An Early 2009 Round-Up: Significant Federal Cases Over the Past Two Months

In this round-up of significant U.S. decisions during the first two months of 2009, we'll focus on two areas of law that generate a lot of jurisprudence at the appellate level.

A. Jurisdiction for Acts Occurring Abroad

Two federal statutory schemes—the first a response to the events of September 11, the second a 200 year old response to piracy on the high seas—are generating a lot of jurisdictional quandaries of late. The Intelligence Reform and Terrorism Prevention Act of 2004 criminalizes the provision of material support to foreign terrorist organizations, and provides for "extraterritorial Federal jurisdiction" to punish those acts. It also provides a civil remedy for those injured in his "person, property or business" by such criminal acts. In *Federal Ins. Co. v. Kingdom of Saudi Arabia*, 538 F.3d 71 (2d Cir. 2008), pet'n for cert. filed, No. 08-640 (Nov. 12, 2008), 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." According to the court, even those foreign entities who knowingly funded al Quada and Osama bin Laden were "far too attenuated" to fall within the jurisdiction of U.S. courts. This decision fostered a split with decisions in the D.C., Ninth and Seventh Circuits, and (along with other facets of the opinion on scope of the FSIA) is now pending on a Writ of Certiorari before the United States Supreme Court. This week, the Court requested the views of the Solicitor General on whether to grant the Petition. This case could become a very significant decision on the constitutional scope of personal jurisdiction over foreign parties if it is granted.

The Second Circuit returned a few months later in *Abdullahi v. Pfizer, Inc.*, No. 05-4863, 2009 U.S. App. LEXIS 1768 (2d Cir., January 30, 2009), to assert subject matter jurisdiction over a cause of action under the Alien Tort Statute of 1789 for

defendant's alleged drug tests on unwitting Nigerian children. The court—in a 2-1 decision—held that the prohibition on non-consensual medical experimentation is a specific and universal norm of "the law of nations," which satisfies the jurisdictional predicate of the ATS. Because defendant acted in concert with the Nigerian government, the court held that the claim could proceed past the pleading stage. The Court also reversed the district court's decision on choice of law—which held that Nigerian law would have applied to these claims—and remanded the case with instructions to the court to more carefully and thoroughly weigh the factors of the "most significant relationship test" which could—the Court suggested—eventually lead to the application of Connecticut law.

B. Forum Selection Clauses

In a topic that is of practical import for both litigators and transaction attorneys alike, the federal courts of appeals have been active in the past two months concerning the scope, validity and enforceability of forum selection clauses. Most recently, in *Answers in Genesis of Kentucky, Inc. v. Creation Ministries Int'l, Ltd*., Nos. 08-6014/6032, 2009 U.S. App. LEXIS 2743 (6th Cir., February 13, 2009), the parties disputed the meaning of a contract that contained a "non-exclusive" choice of court clause vesting jurisdiction in the courts of Australia, alongside a provision that allowed either party to request arbitration of their disputes. One party compelled arbitration in the United States, and the other sought to enjoin such arbitration in favor of litigation it previously filed in Australia. The Sixth Circuit held that the choice of court clause did not preclude arbitration, because reading the contract "as a whole . . . unambiguously provides that the courts of [Australia] are only one possible forum" for the claims in this dispute. The court then moved onto thornier issues of international comity abstention and anti-suit injunctions, both of which were "issues of first impression for [the Sixth] Circuit." Surveying the case law on the "complex interaction of federal jurisdictional and comity concerns," as well as the dictates of "international law" expressed in treaties expressing the judicial preference for allowing arbitration, the court held that "abstention is inappropriate in this case." Interestingly, the court seemed to suggest that in any case falling within Article II(3) of the New York Convention, a court in a signatory country has no authority to abstain from compelling arbitration on comity grounds. With the Australian proceedings voluntarily stayed by the parties pending this appeal, the court declined to review the district court's denial of an anti-suit injunction, but left open the possibility that such an

injunction could issue if that litigation were to be reopened and thereby threaten the "important public policy" of the Convention and the United States.

Finally, an interesting recent decision by the Ninth Circuit illustrates the differential treatment a forum selection clause will get in U.S. courts, depending upon what substantive federal statute governs the cause of action. *Regal-Beloit Corp. v. Kawasaki Kisen Kaisha Ltd*., No. 06-56831, 2009 U.S. Dist. LEXIS 2111 (9th Cir., February 4, 2009) was, as the Ninth Circuit put it, a "maritime case about a train wreck." There, the parties contracted for the carriage of goods from China to the United States by sea, and then inland by rail to various points in the American Midwest through a single bill of lading. The train derailed in Oklahoma, the American buyer sued in California, but the contract contained a choice of forum clause in favor of Tokyo. The Japanese Defendants moved to dismiss the action on the basis of that clause. If the federal Carriage of Goods by Sea Act (COGSA) were to apply to the entire journey, the choice of forum clause would be liberally respected, and the defendants' motion to dismiss likely granted. If the federal Carmack Amendment—which generally covers inland rail transportation—were to apply to the inland portion of the trip, the deference to choice of courts is much more narrow. In the end, the Ninth Circuit held that the Carmack Amendment applied to the claims, and remanded the case to determine whether that statute's narrow allowance of a foreign forum selection clauses were satisfied. How it got to that conclusion, however, is much more interesting.

For starters, the Defendants argued that the Carmack Amendment was categorically inapplicable to them. They are ocean carriers, who only contracted for follow-on rail line transportation at the end of their journey, and the Carmack Amendment literally applies only to persons or companies "providing common carrier railroad transportation for compensation." The Second Circuit, the Florida Supreme Court, and at least one other federal district court, have held that the Carmack Amendment did not apply to ocean carriers who did not perform rail transportation services. The Ninth Circuit disagreed with these decisions, and held that ocean carriers could fall within the Amendment's provisions.

The Defendants next argued that, even though an ocean carrier may fall within the Carmack Amendment, when that carrier provides only one bill of lading covering the entire trip (over-sea and over-land), and thereby elects to contractually extend COGSA to the inland portion of the trip, the Carmack Amendment does not apply. No less than four circuits (the Seventh, Sixth, Fourth

and Eleventh) support this view. “Despite this weight of authority,” the Ninth Circuit held, “our own precedent expressly forecloses” this argument. The Ninth Circuit, like the Second Circuit, has long held the view that “the language of Carmack encompasses the inland leg of an overseas shipment conducted under a single ‘through’ bill of lading.”

The discord in this area is especially troubling in light of recent Supreme Court jurisprudence. The Court has held—and the Ninth Circuit even acknowledged—that contractual autonomy, efficiency and uniformity of maritime liability rules weigh in favor of extending COGSA inland when a single bill of lading takes goods from overseas to inland destinations. Indeed, “confusion and inefficiency will inevitably result if more than one body of law governs a given contract’s meaning,” and the Supreme Court has suggested that where this is the case, “the apparent purpose of COGSA” is defeated. *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 29 (2004). Still, in the Ninth Circuit, “the policy of uniformity in maritime shipping, however compelling, must give way to controlling statutes and precedent.”

Fourth Issue of 2008’s Revue Critique de Droit International Privé

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

It contains two articles. Unfortunately, none of them comes with an abstract in English.

The first is a presentation of the Rome I Regulation by emeritus Professor Paul Lagarde and Aline Tenenbaum, who lectures at the Faculty of Law of Paris XII

University.

Belgian Professor Marc Fallon is the author of the second, which deals with The Posting of Workers in Europe (*Le détachement européen des travailleurs, à la croisée de deux logiques conflictualistes*).

The table of contents can be found here , but articles of the *Revue Critique* cannot be downloaded.

Supreme Court of Canada Addresses Role of Parallel Proceedings in Stay Applications

Canada's highest court has delivered its judgment in *Teck Cominco Metals Ltd. v. Lloyd's Underwriters* (available here). The decision is quite brief and upholds the decision of both courts below, leaving some to wonder why leave to appeal was granted.

Teck has mining and smelting operations in British Columbia. In 2004 it was sued in Washington State for environmental property damage caused by the discharge of waste material into the Columbia River, which flows from Teck's Canadian operations into the United States. Teck notified its insurers, looking to them to defend the claim, but they refused.

Teck therefore sued the insurers in Washington State to establish its entitlement under the insurance policies. The insurers sued Teck in British Columbia to establish their lack of responsibility under the same policies. So the issue became where the coverage issue would be resolved.

Stay applications were brought in both coverage actions. The application failed in the United States. It also failed in the courts of British Columbia, but those decisions were appealed to the Supreme Court of Canada.

Teck wanted Canada's highest court to take a different approach to applications for a stay in cases where a foreign court has already positively asserted jurisdiction. This position was framed in a couple of different ways, but its essence was that the parallel proceedings should be an overriding and determinative factor in the analysis. The court rejected that position, confirming that parallel proceedings are only one factor among many to be considered.

The court's decision is under s. 11 of the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28. However, the court confirms that s. 11 is a codification of the common law doctrine of *forum non conveniens*, and so the reasoning should apply equally in provinces which have not adopted a jurisdiction statute (though it would have been helpful for the court to have expressly made this clear).

Most of the decision is unobjectionable and clear. One point to consider, however, is the court's reference (in para. 3o) to a distinction between interprovincial cases and international cases. This raises the possibility that different considerations could arise as between sister provinces. A refusal to stay proceedings in one province might be treated as determinative of the issue in another, in part because of the possibility of appeal to the Supreme Court of Canada and its binding effect on all provinces, and in part if the other province were required to recognize the admittedly interlocutory decision on the stay application. Both of these are debatable issues, and the orthodoxy would suggest that parallel proceedings in a sister province remain just one factor in the analysis. More guidance from the court on this question would have been welcome.

Garsec goes to the High Court

Readers may recall the interesting *forum non conveniens* case in the New South Wales Court of Appeal, *Garsec Pty Ltd v His Majesty The Sultan of Brunei* [2008] NSWCA 211; (2008) 250 ALR 682. My post on that decision is here. It arises out of an alleged contract for the sale of an old, rare and beautiful manuscript copy of

the Koran by Garsec to the Sultan for USD 8 million. The Court of Appeal unanimously dismissed an appeal from a decision staying the proceeding. On 13 February 2009, Garsec's application for special leave to appeal to the High Court was referred to an enlarged bench of the Court, with instructions that the parties prepare submissions as if on appeal: see [2009] HCATrans 21. Watch this space.

Retaliation in Alien Tort Statute Litigation?

An interesting case where Chevron is seeking to recover legal costs, including $ 190,000 in copying expenses, from Nigerian villagers

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Publication: Liber Fausto Pocar – New Instruments of Private International Law

The Italian publishing house Giuffrè has recently published a very rich collection of essays in honor of Fausto Pocar, Professor at the University of Milan and judge and former President of the International Criminal Tribunal for the former Yugoslavia, one of Italian leading scholars in the field of public international law, EU law and private international law.

The collection, ***Liber Fausto Pocar***, edited by *Gabriella Venturini* and *Stefania Bariatti*, is divided in two volumes, devoted respectively to public international law (vol. I, Diritti individuali e giustizia internazionale – Individual Rights and International Justice) and private international law (vol. II, Nuovi strumenti del

diritto internazionale privato – New instruments of Private International Law).

Here's the table of contents of the second volume:

- *Roberto Baratta*, Réflexions sur la coopération judiciaire civile suite au traité de Lisbonne;
- *Stefania Bariatti*, Filling in the Gaps of EC Conflicts of Laws Instruments: The Case of Jurisdiction over Actions Related to Insolvency Proceedings;
- *Maria Caterina Baruffi*, Il riconoscimento delle decisioni in materia di obbligazioni alimentari verso i minori: l'Unione europea e gli Stati Uniti a confronto;
- *Jürgen Basedow*, Lex mercatoria e diritto internazionale privato dei contratti: una prospettiva economica;
- *Paul R. Beaumont*, The Art. 8 Jurisprudence of the European Court of Human Rights on the Hague Convention on International Child Abduction in relation to Delays in Enforcing the Return of a Child;
- *Michael Bogdan*, Some Reflections Regarding Environmental Damage and the Rome II Regulation;
- *Andrea Bonomi*, Prime considerazioni sul regime delle norme di applicazione necessaria nel nuovo Regolamento Roma I sulla legge applicabile ai contratti;
- *Alegría Borrás*, Reservations, Declarations and Specifications: Their Function in the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance;
- *Nerina Boschiero*, Spunti critici sulla nuova disciplina comunitaria della legge applicabile ai contratti relativi alla proprietà intellettuale in mancanza di scelta ad opera delle parti;
- *Ronald A. Brand*, Evolving Competence for Private International Law in Europe: The External Effects of Internal Developments;
- *Andreas Bucher*, Réforme en matière d'enlèvement d'enfants: la loi suisse;
- *Sergio Maria Carbone*, Accordi interstatali e diritto marittimo uniforme;
- *Roberta Clerici*, Quale favor per il lavoratore nel Regolamento Roma I?;
- *Giuseppe Coscia*, La nuova azione collettiva risarcitoria italiana nel quadro delle discipline processuali di conflitto interne e comunitarie;
- *Saverio De Bellis*, La negotiorum gestio nel Regolamento (CE) n. 864/2007;

- *Patrizia De Cesari*, «Disposizioni alle quali non è permesso derogare convenzionalmente» e «norme di applicazione necessaria» nel Regolamento Roma I;
- *Harry Duintjer Tebbens*, Punitive Damages: Towards a Rule of Reason for U.S. Awards and Their Recognition Elsewhere;
- *William Duncan*, The Maintenance of a Hague Convention. Adapting to Change. A Discussion of Techniques to Ensure that a Convention Remains "Fit for Purpose";
- *Bernard Dutoit*, Le droit international privé des obligations non contractuelles à l'heure européenne: le Règlement Rome II;
- *Marc Fallon*, L'exception d'ordre public face à l'exception de reconnaissance mutuelle;
- *Paolo Fois*, La comunitarizzazione del diritto internazionale privato e processuale. Perplessità circa il carattere «definitivo» del trasferimento di competenze dagli Stati membri alla Comunità;
- *Marco Frigessi Di Rattalma*, La legge regolatrice della responsabilità da direzione e coordinamento nei gruppi multinazionali di società;
- *Manlio Frigo*, Ethical Rules and Codes of Honour Related to Museum Activities: A Complementary Support to the Private International Law Approach Concerning the Circulation of Cultural Property;
- *Luigi Fumagalli*, Il caso «Tedesco»: un rinvio pregiudiziale relativo al Regolamento n. 1206/2001;
- *Giorgio Gaja*, Il regolamento di giurisdizione e il suo ambito di applicazione in materia internazionale;
- *Luciano Garofalo*, Diritto comunitario e conflitti di leggi. Spunti sulle nuove tendenze del diritto internazionale privato contemporaneo emergenti dal Regolamento Roma II;
- *Hélène Gaudemet Tallon*, Le destin mouvementé des articles 14 et 15 du Code civil français de 1804 au début du XXIème siècle;
- *Andrea Giardina*, Gli interessi: conflitti di leggi e diritto uniforme nella pratica giudiziaria e arbitrale internazionale;
- *Trevor C. Hartley*, The Integration Theory v Acquired Rights. The Way Forward for Matrimonial-Property Choice of Law in the EC;
- *Costanza Honorati*, La legge applicabile al nome tra diritto internazionale privato e diritto comunitario nelle conclusioni degli avvocati generali;
- *Monique Jametti Greiner*, La protection des enfants dans le cadre d'enlèvements internationaux d'enfants. Les solutions de La Haye

- *Hans Ulrich Jessurun D'Oliveira*, How do International Organisations Cope with the Personal Status of their Staff Members? Some Observations on the Recognition of (Same-Sex) Marriages in International Organizations;
- *Catherine Kessedjian*, Les actions collectives en dommages et intérêts pour infraction aux règles communautaires de la concurrence et le droit international privé;
- *Peter Kindler*, Libertà di stabilimento e diritto internazionale privato delle società;
- *Christian Kohler*, Trois défis : la Cour de justice des Communautés européennes et l'espace judiciaire européen en matière civile;
- *Paul Lagarde*, La culpa in contrahendo à la croisée des règlements communautaires;
- *Pierre Lalive*, L'ordre public transnational et l'arbitre international;
- *Riccardo Luzzatto*, Riflessioni sulla c.d. comunitarizzazione del diritto internazionale privato;
- *Maria Chiara Malaguti*, Brevi riflessioni sui moderni criteri di unificazione del diritto alla luce della disciplina sui titoli detenuti presso intermediari;
- *Alberto Malatesta*, Cultural Diversity and Private International Law;
- *Sergio Marchisio*, Les conventions de la Commission internationale de l'État civil;
- *Luigi Mari*, Equo processo e competenza in materia contrattuale. Note minime a proposito della giurisprudenza della Corte di giustizia;
- *Johan Meeusen*, Who is Afraid of European Private International Law?;
- *Paolo Mengozzi*, I conflitti di leggi, le norme di applicazione necessaria in materia di rapporti di lavoro e la libertà di circolazione dei servizi nella Comunità europea;
- *Robin Morse*, Industrial Action in the Conflict of Laws;
- *Franco Mosconi*, La Convenzione CIEC del 5 settembre 2007 sui partenariati registrati;
- *Francesco Munari*, L'entrata in vigore del Regolamento Roma II e i suoi effetti sul *private antitrust enforcement*;
- *Peter Arnt Nielsen*, European Contract Jurisdiction in Need of Reform?;
- *Tomasz Pajor*, The Impact of the United Nations Convention on Contracts for the International Sale of Goods on Polish Law;
- *Monika Pauknerová*, International Conventions and Community Law: Harmony and Conflicts;

- *Marta Pertegás*, The Interaction between EC Private International Law and Procedural Rules: The European Enforcement Order as Test-Case;
- *Paola Piroddi*, Between Scylla and Charybdis. Art. 4 of the Rome I Regulation Navigating along the Cliffs of Uncertainty and Inflexibility;
- *Ilaria Queirolo*, L'influenza del Regolamento comunitario sul difficile coordinamento tra legge fallimentare e legge di riforma del diritto internazionale privato;
- *Mariel Revillard*, Pratique de droit international privé de la famille en Italie et en France: perspectives de communautarisation;
- *Carola Ricci*, I fori «residuali» nelle cause matrimoniali dopo la sentenza *Lopez*;
- *Kurt Siehr*, The lex originis for Cultural Objects in European Private International Law;
- *Antoon V.M. (Teun) Struycken*, Bruxelles I et le monde extérieur;
- *Michele Tamburini*, La validità nel processo civile italiano della procura alle liti rilasciata all'estero;
- *Antonio Tizzano*, Qualche riflessione sul contributo della Corte di giustizia allo sviluppo del sistema comunitario;
- *Francesca Trombetta-Panigadi*, Osservazioni sulla futura disciplina comunitaria in materia di successioni per causa di morte;
- *Francesca Clara Villata*, La legge applicabile ai «contratti dei mercati regolamentati» nel Regolamento Roma I;
- *Gaetano Vitellino*, Conflitti di leggi e di giurisdizioni in materia di azione inibitoria collettiva.

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Title: **Liber Fausto Pocar – Vol. II: Nuovi strumenti del diritto internazionale privato**, edited by *Gabriella Venturini* and *Stefania Bariatti*, Giuffrè, Milano, 2009, XXXVII – 1020 pages.

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Jurisdiction in Contract Matters in Brazil

I am grateful to Henry Saint Dahl, the President of the Inter-American Bar Foundation, for contributing this report.

São Paulo Civil Appellate Court, Seventh Chamber (Appeal N0. 312.848-4/4-00): *Editoriale Johnson SPA et al.; v. Renaço Comércio e Importação e Indústria Ltda et al.*, judgment rendered on December 17, 2008

The parties, an Italian publishing house and a Brazilian distributor, entered into a contract for commercial representation in Brazil. The contract was signed in Italy. Alleging contractual breach plaintiff, the Italian publisher, filed a lawsuit in Brazil, against the Brazilian distributor, claiming rescission plus damages.

The Brazilian District Court dismissed the case for lack of Brazilian jurisdiction, based on the fact that the contract was entered in Italy, which made Italian law applicable to solve the two issues raised: rescission and damages.

The Appellate Court held in its majority decision that although the contract was signed in Italy, performance took place in Brazil where defendant distributed plaintiff's products. It is certain then that although the deal was made in Italy, it was meant to produce effects in Brazil. The case is then controlled by Article 88, paragraph II of the Code of Civil Procedure, as well as Article 12 of the Introductory Act to the Civil Code, both of which grant jurisdiction to the Brazilian court when "the obligation must be performed in Brazil."

The Appellate Court further considered that sending the plaintiff to an Italian court would also impose a heavy burden on the Brazilian defendants and even preventing them access to justice and an ample opportunity to defend themselves.

The district-court judgment was annulled and the file was returned to said court with instructions to conform to the appellate decision.

Brazilian attorney André de Almeida provided the text of this decision.

Programme and Booking for the Journal of Private International Law Conference 2009 at NYU

The **programme for the Journal of Private International Law Conference 2009**, to be held at New York University Law School on 17-18 April 2009, along with a special tribute to Andreas Lowenfeld on 16 April, is now available. The line-up, both in the early careers section, and in the plenary sessions, makes this a diverse and fascinating conflicts conference of the very highest quality. There is limited space available, so it is strongly recommended that you book early. The booking page has details on New York accommodation, as well as the relevant fee for each category of registrant.

I look forward to seeing many of you there. Martin.

10th Anniversary of the Yearbook of Private International Law

For the 10th Anniversary of the **Yearbook of Private International Law**, a conference will be held in Lausanne, Switzerland, on 19 March 2009 at the Swiss Institute of Comparative Law.

The topic of the day will be "The Future of PIL between National and International Codifications and Case Law". The program can be found here.

The following day, on 20 March, the Swiss Institute organizes the "21e journée de droit international privé", on "La loi fédérale de droit international privé, 20 ans

après" (interventions in French or German). The program can be found here.

First Issue of 2009's Journal du Droit International

The first issue of French *Journal du Droit International* (also known as *Clunet*) will shortly be released. It contains several articles dealing with conflict issues.

The topic of the first two is the 2008 Rome I Regulation on the law governing contractual obligations. First, Hughes Kenfack, a professor at Toulouse University, wonders whether the Regulation will function like a steady vessel or will be unable to avoid the reefs (*Le règlement Rome I, navire stable aux instruments efficaces de navigation ?*). The English abstact reads:

> *The Regulation on the Law Applicable to Contractual Obligations (« Rome I ») was adopted after five years of preparatory work. It supersedes the Rome Convention for contracts concluded after the 17th of September 2009, and works harmoniously within a framework of other Regulations including « Brussels I » and « Rome II ». Its purpose is to reinforce predictability and security in legal solutions to disputes while safeguarding a measure of flexibility. While upholding certain solutions imposed by the Rome Convention, the new text introduces some well met changes, notably regarding the determination of the applicable law in the absence of choice by the parties. The outcome will now be more predictable for most international commercial contracts.*
> *In the main, as a metaphor in the maritime field, the « Rome I » Regulation functions like a steady vessel with effective instruments of navigation. With the guiding light of the Court of justice of the European Communities, it should allow to avoid the reefs and lead to safe harbour.*

In the second article, Stephanie Francq, a professor of law at the Catholic

University of Louvain (Belgium), presents the changes introduced by the new legislation (*Le Règlement Rome I. De quelques changements…*). The abstract reads:

> *EU Regulation n° 593/2008 (« Rome I ») harmonises conflicts-of-law rules in the area of contract law. The Regulation, which replaces the Rome Convention, applies to contracts entered into as from December 17, 2009. This article analyses in details the main changes brought about by the Regulation and reflects on the consequences of its adoption at EU level. In turn, it inquires into the existence of a logical and theoretical underpinning for the new rules. Finally, it highlights the particular influence exercised by certain Member States in the process leading to the adoption of the Regulation because of their opt-out from title IV of the EC Treaty.*

The third article is a short report by Hélène Péroz (Caen University) on Certifying Authorities for European Enforcement Orders after a recent French Decree (*Les autorités certificatrices de titre exécutoire européen. A propos du Décret n°2008-484 du 22 mai 2008*). Here is the English abstract:

> *Decree n° 2008-484 regarding proceedings before the French Cour de cassation amends the list of authorities in charge of certifying European Enforcement Orders. French notarial acts will from now on be certified by the notary keeping the original document.*
> *Decisions will also henceforward be certified by the chief registrar of the Court, choice which seems in contradiction with Regulation (EC) N° 805/2004 the decree is supposed to implement and therefore contrary to law.*

Finally, the Journal offers two articles on international commercial law.

The first is the written version of the Lalive Lecture that Pierre Mayer, a professor of law at Paris I University and a partner at Dechert, gave in Geneva on Contract Claims and Jurisdiction Clauses in Investment Treaties (Contract Claims *et clauses juridictionnelles des traités relatif à la protection des investissements*).

> *The drafting of the dispute resolution clause contained within most investment treaties varies from one treaty to another. Certain clauses limit the offer of arbitral jurisdiction (addressed by each State party to the investors of the other*

State parties) to claims based on a breach of the substantive clauses of the treaty (treaty claims). Other clauses are drafted in more general terms, but arbitral tribunals limit their scope and exclude, here as well, claims based on a breach of the investment contract (contract claims). In these two cases, requests of the investors which are based on the same facts and seek the same relief – compensation for the loss suffered due to the host state – have to be therefore submitted to different tribunals, which results in injustice and contradictions. No theoretical argument, based in particular on the alleged necessity to distinguish between State legal order and international legal order, justifies such an unacceptable result in practice.

The second is the second part of a piece on The New International Oil Exploration and Sharing Agreements in Libya (the first part was published in the first issue of the 2008 volume of the Journal) by professor de Vareilles-Sommières and attorney Anwar Fekini.

Concluding the previously undertaken study on the legal regime of the exploration and production sharing agreements (EPSAs) entered into by the Libyan National Oil Company with foreign oil companies since 2005 (cf. JDI 2008, p. 3 for its first part), this second part of the article focuses on te rights and obligations deriving from the EPSA. A distinction has to be made between the main contract regarding the exploration or production on the one hand, and auxiliary legal acts such as the Bid Package or other agreements which are annexes to the EPSA like the letter of guarantee, the Shareholders agreement and the Joint operating agreement, on the other hand. The EPSA in itself appears to be a sui generis agreement, neither a concession, nor a works contract, from which derive a number of obligations (payment of bonus, setting up of managing bodies, lifting of oil portion by each party…), as well as a number of rights including a right of property over the oil produced. The article then considers, in order to assess their legal consequences, the four possible occurrences looming for better or worse over the EPSA (commercial discovery, breach of contract, change of circumstances, differences between parties). Regarding auxiliary legal acts, emphasis is lain on coordinating each of them with the main contract and on sorting out problems this coordination is likely to raise.