United States Signs Hague Convention on Choice of Court Agreements

On 19th January, the outgoing State Department Legal Advisor, John Bellinger, signed the Hague Convention (of 30 June 2005) on Choice of Court Agreements on behalf of the United States of America. The USA is the first country to sign the Convention, with Mexico also a party to the Convention through accession. The status table of the Convention can be found on the HCCH website, as well as the preliminary documents, and the explanatory report prepared by Hartley and Dogauchi.

Is this the first of many? Will other countries follow the USA's lead, and sign up to the Convention? I very much doubt it, but you are welcome to disagree with me in the comments.

In Memoriam: Professor Jan Kropholler

Professor *Jan Kropholler,* one of the most renowned German scholars in private international law, has passed away last week.

Only recently *Professor Kropholler* celebrated his 70th birthday. On this occasion, as we have reported, a Festschrift in his honour was published by Mohr Siebeck titled „Die richtige Ordnung" (*The Right Order*) and presented to him last October at a ceremony at the Max Planck Institute for Comparative and International Private Law in Hamburg.

As the Max Planck Institute expresses in a statement on the occasion of his birthday last year, "[a]s Senior Research Fellow at the Hamburg Max Planck

Institute, Kropholler set new standards for private international law and procedure in terms of content, methodology and pedagogy. His textbook on private international law is of particular renown and saw its 6th edition released in 2006. Among Kropholler's works on international and European procedural law, his commentary on the Brussels I Regulation – published for the eighth time in 2005 – bears special witness to his scholarly achievements."

A bibliography of *Professor Kropholler's* published works, as well as further information on his academic career, can be found at the website of the Max Planck Institute in Hamburg.

Foreign Law before the Spanish Courts: the Need for a Reform

In a previous post (under the title Spanish International Adoption Act, Law 54/2007, of December 28) I stated that, with the exception of the International Adoption Act of 2007, there is no Private International Law Act in Spain. For some years, under the direction of Professor Julio Gonzalez Campos, Spanish academics (almost all of us: we are still relatively few in this country) have been working on a bill of this nature. Sadly, Professor González Campos passed away in 2007, and his death has also brought an end to this endevour. However, many of us, if not all, believe that our autonomous PIL needs to be revised both in civil and procedural matters. A decision on some concrete points should be made with the utmost urgency: that's the case of the system of proof of foreign law before our courts.

In recent years the judicial application of foreign law in Spain has been suffering from a confusing and inconsistent practice before the lower Courts; the Supreme Court and the Constitutional Court have been called to clarify the matter, but the fact is, they themselves have not escaped dissension.

The Spanish regulations on the subject is contained in art. 12.6 CC ("Spanish conflict of laws rules will be applied ex officio"), supplemented by art. 282 LEC

2000 (“Content and validity of foreign law should be proved”, and, though proofs are to be carried at the request of the parties, “the court may use any means of finding it deems necessary for the implementation of foreing Law”).
The meaning of these articles is doubtful. The respective role of the parties and the judge in the applicability of foreign law are subject to discussion. Another issue under discussion, with particular acrimony, is the following: if foreign law is to be proved by the parties (completely or only to a certain point) , what happens if they fail?.

As for the former doubt, the prevailing view is that foreign law is to be considered as a fact that should be raised and proved by the parties at trial. However, the assimilation of foreign law to a fact is not absolute: it is for the courts to collaborate in its identification. But, what level of proof is required from the parties? In this respect, the Supreme Court sometimes requires strict means of proof and absolute certainty about the content of the law, whilst the Constitutional Court only ask for a “beginning of a proof”. Furthermore, how deep should a court be involved in the ascertaining of the foreign law? How is its knowledge to be acquired? could the court’s private knowledge of foreign law overcome the passivity of the parties?

There are up to five Supreme Court rulings regarding the second doubt we have pointed out: whether foreign law should be disregarded if the parties fail to comply with their burden of proof. The main thesis supports the application of Spanish law when foreign law has not been proved. Another view that has also received doctrinal approval is the rejection of the claim (in the merits). The remaining possibilities would be: the rejection of the application (merits would not be considered); the return of the proceedings back to the time when foreign law should have been proved, but wasn’t; and an ex officio application of foreign law. None of the solutions are completely satisfactory: in particular, the replacement of foreign law by Spanish law implies breach of the mandatory nature of the conflict of laws rule. As for the rejection of the claim, it is probably contrary to the right to an effective judicial protection: according to the Spanish principles of procedural law, it means that if a party did not allege foreign law, or was unable to prove it, he/she will not be allowed to raise his/her claim again, even alleging and proving foreign law correctly.

In light of the above, our system may surely be said to be of an “open texture”; but, whilst for some Spanish authors this flexibility should be wellcome, for others

(ourselves included) it is actually a source of chaos, therefore of legal uncertainty, and it is crying out for an urgent legal reform.

ERA Conference: Cross-Border insolvency proceedings

On 26-27 March 2009 a conference on Cross-Border insolvency proceedings will be held at the Academy of European Law in Trier. The abstract reads:

When the assets belonging to an insolvent debtor are situated in different EU Member States, crossborder insolvency will often give rise to conflicts that need to be resolved by applying Regulation (EC) 1346/2000 on Insolvency Proceedings.

The Regulation sets up a legal framework that contributes significantly to the better functioning of the Internal Market. It includes conflict-of-law rules as well as rules on jurisdiction, and provides for uniformity of insolvency proceedings by means of mutual recognition within the EU. The Regulation is one very useful element of facilitating cross-border insolvency cases. By now, national courts have several years of practical experience with the Regulation. Concerning the interpretation of the Regulation's material provisions, much has been clarified or established through court authorities.

However, much remains unresolved and will be the subject of extensive judicial activity in the future.
The conference will focus on the case law of the Court of Justice of the European Communities, offering an indepth analysis of the recent jurisprudence and discussing cases still pending.

On the second conference day, enterprise groups' insolvencies will be discussed. Finally, the conference will concentrate on recent developments in national insolvency and turnaround laws.

Choice of Law in the American Courts in 2008

Symeon Symeonides has posted the twenty-second instalment of his annual survey on US choice of law decisions on SSRN. Here's the abstract:

> *This is the Twenty-Second Annual Survey of American Choice-of-Law Cases. It covers cases decided by American state and federal courts from January 1 to December 31, 2008, and reported during the same period. Of the 3,249 conflicts cases meeting both of these parameters, the Survey focuses on those of the 1023 appellate cases that may add something new to the development or understanding of choice of law. The Survey is intended as a service to fellow teachers and students of conflicts law, both within and outside the United States. Its purpose is to inform, rather than to advocate.*
>
> *The following are among the cases discussed in this Survey: Two U.S. Supreme Court cases and several intermediate court cases delineating the extraterritorial reach of the Constitution and federal statutes, and one Supreme Court case on the domestic effect of a judgment of the International Court of Justice; A New Jersey Supreme Court case abandoning Currie's interest analysis in tort conflicts in favor of the Restatement (Second), and a New Mexico Supreme Court case abandoning the traditional approach in contract conflicts (but only in class actions) and adopting the "false conflict doctrine" of the Restatement (Second); Several cases applying (and one not applying) the law of the parties' common domicile to torts occurring in another state; Cases involving cross-border torts and applying the law of whichever of the two states (conduct or injury) favors the plaintiff; Product liability cases granting forum non conveniens dismissals in favor of alternative fora in foreign countries and those countries' responses by enacting "blocking" statutes; Cases refusing to enforce clauses precluding class-action or class-arbitration; Cases illustrating the race to the courthouse between insurers and their insureds; Cases recognizing Canadian or Massachusetts same-sex marriages, and a case refusing to recognize a Pakistani talaq (unilateral, non-judicial divorce); and a*

case refusing to recognize a foreign judgment that conflicted with a previous judgment from another country.

The survey is forthcoming in the *American Journal of Comparative Law* (vol. 57, 2009), but you can also download it for free from SSRN. (*Bonus link: here's our item on last year's survey, and here's the one from 2006*.) As always, highly recommended.

ERA Conference: Annual Conference on European Insurance Law 2009

The ERA website informs: On 23 and 24 March 2009 the Annual Conference on European Insurance Law 2009 will be held in Trier at the Academy of European Law. The objective of this conference is to update practitioners on the most recent developments in the field of insurance law pursuant to legislation and jurisprudence. The Financial Services Action Plan was implemented with a view to improving the single market in financial services, including the insurance market, by allowing insurers to operate throughout the European Union whilst ensuring a high level of consumer protection. Over recent years, legislative measures have been adopted in order to achieve open and secure retail markets as well as sound supervisory structures. The conference will also focus on other relevant measures concerning insurance undertakings and contract law designed for consumer protection, such as:

- Jurisdiction and applicable law in insurance contracts,
- motor insurance,
- insurance mediation,
- Solvency II, the Commission's proposal for a new directive to be adopted in 2009.

This list of topics may be subject to modifications and additions in the final programme to reflect the latest developments.

The Amir of Qatar, a yacht built in New Zealand and sailed to Australia, and the Australian Federal Court

In *Thor Shipping A/S v The Ship "Al Duhail"* [2008] FCA 1842 (5 December 2008) the Australian Federal Court considered damages proceedings in its admiralty jurisdiction against the Ship *Al Duhail*. The proceedings were brought by the owner of a cargo vessel, Thor Shipping, which had been chartered to carry the *Al Duhail* from New Zealand, where it was constructed, to the Seychelles. In fact, in an alleged breach of the charterparty by the charterer, the *Al Duhail* was never loaded onto the cargo vessel, and was instead sailed from New Zealand to Australia, where it was arrested following the commencement of the proceedings. The writ alleged that the charterparty was entered into by agents of the Amir of Qatar, the Head of State of Qatar. The Amir applied for release of the ship on the bases that the Federal Court's admiralty jurisdiction had not been engaged and that, in any event, he enjoyed head of state immunity.

As to the first point, pursuant to s 17 of the *Admiralty Act* 1988 (Cth), for the admiralty jurisdiction to be engaged, it was necessary that the Amir was the owner, or in possession or control, of the *Al Duhail* at the time the cause of action arose and also at the time of commencement of the proceedings. It was common ground that the latter requirement was made out. However, the Amir contended that at the time the cause of action arose, ie when the charterparty was breached, he was not the owner of the *Al Duhail*.

At the time of breach, the *Al Duhail* was under construction and the agreement with the construction company, governed by English law, provided that title did not pass to the Amir from the construction company until the *Al Duhail* had been accepted by the Amir and all payments had been made. That had not occurred. Thor Shipping asserted, among other things, that title had nevertheless passed to the Amir pursuant to the law of Qatar when the *Al Duhail* was registered in Qatar in the name of the Amir, which occurred before breach of the charterparty. There is Full Court authority for the view that in cases where a ship has been registered, the law of the place of registration governs questions of title, property and assignment of the ship as the *lex situs*: *Tisand (Pty) Ltd v The Owners of the Ship MV "Cape Moreton" (ex "Freya")* (2005) 143 FCR 43; [2005] FCAFC 68. However, in this case, Dowsett J considered it uncertain, in circumstances where it was said that registration itself effected a transfer of title, whether the law governing ownership should be the law of the place of registration (Qatar) or the law of the place where the *Al Duhail* was at the time (New Zealand) or the law applicable to the construction contract (England).

Ultimately, Dowsett J did not have to reach a conclusion on this issue, because he considered that the Amir was entitled to head of state immunity pursuant to the *Foreign States Immunities Act* 1985 (Cth) and the *Diplomatic Privileges and Immunities Act* 1967 (Cth). It was common ground that any relevant immunity of the Amir was that applicable in his private capacity. Pursuant to s 36 of the *Foreign States Immunities Act*, as in the UK, the immunity was that extended by the *Diplomatic Privileges and Immunities Act* to the head of a diplomatic mission, with such modifications as are necessary. The latter act applies provisions of the *Vienna Convention on Diplomatic Relations*as Australian law. In particular, it applies art 31, which provides for a general immunity from civil jurisdiction, subject to certain exceptions none of which were relevant in this case. Dowsett J rejected Thor Shipping's contention that the effect of art 39 was to apply the immunity to the Amir in his private capacity only when in Australia. That article relevantly provides:

> *(1) Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed.*

> *(2) When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.*

Dowsett J concluded:

> *The error in the plaintiff's submission is the characterization of article 39 as a geographical limitation upon diplomatic immunity. In fact, it is designed to give immunity whilst the relevant diplomatic agent is in post, whether or not he or she is in the receiving state. It commences upon arrival in that state for the purpose of taking up the post, and terminates upon completion of his or her functions and departure. The geographical references in [art] 39 reflect the nature of the diplomatic agent's duties which generally require that he or she be in the relevant country in order to perform them. However he or she enjoys immunity whilst in post, regardless of location. It is that degree of immunity which must be extended to heads of state pursuant to s 36 of the [Foreign States Immunities Act].*

This is consistent with the approach to art 39 adopted by Lord Browne Wilkinson and Lord Goff of Chieveley in the House of Lords in *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte [No 3]* [2000] 1 AC 147; [1999] UKHL 17.

Assistant in Private International Law in Luxembourg

The Faculty of Law of the University of Luxembourg is seeking to recruit an Assistant (PhD student) in Private International Law, Comparative Law or Civil

Law. This is a distinct position from the one I reported on earlier.

The candidate should be a PhD student who will be expected to work on his doctorate, to teach a few hours per week (one to three) and to contribute to research projects in private international law or in civil law. It is a 2-year fixed-term contract, renewable once.

The full text of the advertisment can be found here (only in French for the time being). The deadline for the application is 10 February 2009.

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (1/2009)

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

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

- *H.-P. Mansel/K. Thorn/R. Wagner:* "Europäisches Kollisionsrecht 2008: Fundamente der Europäischen IPR-Kodifikation" – the English abstract reads as follows:

> *The article gives an overview on the developments in Brussels in the judicial cooperation in civil and commercial matters from September 2007 until October 2008. It summarizes the current projects in the EC legislation and presents some new regulations as the regulations on the law applicable to contractual and non-contractual obligations and the regulation on the service of documents. Furthermore, it refers to the national German laws as a consequence of the new European instruments. With regard to the ECJ, important decisions and some pending cases are presented. The article concludes with an outline of the European position regarding the Hague*

Conference and some Conventions, with regard to which the competence is split between the EC and its member states.

- *P. Mankoswski:* "Ist eine vertragliche Absicherung von Gerichtsstandsvereinbarungen möglich?" – the English abstract reads as follows:

Under the Brussels I regime, the value of agreements on jurisdiction as a means of guaranteeing legal certainty is severely challenged by Turner because the anti-suit injunction as the instrument to enforce agreements on jurisdiction has been inhibited in European cases. Yet this might leave room to look for other tools of enforcement. At least in England, damages have become a big issue inosfar as agreements on jurisdiction can be regarded as ordinary contract terms and their breach would thus amount to a breach of contract. Liquidated damages clauses, clauses stipulating for a reimbursement of costs and penalty clauses could be the next steps. All claims which directly or indirectly sanction a claim not to sue in a forum derogatum militate against the ratio underpinning the inhibition of anti-suit injunctions since a right not to be sued abroad is not recognised under the Brussels I regime. If there is no primary claim, consequentially there cannot be a secondary claim sanctioning it. But, notwithstanding a closer check under the law against unfair contract terms, penalty clauses survive this test since they are established by a separate contractual promise. Insofar as claims for the breach of an agreement on jurisdiction are permitted such claims ought to be pursued in the forum prorogatum.

- *A. Flessner:* "Die internationale Forderungsabtretung nach der Rom I-Verordnung" – the English abstract reads as follows:

The paper explains the assignment of claims under Article 14 of the Regulation Rome I. The relationship between assignor and assignee is to be governed by the law applicable to the contract between them and the position of the debtor is to be determined by the law governing the assigned claim. Moreover, the law applicable to the relationship between assignor and assignee is meant to govern the proprietary aspects of the assignment, which opens these to choice of law by the parties; this inevitably includes the assignment's effect on third parties – an issue highly controversial before and in the making of the Regulation. The

author analyzes and welcomes the new set up and discusses its consequences for a number of issues. He pleads for letting the new law prove itself in practice and for making only cautious use of the special review clause on the third party effects in Article 27 of the Regulation.

- *W. Hau* on two decisions of the Higher Regional Court Stuttgart (5 November 2007 – 5 U 99/07) and the Higher Regional Court Munich (17 April 2008 – 23 U 4589/07) dealing with the requirements of jurisdiction agreements under Art. 23 Brussels I as well as the determination of the place of delivery in terms of Art. 5 Nr. 1 (b) Brussels I in the case of contracts involving carriage of goods: "Gerichtsstandsvertrag und Vertragsgerichtsstand beim innereuropäischen Versendungskauf"(*Remark: The question whether – in the case of contracts involving carriage of goods – the place where under the contract the goods sold were delivered or should have been delivered is to be determined according to the place of physical transfer to the purchaser, or according to the place at which the goods were handed over to the first carrier for transmission to the purchaser has been referred to the ECJ by the German Federal Supreme Court for a preliminary ruling: See C-381/08 (Car Trim GmbH v KeySafety Systems SRL and our previous post which can be found here.)*

- *O. L. Knöfel* on mutual assistance with regard to taking evidence in German-Turkish cross-border proceedings (Higher Regional Court Frankfurt, 26 March 2008 – 20 VA 13/07): "Beweishilfe im deutsch-türkischen Rechtsverkehr"

- *M. Fehrenbach* on a decision of the German Federal Supreme Court (29 May 2008 – IX ZB 102/07) holding that the opening of main insolvency proceedings by a German court is at least provisionally ineffective if the court was aware that main insolvency proceedings had been opened already in another Member State under the European Insolvency Regulation*:* "Die prioritätsprinzipwidrige Verfahrenseröffnung im europäischen Insolvenzrecht"

- *H. Roth* on a decision of the Federal Supreme Court (2 April 2008 – XII ZB 134/06) dealing with the question whether interim decisions according to Art. 15 (1) lit. b Brussels II *bis* can be challenged: "Zur Anfechtbarkeit von

Zwischenentscheidungen nach Art. 15 Abs. 1 lit. b EuEheVO”

- *R. Geimer*: “Notarielle Vertretungsbescheinigungen aus ausländischen Unternehmensregistern und Sonstiges mehr aus dem internationalen Urkundsverfahrensrecht” (OLG Schleswig, 13.12.2007 – 2 W 198/07)
- *E. Eichenhofer*: “Einwohnerrenten im öffentlich-rechtlichen Versorgungsausgleich” (BGH, 6.2.2008 – XII ZB 66/07)
- *P. Huber* on a decision of the Austrian Supreme Court of Justice (19 December 2007 – 9 Ob 75/07f) dealing with the interpretation of Art. 39 (2) CISG: “Rügeversäumnis nach UN-Kaufrecht”
- *M. Weller:* “Ausländisches öffentliches Recht vor englischen Gerichten (Government of the Islamic Republic of Iran v. The Barakat Galleries Ltd., [2008] 1 All E.R. 1177)” – the English abstract reads as follows:

In its recent action to recover certain antiquities of its national heritage from the current possessor, the Barakat Galleries Ltd. in London, the Government of the Islamic Republic of Iran found itself confronted, by the court of first instance, with the declaration that any claim depending on the legal effects of Iran’s legislation to protect its national heritage must fail for the sole reason that domestic courts would not enforce foreign public law. The Court of Appeal now reversed this holding and thereby approximated to the international consensus the English conflicts rules on the application of foreign public law to incidental questions of patrimonial claims. Most interestingly, the Court of Appeal applied this new finding not only to the claim for recovery on conversion on the basis of a proprietary interest, but also on the basis of a mere possessory interest, and this possessory interest may even arise from foreign public law, for example, the obligation of a finder of a cultural good in the ground of Iran to hand over this object to the competent authorities. English choice of law methodology, coupled with the English substantive law of conversion, therefore now seems to advance foreign interests in the protection of a state’s cultural heritage to a surprising extent.

- *C. Mindach:* “Zum Stand der IPR-Kodifikation in der GUS” – the English abstract reads as follows:

The members of the Commonwealth of Independent States (CIS) adopted in the

course of the last years new regulations on Private International Law. In the codification process, they mainly acted on the recommendations of the Interparliamentary Assembly of the CIS (IPA CIS), regulating the norms in this field within their new Civil Codes. Only three CIS members therefore enacted special laws. The Model Laws and Codes of IPA CIS have no compulsory nature; they are rather designed to give aid for the national legislation. The short overview shows the status and sources of the relevant national legislative acts.

Further, this issue contains the following **materials**:

Civil Code of the Republic of Armenia – Section 12 – Private International Law ("Zivilgesetzbuch der Republik Armenien – Abschnitt 12 – Internationales Privatrecht")

As well as the following **information:**

- *E. Jayme/C. F. Nordmeier* report on the session of the German-Lusitanian Lawyers' Association in Heidelberg: "Die Person im Rechtssystem – Sachnormen und Internationales Privatrecht – Tagung der Deutsch-Lusitanischen Juristenvereinigung in Heidelberg"
- *J. H. Mey* reports on the conference on the occasion of the foundation of the International Investment Law Centre Cologne (IILCC): "Aktuelle Fragen des internationalen Investitionsschutzrechts – Gründungsveranstaltung des International Investment Law Centre Cologne (IILCC)"

Jurisdiction to Enjoin a Foreign Website in the EU

Which court has jurisdiction to enjoin a foreign based website to carry on illegal activities in the forum? On November 6, 2008, the French Supreme Court for private and criminal matters (*Cour de cassation*) held that French courts had

jurisdiction to enjoin a company incorporated in Malta from carrying on illicit activities through a website, as the site was accessible in France. The decision was made by a chamber of the court which does not usually deal with conflict issues, and that might explain why it did not address, at least expressly, the issue of the foundation of such jurisdiction, and in particular whether European law applied.

In this case, the foreign company was Zeturf Ltd, and was incorporated in Malta. Zeturf intended to offer online betting on horse races taking place in France. The problem was that the French state has created a special entity to carry on such activity, Pari Mutuel Urbain (PMU), and that it has granted it a legal monopoly since 1891. In other words, any other entity purporting to offer similar services infringes French law. As a consequence, 10 days after Zeturf began its activity in June 2005, PMU sought an interlocutory injunction preventing Zeturf from continuing to infringe French law. As there is no contempt of court in France, PMU asked that the injunction be sanctioned by a financial penalty per day of non-compliance (*astreinte*). On July 8, 2005, the first instance court granted the injunction with a € 8,000 per day penalty. Zeturf appealed.

Then, the procedure got complicated. The injunction was confirmed by the Paris Court of appeal in 2006. Zeturf appealed to the *Cour de cassation*. Meanwhile, PMU sought recovery of the financial penalty. A Paris (first instance) Enforcement court (*Juge de l'exécution*) ordered Zeturf to pay € 915,000 for non complying for a bit more than a month in the fall 2005. Zeturf appealed to the Paris court of appeal (different chamber), and lost again later in 2006. Zeturf appealed to the *Cour de cassation*. It was right to do so. In July 2007, the *Cour de cassation* allowed the first appeal and held that the French monopoly was likely non-compliant with European community law, and that the trial judges ought to reexamine the case in the light of the judgments of the ECJ on that point.

The second appeal was then examined by the *Cour de cassation*. The issue was not anymore whether the injunction should have been granted (most probably not), but whether Zeturf ought to pay the financial penalty for not complying with a (as it deemed to be then) valid injunction. Zeturf challenged the jurisdiction of French courts to make the order for payment of the penalty. It argued that the relevant provision was article 22-5 of the Brussels I Regulation, as *astreinte* was a measure purporting to enforce a judgment, i.e. the injunction. Zeturf further

argued that the only court which thus had jurisdiction was the Maltese court, because *astreinte* was an enforcement measure acting in personam, and it could only be enforced where the said person was, that is in Malta.

The *Cour de cassation* dismissed the appeal, and confirmed the penalty. The judgment, however, is disappointing, as the court did not clearly address the issue of the applicable regime. It did not rule that the Regulation governed. Indeed, it seems that it applied implicitly the French law of international jurisdiction. It held that the French court had jurisdiction to decide on the *astreinte* because the domiciled of the debtor was abroad, and the injunction was to be performed in France. And it happens to be that the French statute on the jurisdiction of Enforcement courts precisely provides that such courts have jurisdiction either when the domicile of the debtor is in France, or when the relevant measure is to be enforced in France.

One cannot really see any good reason not to apply the Brussels I regulation in this case. Now, it seems that, if the *Cour de cassation* had, it would have ruled that both the *astreinte* and the injunction were to be performed in France. The reason the judgment gives for this is that the website was accessible from France. Again, not a really convincing argument. The Paris Court of appeal had a better one: it had held that the injunction was to be enforced in France, because the defendant had not demonstrated that the website could not be modified from France.

Another interesting issue was whether the dispute fell at all within the scope of article 22 of the Brussels I Regulation. The injunction was interlocutory. Arguably, it was thus article 31 which applied, in respect of both the issuance of the injunction and the award of the financial penalty.