in the *Cornell International Law Journal*.

United States Congress Considering Legislation Relating to Foreign Defendants

On May 19, 2009, the United States Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts held a hearing entitled

"Leveling the Playing Field and Protecting Americans: Holding Foreign Manufacturers Accountable." The purpose of the hearing was to explore whether legislation is necessary to deal specifically with foreign defendants in products liability cases. The Committee Chairman, Senator Sheldon Whitehouse of Rhode Island, described the need for legislation as follows.

"We all know American manufacturers must comply with regulations that ensure the safety of American consumers. When they fail to do so, they must answer to regulators and are held accountable through the American system of justice. Unfortunately, however, foreign manufacturers are not being held to the same standards – this puts at risk American consumers and businesses, and puts American manufacturers at a competitive disadvantage.

A major cause of this disparity is that Americans injured by foreign products face unnecessary and inappropriate procedural hurdles if they seek to hold foreign manufacturers accountable. First, they must identify the manufacturer of the product that injured them – often not an easy task since many foreign products do no more than indicate their country of origin. Second, an injured American must serve process on the foreign manufacturer. This means the injured American has to deliver legal papers to the company directly or through a registered agent explaining that he or she is bringing a legal action against it. But this simple step often requires enormous time and expense – lawsuits even can fail over it – as the injured American attempts to comply with various complicated international treaties. Third, an injured American must overcome the technical defense that, even though a foreign manufacturer's product was used by an American consumer, the courts of that consumer's home state do not have jurisdiction over that company. Finally, even after an injured American has overcome these hurdles and prevailed in court, a foreign manufacturer can avoid collection on the judgment – often simply cutting off communications or shutting up its business and starting up again with a different name.

Americans harmed by defective foreign products need justice, and they do not get it when foreign manufacturers use technical legal defenses to avoid paying damages to the people they have injured. Today's hearing will help us learn more about these failures of justice and what we can do to fix them."

More details on the hearing, including witness statements and a webcast, can be found here.

Among other things, it will be interesting to see whether Congress steps into the ongoing debate concerning the exercise of personal jurisdiction over foreign defendants in US courts.

ECJ: Judgment on Art. 15 Brussels I ("Ilsinger")

On 14 May 2009, the ECJ delivered its judgment in case C-180/06 (*Renate Ilsinger v. Martin Dreschers*).

The case basically concerns the question whether legal proceedings by which a consumer seeks an order requiring a mail-order company to award a prize apparently won by him – without the award of that prize depending on an order of goods – are contractual in terms of Art. 15 (1) (c) Brussels I Regulation, if necessary, on condition that the consumer has none the less placed an order.

The Oberlandesgericht Wien (Austria) referred the following questions to the ECJ for a preliminary ruling:

> *Does the provision in Paragraph 5j of the … KSchG …, which entitles certain consumers to claim from undertakings in the courts prizes ostensibly won by them where the undertakings send (or have sent) them prize notifications or other similar communications worded so as to give the impression that they have won a particular prize, constitute, in circumstances where the claiming of that prize was not made conditional upon actually ordering goods or placing a trial order and where no goods were actually ordered but the recipient of the communication is nevertheless seeking to claim the prize, for the purposes of … Regulation … No 44/2001: a contractual, or equivalent, claim under Article 15(1)(c) of Regulation No 44/2001?*
>
> *If the answer to question 1 is in the negative:*
>
> *Does a claim falling under Article 15(1)(c) of Regulation No 44/2001 arise if the*

claim for payment of the prize was not made conditional upon ordering goods but the recipient of the communication has actually placed an order for goods?'

The Court held as follows:

In a situation such as that at issue in the main proceedings, in which a consumer seeks, in accordance with the legislation of the Member State in which he is domiciled and before the court for the place in which he resides, an order requiring a mail-order company established in another Member State to pay a prize which that consumer has apparently won, and

– where that company, with the aim of encouraging that consumer to conclude a contract, sent a letter addressed to him personally of such a kind as to give him the impression that he would be awarded a prize if he requested payment by returning the 'prize claim certificate' attached to that letter,

– but without the award of that prize depending on an order for goods offered for sale by that company or on a trial order, the rules on jurisdiction laid down by Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as follows:

– such legal proceedings brought by the consumer are covered by Article 15(1)(c) of that regulation, on condition that the professional vendor has undertaken in law to pay that prize to the consumer;

– where that condition has not been fulfilled, such proceedings are covered by Article 15(1)(c) of Regulation No 44/2001 only if the consumer has in fact placed an order with that professional vendor.

See with regard to this case also our previous post on the AG opinion which can be found here.

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 désactivitée ?*).

> *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.