Papers Published from the Duke Symposium on the European Choice of Law Revolution

The papers presented at the Duke University School of Law Symposium on 'The New European Choice of Law Revolution: Lessons for the United States?' have now been published in the *Tulane Law Review* (Vol. 82, No. 5, May 2008). Here's the table of contents:

- *Ralf Michaels*, Introduction – The New European Choice-of-Law Revolution (available on SSRN);
- *Patrick J. Borchers*, Categorical Exceptions to Party Autonomy in Private International Law (available on SSRN);
- *Jan von Hein*, Something Old and Something Borrowed, but Nothing New? Rome II and the European Choice-Of-Law Evolution;
- *Dennis Solomon*, The Private International Law Of Contracts In Europe: Advances And Retreats;
- *Symeon C. Symeonides*, The American Revolution and the European Evolution in Choice of Law: Reciprocal Lessons (available on SSRN: see our dedicated post here);
- *Larry Catá Backer*, The Private Law of Public Law: Public Authorities as Shareholders, Golden Shares, Sovereign Wealth Funds, and the Public Law Element in Private Choice of Law (available on SSRN);
- *Jens Dammann*, Adjudicative Jurisdiction and the Market for Corporate Charters;
- *Onnig H. Dombalagian*, Choice Of Law and Capital Markets Regulation (available on SSRN);
- *Katharina Boele-Woelki*, The Legal Recognition of Same-Sex Relationships within the European Union;
- *Horatia Muir Watt*, European Federalism and the "New Unilateralism";
- *Linda J. Silberman*, Rethinking Rules of Conflict of Laws in Marriage and Divorce in the United States: What Can We Learn from Europe?;
- *Richard Fentiman*, Choice of Law in Europe: Uniformity and Integration;
- *William A. Reppy, Jr.*, Eclecticism in Methods for Resolving Tort and Contract Conflict Of Laws: the United States and the European Union;

- *Jürgen Basedow*, Federal Choice of Law in Europe and the United States – A Comparative Account of Interstate Conflicts;
- *Erin Ann O'Hara – Larry E. Ribstein*, Rules and Institutions in Developing a Law Market: Views from the United States and Europe (available on SSRN);
- *William M. Richman*, A New Breed of Smart Empirically Derived Conflicts Rules: Better Law Than "Better Law" in the Post-Tort Reform Era: Reviewing Symeon C. Symeonides, The American Choice-Of-Law Revolution: Past, Present And Future (2006).

Information on subscribing to the *Tulane Law Review* can be found here.

For those who could not attend the event, **the webcast of the conference is available for viewing on the Duke University's website**, in five parts (RealMedia format):

1. **Welcome and Opening Remarks** (*Dean David F. Levi*, *Ralf Michaels*, and *Haller Jackson*) and **Panel 1: Contract and Tort Law**. Moderated by *Paul Haagen*. Panelists include *Jan von Hein*, *Symeon Symeonides*, *Dennis Solomon*, and *Patrick Borchers*.
2. **Panel 2: Corporate Law**. Moderated by *Jim Cox*. Panelists include *Larry Cata Backer*, *Jens Dammann*, and *Onnig Dombalagian*.
3. **Panel 3: Family Law.** Moderated by *Kathy Bradley*. Panelists include *Marta Pertegas*, *Katharina Boele-Woelki*, and *Linda Silberman*.
4. **Panel 4: Methods and Approaches**. Panelists include *Richard Fentiman*, *Ralf Michaels*, and *William Reppy, Jr*.
5. **Panel 5: Internal and External Conflicts, Federalism, and Market Regulation**. Panelists include *Jürgen Basedow*, *Mathias W. Reimann*, *Erin O'Hara*, and *Larry Ribstein*.

(Many thanks to Martin George.)

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (5/2008)

Recently, the September/October 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)**:

- ***Rolf Wagner***: "Der Grundsatz der Rechtswahl und das mangels Rechtswahl anwendbare Recht (Rom I-Verordnung) – Ein Bericht über die Entstehungsgeschichte und den Inhalt der Artikel 3 und 4 Rom I-Verordnung" – the English abstract reads as follows:

In the second half of 2007 the Portuguese EU-Presidency has achieved a political agreement in the negotiations on the regulation of the European Parliament and the Council on the law applicable to contractual obligations. The work on this so-called Rome I Regulation was then finalized under the Slovenian EU-Presidency in the first half of 2008. It will become applicable in the EU member states (without Denmark) as from 17 December 2009. The following remarks provide an overview on the history and content of two key provisions of the Regulation. These are, more specifically, the provision on choice of law (Article 3 Rome I Regulation) and the general provision on the law applicable in absence of a choice of law (Article 4 Rome I Regulation).

- ***Alexander H. Stopp***: "Die Nichtübertragbarkeit der Lizenz beim Unternehmenskauf: Anwendbares Recht bei fremdem Lizenzstatut im Lichte des § 34 UrhG – Zur Sonderanknüpfung des § 34 Abs. 5 S. 2 UrhG" – the English abstract reads as follows:

The author deals with the application of the German Copyright Act in cases of mergers and acquisitions with regard to international software licensing contracts. The German Copyright Act provides for automatic transfer of the usage rights to the buyer in a merger situation. Contractual non-transferability

clauses in international licensing contracts will step in to stop automatic transfer to the buyer. Under German domestic law, non-transfer provisions are, however, in principle admitted by the consent exception in the German Copyright Act (Section 34 Subsection 5 of the German Copyright Act). German rules on standard terms will often void such provisions in licensing terms for being overly broad or unspecific, if they are not specifically designed to address the merger situation. As a general rule, the law of the country in which legal protection is sought for the transfer should apply to the transfer as opposed to the country of the author's citizenship or the law chosen in the licensing agreement. However, the author suggests that the consent provision of the German Copyright Act (Section 34 Subsection 5 of the German Copyright Act) allows for the application of the law of the contract, which will in the cases discussed often be foreign law.

- ***Dorothee M. Kaulen***: "Zur Bestimmung des Anknüpfungsmoments unter der Gründungstheorie – Unter besonderer Berücksichtigung des deutsch-US-amerikanischen Freundschaftsvertrags" – the English abstract reads as follows:

According to the prevailing opinion, article XXV para. 5, s. 2 of the Treaty of Friendship, Commerce and Navigation between the United States of America and the Federal Republic of Germany from 1954 represents a rule of conflict of laws. Applying this interpretation, in German-US-American corporate conflict of laws the law of legal persons is determined by the incorporation principle . Furthermore, it can be expected that the German corporate conflict of laws will soon give up the idea of the seat principle and adopt the incorporation principle completely. However, under the incorporation principle, the question of how the place of incorporation should be determined remains. Different ideas have been discussed like the place of the process of incorporation, the place of the registered office, the place of registration by the secretary of state, the place free chosen, the place of the law under which the corporation is organised, or the place where the law gave the corporation legal personality. This paper investigates all these possible concretizations of the incorporation principle and concludes that under the incorporation principle a corporation is determined by the law of the place of its registration, or failing that, by the law of the place where it is organised, or failing that, by the law of the place that has the closest connection to the corporation.

- ***Alice Halsdorfer***: "Der Beitritt Deutschlands zum UNESCO-Kulturgutübereinkommen und die kollisionsrechtlichen Auswirkungen des neuen KultGüRückG" – the English abstract reads as follows:

In connection with Germany's ratification of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970, a new version of the Law on the Return of Cultural Objects (KultGüRückG) entered into force. The most fundamental improvements are return claims for cultural objects which have been unlawfully removed from the territory of contracting states according to s 6 (2) KultGüRückG and import restrictions for cultural objects listed in the List of Important Cultural Property of the Contracting States according to s 14 (1) KultGüRückG. Regarding the conflict of laws, the traditional lex rei sitae will be replaced after the return of a cultural object by the lex originis of the contracting state from which the object has been unlawfully removed according to ss 5 (1), 9 KultGüRückG. As a result, the lex originis functions as a control mechanism which might correct the validity of intermediary acquisitions of property with retroactive effect. In addition, the new import restrictions have to be considered German mandatory rules which may affect the validity of contractual obligations irrespective of the applicable law according to art. 34 EGBGB. However, certain gaps remain due to the fact that the lex originis has not been fully and unconditionally embodied and that the import restrictions as mandatory rules do not refer to the foreign laws on cultural objects themselves. Despite of these gaps, the ratification of the convention and the new legislation are important steps towards a better protection of cultural property under German law.

- ***Burkhard Hess*** on the ECJ's judgment in case C-14/07 (*Weiss und Partner*): "Übersetzungserfordernisse im europäischen Zivilverfahrensrecht"
- ***Stephan Gregor*** on a decision of the Local Court Berlin-Lichtenberg dealing with the question of the determination of the place of performance with regard to contracts on air transport: "Der Gerichtsstand des Erfüllungsorts beim Luftbeförderungsvertrag"
- ***Astrid Stadler*** on a decision of the Federal Constitutional Court dealing with the question of whether a state is allowed to refuse the fulfilment of private individuals' payment claims in case of a national state of

emergency caused by a financial crisis: “Pacta sunt servanda – auch im Falle argentinischer Staatsanleihen”

- ***Boris Schinkels*** on a decision of the Higher Regional Court Stuttgart dealing inter alia with the question of international jurisdiction for actions against the controlling and the controlled stock corporation of a European cross-border de facto group regarding injunctions prohibiting measures to the detriment of the controlled corporation: “Ansprüche auf Unterlassung nachteiliger Maßnahmen gegen beherrschende und beherrschte Aktiengesellschaft im europäisch-grenzüberschreitenden faktischen AG-Konzern”
- ***Harald Koch*** on a judgment of the Higher Regional Court dealing with a creditor’s action to set aside in case of the donation of property allocated abroad: “Gläubigeranfechtung der Schenkung eines ausländischen Grundstücks”
- ***David Bittmann***: “Die Voraussetzungen der Zwangsvollstreckung eines Europäischen Vollstreckungstitels” – the English abstract reads as follows:

The decision of the Austrian Supreme Court (OGH) is one of the first published decisions concerning Regulation (EC) No. 805/2004 creating a European Enforcement Order for uncontested claims, which is in force since October 2005. The OGH had to deal with two main problems regarding the enforcement of a European Enforcement Order (EEO) in the state of execution (here Austria): The first question was, whether the service of the debtor with the EEO is a condition for the enforcement of the foreign decision. Here the OGH stated that this is not the case. The second question was, whether and when the EEO has to be translated. As to this point, the OGH held that a translation was only necessary in case that the certification of the judgment as an EEO, which is made by using a standard form, contains written additions which go beyond the mere ticking of the respective points of the standard form. This article outlines the conditions for the enforcement of an EEO in the state of execution by critically considering the decision of the OGH. Thus the focus will be first on the question whether the debtor has to be served with the EEO before examining possible consequences if this is not the case. Finally the article goes into the matter under which circumstances the EEO has to be translated.

- ***Ben Steinbrück***: “US-amerikanische Beweisrechtshilfe für ausländische

private Schiedsverfahren" – the English abstract reads as follwos:

For many years U.S. courts have ruled out state-court support in the taking of evidence for foreign private arbitration according to 28 U.S.C. § 1782. In 2004, however, the U.S. Supreme Court ruled that section 1782 applies to all foreign and international tribunals if they act as adjudicatory bodies. In the wake of this decision district courts have started to grant discovery orders in aid of foreign arbitration proceedings. Despite some occasional concerns in the United States that the application of section 1782 to foreign private arbitration would lead to procedural disadvantages to US-parties, these decisions may turn the tide in favour of a more arbitration-friendly case law. A flexible and well-balanced application of section 1782 to private international arbitration is not only perfectly in line with the U.S. Supreme Court's interpretation of this provision. Also strong policy considerations militate in favour of granting parties to foreign private arbitrations access to evidence located in the United States.

- ***Dominique Jakob/Danielle Gauthey Ladner:*** "Die Implementierung des Haager Trust-Übereinkommens in der Schweiz" – the English abstract reads as follows:

On 1st July 2007 the Hague Convention on the Law Applicable to Trusts and on their Recognition of 1 July 1985 (HTC) entered into force in Switzerland. The authors present the new implementing Chapter 9a of the Swiss Private International Law Statute (PILS; art. 149a-149e) as well as two new articles of the Swiss Insolvency Law Statute (ILS; art. 284a, 284b). The new provisions facilitate the recognition of trusts in Switzerland and aim to avoid contradictions between the PILS and the HTC. Swiss substantive law has not been modified. Chapter 9a PILS expressly refers to the HTC regarding the definition of a trust and the applicable law (art. 149a and c). Yet it is broader, since it contains provisions on jurisdiction (art. 149b) as well as provisions on the recognition and enforcement of decisions in matters concerning trust law (art. 149e). The new chapter further applies to trusts which are not evidenced in writing (art. 149a). Of particular interest is the fact that the Swiss legislator expressly recognises internal trusts (art. 149c § 2 and art. 13 HTC), thus arousing anew the question of the compatibility of family trusts with Swiss public policy, since entailed estates (fideicommiss) are prohibited under Swiss

Law (art. 335 of the Swiss Civil Code). For the authors family trusts do not contravene against Swiss public policy as long as their duration is limited in time. The two new articles in the ILS stipulate the segregation of the trust assets in insolvency proceedings concerning the trustee or the trust itself, thus resolving this question once and for all.

- ***Arkadiusz Wowerka*** on the law applicable to factoring according to Polish choice of law rules: "Das auf das Factoring anwendbare Recht nach polnischem Kollisionsrecht"

As well as the following **information**:

- ***Frank Beckstein*** on the international conference "Intellectual Property and Private International Law": "Tagungsbericht zur Internationalen Konferenz 'Intellectual Property and Private International Law'"
- ***Martin Winkler*** on a conference on patent law which has taken place in Düsseldorf: "Internationalverfahrensrechtliche Probleme der Patentstreitigkeiten – Düsseldorfer Patentrechtstage 2008"
- ***Wolfram Prusko*** on the conference "The Future of of Secured Credit in Europe": "'The Future of Secured Credit in Europe' – Ein Konferenzbericht"

Garsec Pty Ltd v His Majesty The Sultan of Brunei

The New South Wales Court of Appeal recently handed down its decision in the interesting *forum non conveniens* case of *Garsec Pty Ltd v His Majesty The Sultan of Brunei* [2008] NSWCA 211.

The case arose 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. Garsec alleged that the Sultan had failed to perform the contract and took action in the Supreme Court of New South Wales against the Sultan for specific performance. The contract was allegedly negotiated with, among others, representatives of the Sultan's Private and Confidential Secretary. As an alternative to the claim against the Sultan, Garsec claimed against the Secretary on the footing that he had represented he had authority to negotiate the contract from the Sultan and, in the event that he did not have that authority, he was liable for breach of warranty and the tort of negligent misstatement. The Sultan and the Secretary applied to have the matter stayed on the basis that New South Wales was *forum non conveniens*. It was accepted on appeal that the *lex causae* for each of the claims was the law of Brunei.

The New South Wales Court of Appeal unanimously dismissed an appeal from the primary judge's decision staying the proceeding. In brief, the Court reached the following conclusions.

1. An immunity from suit conferred on the Sultan by the Constitution of Brunei was substantive not procedural, as that distinction is drawn by Australian common law rules of private international law, and would therefore be applied by the Supreme Court of New South Wales as part of the *lex causae*. (Australian common law adopts a very narrow definition of procedure, essentially limited to rules directed to governing the conduct of court proceedings; matters affecting the existence, extent or enforceability of rights or duties are substantive.)
2. It is irrelevant to the procedure/substance characterisation as to whether the immunity would be characterised as substantive or procedural under Brunei law, as the characterisation is to be done according to the law of the forum, ie the common law of Australia.
3. Accordingly, Garsec would not obtain any advantage as to the immunity by suing in New South Wales, rather than Brunei, and no question arose in this case as to the weight to be given to such an advantage in determining whether New South Wales is *forum non conveniens*.
4. In any event, the fact that the case would involve interpretation of a foreign country's constitution is a powerful factor in favour of a stay: an Australian court should only interpret a foreign country's constitution if

this cannot be avoided.

However, there was disagreement among the judges of the Court as to whether, if the immunity had been procedural such that it would have been applied in Brunei but not in New South Wales, this would have tended against a conclusion that New South Wales was *forum non conveniens*. This raises the broader issue of the weight to be given to the unavailability of an alternative forum and the correctness of the view that, ordinarily, an applicant for a stay on *forum non conveniens* grounds must identify an available alternative forum in order to obtain a stay.

Choice of Law for Procedural Matters in Patent Cases: A New Article

Ted Field, a Visiting Assistant Professor of Law at Chicago-Kent has recently posted an Article entitled *Improving the Federal Circuit's Approach to Choice of Law for Procedural Matters in Patent Cases* on SSRN. Here is the Abstract:

> *Because of its virtually exclusive jurisdiction over patent cases from the entire country, the United States Court of Appeals for the Federal Circuit faces a unique situation with respect to choice of law for procedural matters in patent cases. Normally, in a non-patent-related case, a district court applies the procedural-law precedent of the U.S. Court of Appeals for the circuit in which the district court sits. However, because the Federal Circuit's jurisdiction is based on subject matter rather than geography, the court has had to choose whether (1) to develop and apply its own precedent to procedural matters or (2) to apply the precedent of the regional circuit court in which the district court sits. Under its current choice-of-law rules, the Federal Circuit by default is supposed to apply the law of the regional circuit to procedural matters. But where the procedural matter in question sufficiently pertains to patent law, the court is supposed to apply its own law under the current choice-of-law rules.*

Problems have arisen in the application of these rules. For one thing, the Federal Circuit has articulated these rules in many different ways over the years. And this inconsistent articulation has led to inconsistent application. As a result, district courts and litigants in patent cases often cannot be sure which law applies to a particular procedural issue. This article evaluates the Federal Circuit's current rules and contrasts these current rules with several other possible rules. To evaluate these different possibilities, this article considers how each of them advances or retards the institutional interests, needs, and goals of the players involved-namely, the Federal Circuit, the district courts, and litigants. Ultimately, this article concludes that the best approach for the Federal Circuit is to develop and apply its own law to all procedural matters in patent cases.

Guest Editorial: Hay on Recognition of a Recognition Judgment under Brussels I?

Prof. Peter Hay is one of the most distinguished comparative law scholars in the US. He was Alumni Distinguished Professor of Law and dean at the University of Illinois before joining Emory in 1991.

Since 1975 he has been an honorary professor at the University of Freiburg in Germany. In 1989 Dean Hay received the research prize of the Alexander von Humboldt Foundation in Germany. He was elected a titular member of the International Academy of Comparative Law, a member of the American Law Institute in 1984, and a member of the American Academy of Foreign Law in 1986.

Dean Hay's research has focused on the fields of conflict of laws, European Community law, comparative law, contracts and sales, and jurisprudence. From 1994 to 2000 he held, concurrently with his Emory appointment, the chair for

Civil Law, Foreign and International Private Law, and Comparative Law at the University of Dresden, Germany, where he served as dean of its law faculty from 1997 to 2000.

Recognition of a Recognition Judgment under Brussels I?

Should recognition by a Member State of a non-member state's judgment itself be entitled to recognition in other Member States under the Brussels I Regulation?

The question is hardly new, and the standard answer has usually been a rather undifferentiated, but nonetheless resounding "no". Both question and answer may bear at least some reexamination.

The great majority of Continental writers follows *Kegel*'s view of "exequatur sur exequatur ne vaut" (Festschrift Müller-Freienfels 377, 1986, by him attributed to *Gavalda*, Clunet 1935, 113): "It has always been accepted" that a recognition judgment "cannot … be the object of further recognition …" (*Wautelet*, in Magnus/Mankowski, eds., Brussels I Regulation, Art. 32 at no. 33 (2007). Only isolated voices disagree, often cautiously and subject to limitations (references in *Kegel*, at nn. 6 and 10). The ECJ has not addressed the question directly – *Owens Bank Ltd. v. Bracco* (C 129/92, [1994] ECR 1) did not decide the point, but dealt with matters now addressed by Arts. 27-28 of Brussels I. Advocate General *Lenz* had, however, examined the question in his Submissions and concluded that the exequatur of an exequatur is not envisioned by the (then) Brussels Convention (id., Submissions at No. 20 et seq.). The recognition – the declaration of enforceability, the exequatur – extends only to the recognizing state's own territory and not beyond, as confirmed, in his view, by the language of what is now Art. 38(1), that the judgment "has been declared enforceable *there*" (emphasis added).

It seems axiomatic not to give a judgment greater force than it itself claims. And it is also true that the traditional exequatur only certifies the *foreign* judgment to be enforceable locally; it neither changes it into a local judgment nor substitutes a local judgment for it or adds one to it. But that is the Continental view of judgment recognition and enforcement. The common law tradition sees it differently. (On accommodation of common law approaches generally, see also this comment by Gilles Cuniberti).

In the common law, a foreign-country judgment is a *claim*. That claim is enforced

(thereby recognized) by a proceeding (the old *actio judicati*), leading to the issuance of a judgment. In the issuing state, this is a judgment like any other: Dicey/Morris/Collins, Conflict of Laws 570 (14th ed. 2007); *Scoles/Hay/Borchers/Symeonides*, Conflict of Laws § 24.3 et seq. (4th ed. 2004); *Whincop*, 23 Mel. U. L. Rev. 416, 424 (1999). This is also the case when a modern registration procedure replaces the common-law suit on a judgment: there is now a local *judgment*. *Dicey/Morris/Collins*, supra, at 645-46. If the (local) issuing state does not attribute a different (lesser) effect to the judgment upon the foreign (judgment) claim, why – on what basis – should the present court deny it recognition? Yet it is said that "the same rule [non-recognition, as in the case of an exequatur Continental-style] must apply [in the case of an] *actio judicati*" (*Wautelet*, supra at no. 35). Why?

If it were otherwise, it is said, the present court could no longer check whether the original court observed procedural (due process) requirements or whether its judgment perhaps violates the present state's *ordre public*. *Id.* at no. 34. This kind of review would be precluded by required recognition of the recognition judgment. True – and why shouldn't it be? Procedural defects in the original proceeding were or could have been reviewed in the first recognition court. When such an opportunity existed, these issues would be precluded thereafter: that would be the result in the United States (Juenger, 1983 Rev. crit. dr. int. priv. 37, 48 n. 30), in Canada (*Saldanha v. Beals*, [2003] 3 S.C.R. 416), and in inter-EU cases. See, e.g., OLG Köln, 12 January 2004, 16 W 20/03, *unalex* DE-470; OLG Frankfurt/M, 16 December 2004, 20 W 507/04, *unalex*-DE 451; *Hay* in [2007-6] *Eu L F* I-289, at I-290-92 nn. 10, 31-36).

The public policy defense is also relatively narrow under Brussels I (*Hay*, supra, at I-290 *et seq.*, I-293). An English judgment awarding exemplary damages to an English plaintiff presumably would not be denied recognition in another Member State on public policy grounds. Should an English judgment recognizing an American award of punitive damages in favor of an English plaintiff fare less in another Member State when – presumably – the recognizing English court had concluded that the award was within the ambit of exemplary-damage law and did not offend English public policy?

The isolated cases and comments approving of recognition of a recognition decree point to the circumstance that the (first) recognizing court had expressly pronounced a damage award (parallel to the original award) or had added an

award of interest: OLG Frankfurt/M, 13 July 2005, 20 W 239/04; OLG Hamm, RIW 1992, 939; see *Wautelet*, supra, no. 35). Why this emphasis on the specific tenor of the recognizing judgment (and a common law court's recognition will of needs reduce the claim for recognition to a judgment)? Is it to be *sure* that the recognizing court had paid attention?

Kegel wrote (supra at 392), "one trusts one's friends, but not the friends of one's friends." He made the statement in the context of recognition treaties. The recognition command under Brussels I is more than that. It has become, more than the Brussels Convention for which it had been asserted, the EU's "Full Faith and Credit Clause." (*Bartlett*, *Int'l & Comp L Q.* 24 (1975) 44). As that Clause serves a unifying function in the United States, it should also in the EU: its Members should "trust" each other – in the present context, to have undertaken the proper review of the original judgment before according it recognition. The third-country judgment thereby becomes "transformed" into an EU judgment (for additional discussion, see *H. Patrick Glenn*, in Basedow et al. (eds.), Aufbruch nach Europa (2001) 705, 709-12, also with respect to the transformation of Mexican judgments in the United States under NAFTA).

The European Small Claims Procedure and the Enforcement Order Regulation – in their limited fields of application – no longer envision exequatur. The Commission favors departing from it generally. Until that happens and to the extent that a state's action extends recognition to a foreign judgment only to its territory, Brussels I indeed does not require its recognition by another EU state. But this is not because "recognition of a recognition judgment" is not possible, but because the *recognition judgment itself* claims no greater force: its effect is the same as where rendered. When recognition action does take the form of a judgment, it seems that it should be treated as such: defenses under Brussels I Art. 34 then apply to it and not to the underlying judgment.

French Tax Authorities Recognize Dutch Same-Sex Marriage

Le Monde has reported this week that the French Ministry of Finance has accepted to recognize a Dutch same-sex marriage for tax purposes.

According to the article, the two Dutch men had married in Leyden in 2002. They then moved to France, probably in 2004. In 2005, they tried to file a tax return in common, which can attract significant tax benefits. First, French tax authorities refused, arguing that same-sex marriage does not exist in France.

The spouses hired a lawyer who challenged the decision on their behalf. *Le Monde* reports that he insisted "international conventions signed by France and rules of international private law" should be applied. In July 2008, the Legal Department of the Ministry of Finance eventually notified the spouses that they would be considered so for French tax purposes.

Same sex union was introduced in France in 1999 ("PACS"). It has some tax consequences. Here, the parties never tried to argue, it seems, that the Dutch marriage could be recognized as a French PACS.

The AG Opinion in West Tankers

Advocate General Kokott's Opinion in **Allianz SpA (formerly Riunione Adriatica Di Sicurta SpA) and Others v West Tankers Inc.** is out, and the House of Lords (and most common law practitioners) are not going to find it a pleasurable read.

The question, you will remember, is whether anti-suit injunctions to give effect to arbitration agreements are compatible with the Brussels I Regulation (No 44/2001), in the wake of the ECJ decisions in *Gasser* and *Turner*. The door had been closed on issuing injunctions restraining legal proceedings in other Member

States, except (as was quickly pointed out in London) perhaps where that injunction was granted in order to uphold an agreement to arbitrate. Article 1(2)(d) of the Brussels I Regulation does, after all, provide that the Regulation shall not apply to arbitration.

The reference by the House of Lords also cited (among other things) the practical effect that a negative answer would have on arbitration in London; if injunctions were no longer to be part of the judicial arsenal, then London's popularity as an arbitral seat would significantly diminish. Parties would simply choose New York, Singapore, or other arbitration centres, where injunctions could still be issued.

The exclusion argument under 1(2)(d) is given short shrift by AG Kokott:

> *56. Every court seised is therefore entitled, under the New York Convention, before referring the parties to arbitration to examine those three conditions. It cannot be inferred from the Convention that that entitlement is reserved solely to the arbitral body or the national courts at its seat. As the exclusion of arbitration from the scope of Regulation No 44/2001 serves the purpose of not impairing the application of the New York Convention, the limitation on the scope of the Regulation also need not go beyond what is provided for under that Convention.*
>
> *In its judgment in Gasser the Court recognised that a court second seised should not anticipate the examination as to jurisdiction by the court first seised in respect of the same subject-matter, even if it is claimed that there is an agreement conferring jurisdiction in favour of the court second seised. () As the Commission correctly explains, from that may be deduced the general principle that every court is entitled to examine its own jurisdiction (doctrine of Kompetenz-Kompetenz). The claim that there is a derogating agreement between the parties – in that case an agreement conferring jurisdiction, here an arbitration agreement – cannot remove that entitlement from the court seised.*
>
> *That includes the right to examine the validity and scope of the agreement put forward as a preliminary issue. If the court were barred from ruling on such preliminary issues, a party could avoid proceedings merely by claiming that there was an arbitration agreement. At the same time a claimant who has brought the matter before the court because he considers that the agreement is invalid or inapplicable would be denied access to the national court. That would*

be contrary to the principle of effective judicial protection which, according to settled case-law, is a general principle of Community law and one of the fundamental rights protected in the Community. ()

There is no indication otherwise in Van Uden. In that case the Court had to give a ruling regarding jurisdiction in respect of interim measures in a case which had been referred to arbitration in the main proceedings. In that context the Court stated that, where the parties have excluded the jurisdiction of the courts in a dispute arising under a contract and have referred that dispute to arbitration, there are no courts of any State that have jurisdiction as to the substance of the case for the purposes of the Brussels Convention. ()

That statement is certainly correct. The justification for the exclusive jurisdiction of the arbitral body specifically requires, however, an effective arbitration agreement covering the subject-matter concerned. It cannot be inferred from the judgment in Van Uden that examination of preliminary issues relating thereto is removed from the national courts.

It is also not obvious why such examination should be reserved to the arbitral body alone, as its jurisdiction depends on the effectiveness and scope of the arbitration agreement in just the same way as the jurisdiction of the court in the other Member State. The fact that the law of the arbitral seat has been chosen as the law applicable to the contract cannot confer on the arbitral body an exclusive right to examine the arbitration clause. The court in the other Member State – here the court in Syracuse – is in principle in a position to apply foreign law, which is indeed often the case under private international law.

Finally it should be emphasised that a legal relationship does not fall outside the scope of Regulation No 44/2001 simply because the parties have entered into an arbitration agreement. Rather the Regulation becomes applicable if the substantive subject-matter is covered by it. The preliminary issue to be addressed by the court seised as to whether it lacks jurisdiction because of an arbitration clause and must refer the dispute to arbitration in application of the New York Convention is a separate issue. An anti-suit injunction which restrains a party in that situation from commencing or continuing proceedings before the national court of a Member State interferes with proceedings which fall within the scope of the Regulation.

The Advocate General found the House of Lords' practical arguments similarly unconvincing. The comparison with other arbitration centres such as New York and Bermuda was rebuffed with, "To begin with it must be stated that aims of a purely economic nature cannot justify infringements of Community law." The point Lord Hoffman made about individual autonomy – the parties' choice to submit to arbitration, and not be bothered by the fuss of court proceedings – was seen as co-existing peacefully with a negative answer to the question: "proceedings before a national court outside the place of arbitration will result only if the parties disagree as to whether the arbitration clause is valid and applicable to the dispute in question. In that situation it is thus in fact unclear whether there is consensus between the parties to submit a specific dispute to arbitration." AG Kokott does, however, go on to point out the flaw in that argument:

> *If it follows from the national court's examination that the arbitration clause is valid and applicable to the dispute, the New York Convention requires a reference to arbitration. There is therefore no risk of circumvention of arbitration. It is true that the seising of the national court is an additional step in the proceedings. For the reasons set out above, however, a party which takes the view that it is not bound by the arbitration clause cannot be barred from having access to the courts having jurisdiction under Regulation No 44/2001.*

One more problem was alluded to (echoing the concerns of the House of Lords): the arbitral body (and its supporting national courts) and the courts which take subject-matter jurisdiction under the Regulation may not agree on the scope or validity of the arbitration clause. Conflicting decisions then follow. The Regulation, capable of keeping the peace between two national courts when conflicting decisions arise under Arts 27 and 28, is powerless to solve the dilemma; Article 1(2)(d), you will still remember, *excludes* arbitration. What to do, then? Kokott concludes:

> *72. A unilateral anti-suit injunction is not, however, a suitable measure to rectify that situation. In particular, if other Member States were to follow the English example and also introduce anti-suit injunctions, reciprocal injunctions would ensue. Ultimately the jurisdiction which could impose higher penalties for failure to comply with the injunction would prevail.*

> *Instead of a solution by way of such coercive measures, a solution by way of law is called for. In that respect only the inclusion of arbitration in the scheme of Regulation No 44/2001 could remedy the situation. Until then, if necessary, divergent decisions must be accepted. However it should once more be pointed out that these cases are exceptions. If an arbitration clause is clearly formulated and not open to any doubt as to its validity, the national courts have no reason not to refer the parties to the arbitral body appointed in accordance with the New York Convention.*

It may come as a disappointment to common law lawyers, but the Opinion won't really come as a surprise; the writing was on the wall post-*Gasser* and *Turner*, and it would have been extraordinary for the powers that be in Luxembourg to upset the delicate conflicts ecosystem created by those decisions (and the one in *Owusu*) by placing those cases involving a *prima facie* valid arbitration clause outside of the scope of the Regulation entirely. If you're going to produce poor decisions, one could say, you might as well do it *consistently*.

Those in civil law jurisdictions may disagree that the Opinion in *West Tankers* represents a bad day for the business of solving disputes in London – see the articles by the Max Plank Institute, for instance. Some others, however, may begin to wonder whether the European Union's pursuit of the hallowed principle of 'legal certainty' will end with the removal of any and all discretionary national court powers – indeed, the removal of common law private international law itself. The tension between common and civil law traditions is likely to continue as we proceed along the path to complete Europeanization of the conflict of laws; and at the moment, the common law is looking decidedly battered and bruised.

Conference: Arbitration and EC Law

The Heidelberg Centre for International Dispute Resolution at the Institute for Private International and Comparative Law will host a conference with the topic

“Arbitration and EC Law – Current Issues and Trends”.

The conference will focus on the relations between European civil procedure and arbitration which have been an intensely debated topic among legal scholars and practitioners for a long time. Lately the debate has been fuelled in particular by:

- the upcoming decision of the European Court of Justice which will decide on the availability of anti-suit injunctions for the protection of arbitral agreements (case C-185/07) – on September 4, 2008 GA Kokott proposed in her conclusions not to permit such remedies in the European Judicial Area,
- recent case law in several EC Member States addressing the arbitrability of EC antitrust law,
- the publication of a report, commonly known as the Heidelberg Report, analyzing – in view of the European Commission’s upcoming proposals on possible improvements of the Brussels I Regulation in 2009 – the application of the Regulation in 25 Member States, which proposes to delete the arbitration exception in article 1 no. 2d in order to bring ancillary proceedings relating to arbitration under the scope of the Brussels I Regulation

The conference will take place from 5th to 6th December 2008 in Heidelberg. Here is the **conference program**:

Friday, Dec. 5, 2 p.m.

1. Free movement of arbitral awards: European challenges

Prof. Gomez Jene, Madrid

2. West Tankers Litigation – the present state of affairs

Att. Prof. H. Raeschke-Kessler, Karlsruhe

3. Articles 81 and 82 EC-Treaty and arbitration

Prof. P. Schlosser, Munich

4. The Regulations Rome I and Rome II: Their impact on arbitration

Prof. T. Pfeiffer, Heidelberg

Dinner

Saturday, Dec. 6, 9.30 a.m.

5. Roundtable: The Brussels I Regulation and arbitration

(Chair: *Prof. H. Kronke*)

5.1 Findings and proposals of the Heidelberg Report on the Regulation (EC) 44/01

Prof. B. Hess, Heidelberg

5.2 A French reaction

Att. Alexis Mourre, Paris

5.3 An English reaction

Att. VV. Veeder, London

5.4 A Belgian perspective

Prof. H. van Houtte, Leuven

5.5 An Italian reaction

Prof. C. Consolo, Verona.

The conference will end at 12.00.

Further information, in particular on registration and accomodation, can be found at the website of the Institute for Private International and Comparative Law Heidelberg.

Third Issue of 2008's Journal du Droit International

The third issue of French *Journal du Droit International* (also known as *Clunet*) was just released. It contains two articles dealing with conflict issues.

In the first, Pierre Berlioz, who lectures at Paris I (Panthéon-Sorbonne) University, seeks to define the notion of provision of services for the purpose of article 5-1 b) of the Brussels I Regulation ("*La notion de fourniture de services au sens de l' article 5-1 b) du Règlement Bruxelles I*"). The English abstract reads as follows:

> *Article 5 N° 1 lit. b) of the Council Regulation (EC) N° 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters does not define the term « provision of services », leaving the exact scope of this Article uncertain. In particular, it is not clear if the term includes : rental agreements, loans, franchising and concession agreements. It is then necessary to determine its meaning, according to the Regulation, since the simplification sought by Article 5 N° 1 lit. b) can be reached only if the characterization is made according to autonomous concepts. Therefore, this study intends to precise what is an obligation of provision of services, and under which circumstances a contract can be characterized as a such a provision.*

The second article is authored by Hélène Peroz, who lectures at Caen University. It discusses the protection of vulnerable adults going abroad ("*La cessation des mesures de protection du majeur pour éloignement géographique*"). The (short) English abstract reads:

> *Under Act n° 2007-308, March 5th 2007, reforming the legal protection of adults, the judge can end protective measures bestowed to a vulnerable person if he or she decides to go abroad. This new provision on international private law raises many issues as regarding its implementation.*

Articles of the *Journal* can be downloaded by suscribers to LexisNexis JurisClasseur.

Immunity of Foreign Central Banks Assets in Belgium

Patrick Wautelet is a professor of law at the University of Liège (Belgium).

Belgium has recently adopted a specific legislation granting immunity of enforcement to assets held by foreign central banks and international monetary institutions, such as the World Bank. The Act of 24 July 2008 provides that no attachment can be performed on assets, whatever their nature, including foreign reserves, held or maintained in Belgium by foreign central banks and international monetary institutions

With this new legislation, Belgium joins the growing club of countries which have adopted specific legislation to protect assets of foreign central banks. In the United Kingdom (Section 14(4) Sovereign Immunities Act) and the United States (§ 1611 -b (1) FSIA), the relevant acts on foreign sovereign immunity already guarantee that assets of foreign central banks cannot be attached, save in specific circumstances such as when the State has given its consent to the attachment.

As with these countries, the special immunization given by the Kingdom of Belgium to central banks aims to ensure that Belgium remains an attractive place for foreign central banks to deposit their assets and in the first place foreign reserves. For international monetary institutions, the new legislation comes on top of the immunity already enjoyed under specific agreements made with States where the bank or institution has its seat or a branch.

In other countries, judicial practice supports the existence of a principle of immunity for assets of foreign central bank. However, the immunity appears to be far from absolute. Hence, a distinction may need to be made according to the nature of the assets held. At least when foreign reserves are concerned, the

general rule seems to be that immunity from enforcement will be granted.

In the future, central banks may enjoy a privileged position if and when the Convention on Immunities prepared by the ILC enters into force. According to Article 21(1(c) of the UN Convention on State Immunities, « *property of the central bank or other monetary authority of the State* » must be immune from enforcement. Under the Convention, it appears not possible to demonstrate that such property is used or intended for use for a commercial purpose.

The immunity granted by the Belgian legislator – which only prevents execution against central banks, without guaranteeing that the banks will also enjoy immunity from the juridiction of the courts – is defined broadly : it is not restricted to a specific class of assets, nor to those owned or held by the foreign central bank for its own account. Assets held by a central bank for a third party – one can think of the gold reserves which are sometimes held by one central bank for another – also enjoy the immunity.

The law also provides that creditors may attempt to attach assets held by central banks provided they demonstrate that such assets are exclusively used for commercial purposes. In practice, creditors will probably find it very difficult to target specific assets and to demonstrate that these assets are indeed not used for typical central bank activities. In any case, this possibility is only open for creditors seeking post-judgment relief. Pre-judgment attachment appears to be always excluded.