Presentation of the CLIP Principles

Following the publication of the final Draft Principles for Conflict of Laws in Intellectual Property which we reported here, the European Max-Planck Group on Conflict of Laws in Intellectual Property (CLIP) is now prepared to make their presentation. The conference organised for this purpose by will take place on 3-5 November in Berlin. The program is as follows:

Thursday, November 3
Welcome reception *Jürgen Basedow, Hamburg/Josef Drexl, Munich*

Friday, November 4
Introduction to the CLIP Project Jürgen Basedow, Hamburg
The principle of territoriality and the rules of the CLIP Principles on jurisdiction *Paul Torremans, Nottingham/Rochelle Dreyfuss, New York*
The principle of territoriality and the rules of the CLIP Principles on the applicable law *Josef Drexl, Munich/Dário Moura Vicente, Lisbon*
The approach of the CLIP Principles to ubiquitous infringement *Annette Kur, Munich/Rufus Pichler, New York*
Party autonomy and contracts under the CLIP Principles *Axel Metzger, Hanover/Ivana Kunda, Rijeka*
The approach of the CLIP Principles to recognition and enforcement of judgements *Pedro de Miguel Asensio, Madrid/Stefania Bariatti, Milan*

Saturday, November 5
The impact of the CLIP Principles on courts and arbitration *Mireille van Eechoud, Cambridge (Chair)/Joachim Bornkamm, Freiburg/François Dessemontet, Lausanne/Sierd Schaafsma, The Hague/Winfried Tilmann, Düsseldorf*
The impact of the CLIP Principles on legislation and international law *Alexander Peukert, Frankfurt (Chair)/Spiros Bazinas, UNCITRAL/Friedrich Bulst, DG Competition/Marta Pertegás, Hague Conference/Christian Wichard, WIPO*
The CLIP Principles and the parallel projects of the American Law Institute and Waseda/KOPILA *Graeme Dinwoodie, Oxford (Chair)/Jane Ginsburg, New York/Toshiyuki Kono, Fukuoka*
Farewell address *Josef Drexl, Munich*

French Book on the Rome I Regulation

The university of Burgundy has just published a new book on the Rome I Regulation: Le Règlement communautaire Rome I et le choix de loi dans les contrats internationaux. The book is the result of a conference held in Dijon in September 2010.

The contributions include:

AVANT-PROPOS, par Sabine CORNELOUP et Natalie JOUBERT

. La théorie de l'autonomie de la volonté, par J.-M. JACQUET

. Les travaux de la Conférence de La Haye sur un instrument non contraignant favorisant l'autonomie des parties, par M. PERTEGAS

. Le choix de loi dans les contrats internationaux et la construction européenne, par S. POILLOT-PERUZZETTO

. La recherche des sécurité juridique : la stipulation quasi-systématique d'une clause de choix de la loi applicable, par Laurence RAVILLON

. L'articulation, en pratique, entre la clause de choix de loi applicable et la clause relative à la compétence internationale (clause attributive de juridiction ou clause compromissoire), par I. MICHOU

. Rome I et les principes et règles de roit matériel international des contrats, par E. LOQUIN

. Le choix d'un instrument optionnel en droit européen des contrats, par B. FAUVARQUE-COSSON

. Rome I, choix de la loi et compatibilité avec la chari'a, par G. PILLET et O. BOSKOVIC

. Le dépeçage, par C. NOURISSAT

. Le choix tacite dans les jurisprudences nationales : vers une interprétation uniforme du règlement Rome I ?, par N. JOUBERT

. Le choix implicite dans les jurisprudences nationales : vers une interprétation uniforme du Règlement ? – L'exemple du choix tacite résultant des clauses attributives de juridiction et d'arbitrage, par M. SCHERER

. Choix de loi et contrats liés, par S. CORNELOUP

. Les limites au choix de la loi applicable dans les contrats impliquant une partie faible, par S. BARIATTI

. Les limites du choix : dispositions impératives et internationalité du contrat, par H. MUIR WATT

. Les lois de police, une approche de droit comparé, par F. JAULT-SESEKE et S. FRANCQ

. Le choix de la loi applicable au contrat électronique, par Guillaume BUSSEUIL

. Le choix de loi dans la jurisprudence arbitrale, par P. MAYER

. Rapport de synthèse, par P. LAGARDE

More details can be found here.

Fourth Issue of 2010's Revue Critique de Droit International Privé

The last issue of the *Revue critique de droit international privé* was just released. It contains two articles and several casenotes. The full table of content can be found here.

In the first article, Dr. Marius Kohler and Dr. Markus Buschbaum discuss the concept of recognition of authentic instruments in the context of cross-border successions (*La « reconnaissance » des actes authentiques prévue pour les successions transfrontalières. Réflexions critiques sur une approche douteuse entamée dans l'harmonisation des règles de conflits de lois*). The English abstract reads:

> *However advantageous the introduction of a European inheritance certificate may be, as envisaged by the Commission's proposed Regulation on international successions, it is in its current form likely to create friction because of the way in which it organises the relationship with national inheritance certificates. It would therefore be wise to restrict the use of the European certificate to international successions, where it could then be drafted on basis of the national one, and to limit its effects to the Member States of destination. Moreover, as far as the free circulation of authentic instruments in general is concerned, the Regulation raises serious misgivings as to the use made by the proposal of the concept of mutual recognition. It appears that this concept – appropriate as it is for judicial decisions – is unsuitable to promote the circulation of authentic instruments.*

In the second article, Professor Malik Laazouzi, who teaches at St Etienne University, discusses the impact of the recent *Inserm* decision of the French *Tribunal des conflits* (a translation of which can be found here) on choice of law in administrative contracts (*L'impérativité, l'arbitrage international des contrats administratifs et le conflit de lois. A propos de l'arrêt du Tribunal des conflits du 17 mai 2010,* Inserm c/ Fondation Saugstad). I am grateful to the author for providing the following summary:

> *The Inserm case deals primarily with international arbitration issues. But the way of reasoning used to decide the case could also interfere with the handling of public law matters involving French public entities in private international law by French jurisdictions.*

How did the issue occur ?

A French public law entity (Inserm) entered into a contract with a Norwegian Fondation (Letten F. Sugstad) in order, inter alia, to achieve the implementation of a research facility in France, including a construction project. An arbitration occurred to decide over the termination of the agreement by the Fondation. The arbitral award, rendered in France, dismissed Inserm's claims. The French entity then applied to set aside the award simultaneously before french civil and administrative courts. To assert the jurisdiction of the letter, Insermargued that the dispute arose out of a French administrative contract.

The case has given rise to the intricate issue of allocation of jurisdiction between civil and administrative courts. As a matter of consequence, it has been brought before the Tribunal des conflits.

The question which the Tribunal des conflits had to solve is complicated to enunciate. Which one of the French civil or administrative courts have jurisdiction to set aside an international arbitral award rendered in France, in a dispute arisen out of the performance or termination of a contract to be performed on the French territory and entered into between a French public law entity and a foreign individual or entity ?

The Tribunal des conflits decided, on 17 may 2010, that the application to set aside the award in such a case is to be brought before civil courts, even if the contract is an administrative one under French law. This solution allows an exception when the contract entered into by a french public entity is governed by a mandatory administrative regime. In this particular case, administrative courts retain jurisdiction to decide over challenges to the arbitral award.

This decision is strictly limited to some international arbitration matters involving a contract entered into by a french public entity. When it is not the case – i.e. when no french public entity is involved – French administrative courts does not intervene at all.

This case is worth mentioning within the field of private international law. The distinction it introduces between mandatory and non mandatory administrative rules in the international arena could reshape the very idea of the split in methods to solve conflict of laws issues according to the public or private law

nature of the rules at stake.

Proving Foreign Law in U.S. Federal Court: Is The Use Of Foreign Legal Experts "Bad Practice"?

A panel of the United States Court of Appeals for the Seventh Circuit last week decided a fairly routine contract case—applying French law (opinion here). In doing so, Judges Easterbrook, Posner and Wood stated their views on the best means to prove foreign law. Of course, they each noted (in separate opinions) that the Federal Rules of Civil Procedure give courts a wide berth to rely on any source or authority, including sworn statements by experts in foreign law. But Judges Easterbrook and Posner see the use of such experts as "bad practice"—in their view, it's better for judges to consult English-language translations and treatises, which will be relatively objective, rather than the statements of experts hired by each party. According to Judge Easterbrook:

> *Trying to establish foreign law through experts' declarations not only is expensive (experts must be located and paid) but also adds an adversary's spin, which the court then must discount. Published sources such as treatises do not have the slant that characterizes the warring declarations presented in this case. Because objective, English-language descriptions of French law are readily available, we prefer them to the parties' declarations.*

Indeed, Judge Easterbrook gave more credence to a Danish Court's resolution of a parallel case than the parties' experts. In his view, "Denmark is a civil-law nation, and a Danish court's understanding and application of the civil-law tradition is more likely to be accurate than are the warring declarations of the paid experts in

this litigation."

Judge Posner was even more scathing of foreign legal experts. He wrote separately "merely to express emphatic support for, and modestly to amplify, the court's criticism of a common and authorized but unsound judicial practice. That is the practice of trying to establish the meaning of a law of a foreign country by testimony or affidavits of expert witnesses":

> *Lawyers who testify to the meaning of foreign law, whether they are practitioners or professors, are paid for their testimony and selected on the basis of the convergence of their views with the litigating position of the client, or their willingness to fall in with the views urged upon them by the client. These are the banes of expert testimony. When the testimony concerns a scientific or other technical issue, it may be unreasonable to expect a judge to resolve the issue without the aid of such testimony. But judges are experts on law, and there is an abundance of published materials, in the form of treatises, law review articles, statutes, and cases, . . . to provide neutral illumination of issues of foreign law. I cannot fathom why in dealing with the meaning of laws of English-speaking countries that share our legal origins judges should prefer paid affidavits and testimony to published materials. It is only a little less perverse for judges to rely on testimony to ascertain the law of a country whose official language is not English, at least if is a major country and has a modern legal system [(because law and secondary sources are readily translated into English)]. . . . [O]ur linguistic provincialism does not excuse intellectual provincialism. It does not justify our judges in relying on paid witnesses to spoon feed them foreign law . . . . I do not criticize the district judge in this case, because he was following the common practice. But it is a bad practice, followed like so many legal practices out of habit rather than reflection. . . .*

Judge Wood disagreed, arguing that judges are too likely err in interpreting foreign law, especially when it is in a foreign language:

> *Exercises in comparative law are notoriously difficult, because the U.S. reader is likely to miss nuances in the foreign law, to fail to appreciate the way in which one branch of the other country's law interacts with another, or to assume erroneously that the foreign law mirrors U.S. law when it does not. . . .*
>
> *There will be many times when testimony from an acknowledged expert in*

> *foreign law will be helpful, or even necessary, to ensure that the . . . U.S. judge understands the full context of the foreign provision. Some published articles or treatises, written particularly for a U.S. audience, might perform the same service, but many will not, even if they are written in English, and especially if they are translated into English from*
> *another language. It will often be most efficient and useful for the judge to have before her an expert who can provide the needed precision on the spot, rather than have the judge wade through a number of secondary sources. In practice, the experts produced by the parties are often the authors of the leading treatises and scholarly articles in the foreign country anyway. In those cases, it is hard to see why the person's views cannot be tested in court, to guard against the possibility that he or she is just a mouthpiece for one party.*

Both Judges Easterbrook and Posner recognized a caveat. According to the latter, the use of foreign law experts was "excusable only when the foreign law is the law of a country with such an obscure or poorly developed legal system that there are no secondary materials to which the judge could turn." The former would allow an expert to help determine the law of countries who do not "engage in extensive international commerce." This begs a question of line-drawing. One might assume that a U.S. judge would do his own research of an English-speaking common law system, irrespective of how much "international commerce" flowed through its ports. At the other end of the spectrum, the law of the Congo might be best explained by an expert. In between, as queried by Eugene Volokh, what about a country like Saudi Arabia, which is economically quite significant, but its legal system is so different from ours in many ways that I suspect most judges would want to hear from experts? What would Judges Easterbrook and Posner say about Chinese law, which is also radically different from ours but is an economic powerhouse and is the subject of a good deal of written English-language commentary? Perhaps, in close cases, courts may be more willing to hire their own foreign law experts pursuant to Federal Rule of Evidence 706, as is sometimes done. *See, e.g., Saudi Basic Indust.Corp. v. Mobil Yanbu Petrochemical Co., Inc.*, 866 A.2d 1, 30-32 (Del. 2005).

Swiss Institute of Comparative Law: Programme of the Conference on the EU's Proposal on Succession

As we anticipated in a previous post, on Friday, 19th March 2010, the **Swiss Institute of Comparative Law** (ISDC) will host **the 22nd *Journée de droit international privé***, organised in collaboration with the **University of Lausanne** (Center of Comparative Law, European Law and International Law – CDCEI). The conference will analyse the **Commission's Proposal on Succession**: **"Successions internationales. Réflexions autour du futur règlement européen et de son impact pour la Suisse"**.

Here's the programme:

Première session (09h00) – La proposition de règlement européen

Ouverture de la journée: *Christina Schmid* (director a.i., ISDC)*; Andrea Bonomi* (director, CDCEI, Univ. of Lausanne)

Chair: *Lukas Heckendorn Urscheler* (Head of Legal Division, ISDC)

- *Mari Aalto* (national expert, European Commission, DG FSJ): Introduction au projet européen en matière de succession;
- *Paul Lagarde* (Univ. of Paris I): Les grandes lignes de la future réglementation européenne: l'approche unitaire et le rattachement à la résidence habituelle;
- *Andrea Bonomi* (Univ. of Lausanne): Le choix de la loi applicable à la succession;

Discussion.

Chair: *Andrea Bonomi* (Univ. of Lausanne)

- *Olivier Remien* (Univ. of Würzburg): La validité et les effets des actes à cause de mort;
- *Richard Frimston* (Partner, Russell-Cooke LLP): The scope of the law applicable to the succession, in particular the administration of the estate;
- *Eva Lein* (British Institute of International and Comparative Law): Les compétences spéciales dans la proposition de Règlement;

Discussion.

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Deuxième session (14h00) – Round Table: L'impact du futur règlement sur le droit suisse

Chair: *Andreas Bucher* (Univ. of Geneva)

- *Peter Breitschmid* (Univ. of Zurich)
- *Florence Guillaume* (Univ. of Neuchâtel) (invited)

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Troisième session (15h30) – Round Table: La reconnaissance des certificats d'héritiers

Chair: *Christina Schmid* (ISDC)

- *Andreas Fötschl* (Univ. of Bergen and ISDC)
- *Paolo Pasqualis* (notary in Venice, Council of the Notariats of the European Union – CNUE) (invited)
- *Franco del Pero* (notary in Morges)

The conference will be held in French, English and German (no translation is provided).

For further information (including fees) see the conference's programme and the registration form, available on the ISDC's website.

(Many thanks to Prof. Andrea Bonomi)

Brussels I Review – Intellectual Property

The Commission's fourth question concerns the Regulations treatment of litigation concerning intellectual (industrial) property rights.

In its Green Paper, the Commission comments:

> *The possibility to effectively enforce or challenge industrial property rights in the Community is of fundamental importance for the good functioning of the internal market. Substantive law on intellectual property is already largely part of the acquis communautaire . Directive 2004/48/EC on the enforcement of intellectual property rights aims at approximating certain procedural questions relating to enforcement. . In order to address the lack of legal certainty and the high costs caused by duplication of proceedings before national courts, the Commission has proposed the creation of an integrated jurisdictional system through the establishment of a unified European patent litigation system which would be entitled to deliver judgments on the validity and the infringement of European and future Community patents for the entire territory of the internal market . In addition, on 20 March 2009, the Commission adopted a Recommendation to the Council concerning the negotiating directives for the conclusion of an international agreement involving the Community, its Member States and other Contracting States of the European Patent Convention . Pending the creation of the unified patent litigation system, certain shortcomings of the current system may be identified and addressed in the context of Regulation (EC) No 44/2001.*
>
> *With respect to the coordination of parallel infringement proceedings, it could be envisaged to strengthen the communication and interaction between the courts seized in parallel proceedings and/or to exclude the application of the rule in the case of negative declaratory relief (cf. supra, point 3).*
>
> *With respect to the coordination of infringement and invalidity proceedings, several solutions to counter "torpedo" practices have been proposed in the*

general study. It is hereby referred to the study for those solutions. However, the problems may be dealt with by the creation of the unified patent litigation system, in which case modifications of the Regulation would not be necessary.

If it is considered opportune to provide for a consolidation of proceedings against several infringers of the European patent where the infringers belong to a group of companies acting in accordance with a coordinated policy, a solution might be to establish a specific rule allowing infringement proceedings concerning certain industrial property rights against several defendants to be brought before the courts of the Member State where the defendant coordinating the activities or otherwise having the closest connection with the infringement is domiciled. A drawback of such a rule might be, as the Court of Justice suggested, that the strong factual basis of the rule may lead to a multiplication of the potential heads of jurisdiction, thereby undermining the predictability of the jurisdiction rules of the Regulation and the principle of legal certainty. In addition, such a rule may lead to forum shopping. Alternatively, a re-formulation of the rule on plurality of defendants might be envisaged in order to enhance the role of the courts of the Member State where the primary responsible defendant is domiciled.

Question 4: What are the shortcomings in the current system of patent litigation you would consider to be the most important to be addressed in the context of Regulation 44/2001 and which of the above solutions do you consider appropriate in order to enhance the enforcement of industrial property rights for rightholders in enforcing and defending rights as well as the position of claimants who seek to challenge those rights in the context of the Regulation?

This is a specialised area of litigation and it seems sensible to leave it to experienced and expert practitioners, commentators and judges to identify, and suggest solutions, to the jurisdictional conflicts that actually arise in the enforcement of IP rights in the Member States. Suffice it to say that the current framework, as applied by the ECJ in its decisions in the *GAT* and *Roche Nederlands* cases, appears unsuitable. As the English Court of Appeal noted in its 2008 judgment in *Research in Motion UK Ltd v. Visto Corporation* (paras. 5-14):

The [Brussels I] Regulation is substantially the same as that which it replaced, the Brussels Convention of 1968. Unfortunately neither document fully

considered the problems posed by intellectual property rights. This is because at present such rights are national rather than EU rights. They are not only limited territorially, but exist in parallel. Neither the Convention nor the Regulation specifically considered how parallel claims are to be dealt with. They were constructed for the simpler and more ordinary case of a single claim (e.g. of a breach of contract or a single tort or delict) and provide a system for allocating where that single claim is to be litigated. Parallel rights cannot give rise to single claims: only a cluster of parallel, although similar, claims.

Intellectual property also adds three further complications. Firstly there is a range of potential defendants extending from the source of the allegedly infringing goods (manufacturer or importer) right down to the ultimate users. Each will generally infringe and the right holder can elect whom to sue. One crude way to achieve forum selection is to sue a consumer or dealer domiciled in the country of the IP holder's choice (jurisdiction conferred by Art. 2.1) and then to join in his supplier – the ultimate EU manufacturer or importer into the EU if the product comes from outside. Jurisdiction for this is conferred by Art. 6. Thus there is considerable scope for forum shopping – the very thing the scheme of the Regulation is basically intended to avoid.

The second complication is that caused by a claim for a declaration of non-infringement. This remedy is necessary – a practical and sensible way for a potential defendant who wishes to ensure (normally before significant investment) that he is in the clear, is to seek a declaration that his proposed (or actual) activity does not fall within the scope of someone's rights. It is a way of making a potential patentee "put up or shut up".

The third complication is that the ultimate court for deciding the validity of a registered national right (most importantly a patent), is only the national court of the country of registration. Those responsible for the Convention/Regulation did consider registered intellectual property rights, providing, in what is now Art. 22:

The following courts shall have exclusive jurisdiction, regardless of domicile:

4. in proceedings concerned with the registration or validity of patents, trade marks, designs, or other similar rights required to be deposited or registered, the courts of the Member State in which the deposit or registration has been

applied for, has taken place or is under the terms of a Community instrument or an international convention deemed to have taken place.

Without prejudice to the jurisdiction of the European Patent Office under the Convention on the Grant of European Patents, signed at Munich on 5 October 1973, the courts of each Member State shall have exclusive jurisdiction, regardless of domicile, in proceedings concerned with the registration or validity of any European patent granted for that State

This provision is an incomplete way of dealing with IP: it does not cater for most of the common situations. Liability for patent infringement (we will confine our example to patents) depends on two things: the scope of the protection claimed and the validity of the patent: you can't infringe an invalid patent. The nature of a defence involves a spectrum of possibilities. At one end the defendant may simply say "What I do is outside the scope of the patent". If that is all, then the dispute is simply about the scope of the patent and what the defendant does. At the other he may say: "yes, I accept that what I do is within the scope of the patent. But the patent is invalid." Then the dispute is only about validity. Or the position may be a mixture of both. The defendant may run two defences, denying that what he does is within the scope of the patent and also contending that the patent is invalid. A particular (and often important) version of this intermediate position is where the defendant says "if the scope is wide enough to cover what I do, then the patent is invalid." …

Where a potential defendant takes this last kind of position he may well go on the offensive in two, combined ways. He will seek both revocation of the patent and a declaration of non-infringement.

Art.22 confers exclusive jurisdiction on a national court where validity is challenged. Difficult questions arose about this and were referred to the ECJ; see the ruling in Roche v Primus case, C-539/03 [2007] FSR 5. They still do, despite that decision, see the ruling of the Hoge Raad (Dutch Supreme Court) on 30th November 2007 in Roche v Primus following the ruling of the ECJ.

There is also a potential fourth complication for IP rights, particularly patents, arising or possibly arising from the Convention, now Regulation. It is known as the "Italian torpedo" – a graphic name invented (we think) by the well-known distinguished scholar Prof. Mario Franzosi ("Worldwide Patent Litigation and

the Italian Torpedo" [1997] 7 EIPR 382).

It works in this way: suppose a potential defendant is worried about being sued for infringement. To prevent any immediate effective action against him he starts an action against the patent holder for a declaration of non-infringement in a country whose legal system runs very slowly. (When Prof. Franzosi wrote his article, Italy was notoriously slow, though it is our understanding that things have improved since then and are continuing to improve.) The putative defendant claims such a declaration not only in relation to the Italian patent, but also in relation to all the corresponding patents in other European countries. If sued in any of these countries he raises Art 27 of the Regulation saying: the issue of infringement and that of non-infringement are the same cause of action expressed differently. The courts of the slow member state are first seised of the action. So the courts of all other member states must, pursuant to Reg. 27, stay its proceedings.

The effectiveness of the Italian torpedo (and Belgian, for the courts of that country were once also slow) has been blunted by a number of decisions, particularly the Roche Primus case at European level, the decision of the Italian Supreme Court in Macchine Automasche v Windmoller & Holscher, 6th November 2003 and some decisions of the Belgian courts, particularly Roche v Wellcome 20 February 2001. But the torpedo is not completely spent. It still has some possibilities (or is thought to have some) in it, as this case shows. …

The Court added (paras. 15-16)

Much ingenuity is expended on all this elaborate game playing. Despite the temptation to do otherwise, it is not easy to criticise the parties or their lawyers for this. They have to take the current system as it is and are entitled (and can only be expected) to jockey for what they conceive to be the best position from their or their client's point of view. Of course parties could, if they agreed, decide to abide by the result in a single jurisdiction (or perhaps take best out of three). Or they could arbitrate instead of plunging their dispute into the chaotic system which Europe offers them for patent disputes. But why should a party do any of these things if it thinks it has a better prospect commercially from the chaos? In some industries for instance, a patentee with a weak patent would actually prefer to be able to litigate in a number of parallel countries in the

hope that he wins in one. Winning in one member state may indeed be enough as a practical matter for the whole of Europe – some companies market products only Europe-wide. A hole, say in Germany, of a Europe-wide business in a particular product may make the whole of that business impractical.

Again a party who fires an Italian torpedo may stand to gain much commercially from it. It would be wrong to say that he is "abusing" the system just because he fires the torpedo or tries to. Things may be different if he oversteps the line (e.g. abuses the process of a court) but he cannot and should not be condemned unless he has gone that far.

Book: Liber Amicorum Hélène Gaudemet-Tallon

The French publisher Dalloz has recently published a very rich collection of essays in honor of **Hélène Gaudemet-Tallon**, Professor Emeritus at the University of Paris II and Associate Member of the *Institut de Droit International*, one of French leading scholars in the field of conflicts of laws and jurisdictions (among her recent works, see *Le pluralisme en droit international privé, Richesses et faiblesse (le funambule et l'arc en ciel)*, General Course held in 2005 at the Hague Academy of International Law, and the forthcoming fourth edition of her authoritative book on the Brussels I reg., *Compétence et exécution des jugements en Europe*).

The volume, ***Vers de nouveaux équilibres entre ordres juridiques. Liber amicorum Hélène Gaudemet-Tallon***, includes 50 articles on almost all fields of Private International Law, written by leading academics.

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Title: **Vers de nouveaux équilibres entre ordres juridiques – Liber**

amicorum Hélène Gaudemet-Tallon. May 2008 (886 pages)**.**

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(Many thanks to Gilles Cuniberti and Etienne Pataut)

Book: Conflits de Lois et Régulation Economique

This interesting book on *Conflict of Laws and Economic Regulation* gathers the contributions of the speakers to a conference held in Paris a year ago. It is edited by three French scholars, Mathias Audit, Horatia Muir Watt (who was our Guest Editor last month) and Etienne Pataut, who all teach in Paris.

Here is how the conference was presented:

> *Within the specific instance of the internal market, the installation and the operation of mechanisms of economic regulation raise a well identified difficulty. Building legal instruments suitable to ensure this regulation supposes indeed to resort to community instruments, which have by nature vocation to transcend national legal orders. However, it is the object of private international law to implement the management tools of this normative diversity. Consequently, this raises the question which will be at the center of this conference: the relationship between the internal market's tools of regulation (set up by the European Union) and private international law.*

The first part of the book discusses the influence of economic regulation on choice of law in fields which are regulated, such as companies, products, services, banks or securities. The second part wonders whether other areas such as culture, environment, employment, health and judicial services, could be subjected to economic regulation, and how this would influence choice of law.

Contributors include the three editors, but also T. Azzi, M. Behar-Touchais, O.

Boscovic, E. Bouretz, F. Fages, S. Francq, M.-A. Frison-Roche, F. Garcimartin-Alferez, L. Idot, M.-N. Jobard-Bachellier, P. Mavridis, A. Perrot.

Guest Editorial: Dickinson on Trust and Confidence in the European Community Supreme Court?

Throughout 2008, CONFLICT OF LAWS .NET will play host to twelve guest editors: distinguished scholars and practitioners in private international law, who have been invited to write a short article on a subject of their choosing. It is hoped that these guest editorials will provide a forum for discussion and debate on some of the key issues currently in the conflicts world, and I would very much encourage everyone to post comments.

The first editorial is on "**Trust and Confidence in the European Community Supreme Court?**" by Andrew Dickinson.

Andrew Dickinson is a practising solicitor advocate (England and Wales) and consultant to Clifford Chance LLP. He is also a Visiting Fellow in Private International Law at the British Institute of International and Comparative Law. Andrew is the co-author of *State Immunity: Selected Materials and Commentary* (OUP, 2004) and an editor of the *International Commercial Litigation Handbook* (LexisNexis, 2006). He has written widely in the areas of private and public international law – recently published papers include "Third-Country Mandatory Rules in the Law Applicable to Contractual Obligations: So Long, Farewell, Auf Wiedersehen, Adieu?" (2007) 3 *J Priv Int L* 53 and "Legal Certainty and the Brussels Convention – Too Much of a Good Thing?", ch 6 in P de Vareilles-Sommières (ed), *Forum Shopping in the European Judicial Area* (Hart Publishing, 2007).

Trust and Confidence in the European Community Supreme Court

Under Article 10 of the EC Treaty, the relations between the Member States and the Community institutions are governed by a principle of loyal co-operation (Case C-275/00 *Commission v First NV* [2002] ECR I-10943, para 49). In the area of private international law, now within Title IV of the EC Treaty, that principle has manifested itself in the relationship of mutual trust between Member States' judicial systems in the application of the Brussels I Regulation and its predecessor Convention (Opinion 1/03, *Lugano Convention* [2006] ECR I-1145, para 163; Case C-159/02 *Turner v Grovit* [2004] ECR I-3565, para 72). To a certain degree, that relationship is, of course, a fiction. Some Member State courts are unwilling to trust certain of their continental cousins, whose reputation (deserved or undeserved) precedes them. Others are wholly undeserving of the fiduciary responsibility (see Case C-7/98, *Krombach v Bamberski* [2000] ECR I-1935).

Importantly, however, the principle of loyal co-operation not only requires the Member States to take all measures necessary to ensure the application and effectiveness of Community law, but also imposes on the Community institutions reciprocal duties of sincere co-operation with the Member States (*Commission v First NV*, above). Accordingly, a relationship of "common trust" supposedly exists between the Member States, on the one hand, and the European Court of Justice, on the other, in the performance of the latter's primary function in ensuring that in the interpretation and application of the treaty the law is observed (EC Treaty, Art 220). In this connection, the question arises: "Is the Court of Justice really deserving of our trust?"

Three reasons, in particular, justify hesitation before giving an affirmative answer to that question. The first concerns the judicial, administrative, financial and procedural resources available to the Court. The current restriction on the number of judges and Advocates-General under the EC Treaty (Arts 221-222) inevitably restricts the number of cases that can be heard, particularly if (as is currently the case) the procedural rules entitle intervention by other interested parties and require a fixed, multi-layered procedure to be followed (ECJ Statute, Arts 20 and 23). Further, as the President of the Court of Justice has noted "the accelerated procedure laid down under Article 104a of the Rules of Procedure of the Court is not suited for dealing adequately with a high number of references for a preliminary ruling in areas such as visas, asylum and immigration, or judicial co-operation in civil and criminal matters" (see Council document 11759/1/07

REV 1 (en), p 3).

The result, inevitably, is delay in the administration of justice, a delay which is all the more important in situations in which the private rights and obligations of natural and legal persons are directly at stake. By way of example, of the four decisions of the ECJ in 2006 concerning the Brussels Convention, two (Case C-4/03, *GAT* and Case C-539/03, *Roche Nederland*) had been referred to the ECJ in 2003. Little wonder, therefore, that a reference to the Court is seen in some quarters as a useful way to gum up proceedings (a "Luxembourg torpedo", perhaps) and focus the claimant's mind on settlement.

Happily, the ECJ has itself on more than one occasion taken the initiative in proposing amendments to its statute and rules to create a more streamlined and flexible procedure for certain references for a preliminary ruling in the area of freedom, security and justice (see Council documents 13272/06; 17013/06; 11597/1/07 REV 1 (en); 11824/07). Unfortunately, it appears that the Council and the Member States have yet to act on that initiative.

The second reason concerns the expertise of the Court in matters of private law, and private international law in particular. Thus, the potted biographies of the current members of the Court appearing on the curia website suggest that significantly less than half have any experience of private practice. Unsurprisingly, the background of most lies in the areas of public and European law, and only two CVs (those of the judges from Slovenia and Romania) refer to private international law. This suggests a significant imbalance, particularly given the increasing prominence of "private law" instruments in the Community *acquis*.

The third reason, arguably the most troubling, concerns the unfavourable impression given by the Court's reasoning in recent cases in this area, particularly those concerning the European jurisdiction instruments. Thus, the Court has appeared unconcerned by arguments raised concerning encouragement of abusive practices by litigants (*Turner*, above, para 53) and consequential difficulties in the due administration of justice (Case C-281/02, *Owusu v Jackson* [2005] ECR I-1383, paras 44-45). Suffice it to observe, to use one of the ECJ's favoured expressions, it is not so much the fact that these arguments were rejected as the manner in which the Court curtly swept them under the carpet. More recently, in Case C-98/06, *Freeport v Arnoldsson* (10 November 2007), the ECJ refused to acknowledge the doubts which it had generated through a careless

(and unnecessary) comment in its judgment in its earlier decision in the *Réunion* case ([1998] ECR I-6511, para 50), seeking instead to explain away the comment on an implausible basis (see here for the discussion on this website). Had the Court said "we went further than both the decision and the terms of the 1968 Convention required" or even "we went further than the decision required and we can see why it has caused confusion and dissatisfaction in some quarters", its decision in *Freeport* would not have raised doubts. By deploying a judicial sleight of hand, however, the Court calls into question, once again, whether it is deserving of our common trust as the arbiter of an increasingly broad civil justice regime under EC law.

Like the principle of mutual trust in other Member State courts which the ECJ has emphasised, it is a fiduciary relationship from which the "beneficiaries" are not free to withdraw. But the importance of the Court's role in our personal and professional lives is too important to allow the re-writing of history to pass without remark, particularly at a time when the ECJ is likely to exercise an increasingly significant role in the area of private law, as a result both of the recent tide of legislation under Title IV (the legacy of the rush to exercise competences created by the Treaty of Amsterdam and the Commission's scoreboard turning activity in the early years of this century) and the intended removal by the Reform Treaty of the restrictions (currently, EC Treaty, Art 68) on the right of lower Member State courts to refer cases for preliminary ruling on a question of EC law. Improvements in the Court's procedural rules (see above) may address some of the problems, but it is submitted that a more fundamental institutional reform is required. One option, which may merit further thought (and on which comments would be welcomed) would be to create a specialist "civil and commercial court" using the power conferred by Art 225a [256, post-Reform Treaty], with specifically tailored procedures and judges chosen for their expertise in, and sensitivity to, private law issues and the resolution of disputes between private parties. Absent reform of this kind, Europe's supreme court may acquire a reputation as a court of injustice, not of Justice.

(The February Guest Editorial will be by Professor Jonathan Harris; details to follow.)

CLIP conference: Intellectual Property and Private International Law

As we announced in the last posting concerning the CLIP group, they are preparing an international conference on issues arising where in the intersection of intellectual property law and private international law. The conference program includes the following topics and speakers:

Are there any Common European Principles of a Private International Law with regard
to Intellectual Property?
Prof. Dr. Annette Kur, Max Planck Institute for Intellectual Property Law, Munich

The ALI Principles Governing Jurisdiction, Choice of Law and Judgments in Transnational Intellectual Property Disputes
Prof. Dr. Rochelle C. Dreyfuss, New York University

"Contracts Relating to Intellectual or Industrial Property Rights" under the Rome I
Proposal
Prof. Dr. Matthias Leistner, University of Bonn

The Law Applicable to Non-Contractual Obligations Arising from an Infringement of
Registered IP Rights
Prof. Dr. Peter Mankowski, University of Hamburg

The Law Applicable to Infringements of Non-Registered IP Rights
Prof. Dr. Haimo Schack, University of Kiel

Extraterritorial Application of IP Law – An American View
Prof. Dr. Graeme B. Dinwoodie, Chicago-Kent College of Law

The Private International Law of IP and of Unfair Commercial Practices: Coherence or
Divergence?
Prof. Dr. Pedro Miguel de Asensio, University Complutense of Madrid

Cross Border IP Litigation – Still an Issue under the Brussels I Regulation?
Prof. Dr. Paul Torremans, University of Nottingham/University of Ghent

A Spider without a Web? Multiple Defendants in IP Litigation
Prof. Dr. Marcus Norrgård, Swedish School of Economics and Business Administration, Helsinki

The Future of Centralised Patent Litigation in Europe – Between EPLA and the Community Patent Regulation
Dr. Stefan Luginbühl, European Patent Office

Jurisdiction in Cases Concerning IP Infringements on the Internet
Dr. Axel Metzger, Max-Planck Institute for Comparative and International Private Law, Hamburg

The opening speach on behalf of the DFG Graduate School n. 1148 "Intellectual Property and the Public Domain", University of Bayreuth belongs to Prof. Dr. Diethelm Klippel, and the introduction into the conference has been entrusted to Prof. Dr. Stefan Leible and Prof. Dr. Ansgar Ohly of the University of Bayreuth. The conference will take place **in Bayreuth, Germany on 4 and 5 April 2008**.

The detailed program of the conference can be downloaded here.