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.

Reference on Art. 5 No. 1 (b) Brussels I: Distinction between sales of goods/provision of services and determination of place of

performance regarding contract involving carriage of the goods

With decision of 9th July 2008, the German Federal Supreme Court (*Bundesgerichtshof*) has referred a reference to the ECJ for a preliminary ruling on the interpretation of Art. 5 No. 1 (b) Brussels I Regulation.

The German-Italian case concerns contracts for the delivery of goods to be manufactured or produced which, however, showed certain elements of a provision of services as well. Further, the contracts involved carriage of the goods in terms of Art. 31 (a) CISG.

The reference basically deals with two issues which have been discussed controversially so far:

First, the case concerns the question on how the place of performance in terms of Art. 5 No. 1 (b) Brussels I should be determined if the contract shows elements of a sale of goods as well as a provision of services and thus raises the question of the delimitation of the first and the second indent of Art. 5 No. 1 (b) Brussels I. This question has not been decided by the ECJ so far. With regard to contracts for the delivery of goods to be manufactured or produced, the *Bundesgerichtshof* tends – in view of Art. 1 (4) of the Directive on certain Aspects of the Sale of Consumer Goods and Associated Guarantees according to which also contracts for the supply of consumer goods to be manufactured or produced shall be deemed contracts of sale for the purpose of the directive – to regard certain specifications made by the ordering party e.g. on the purchasing, the processing or the guarantee of the quality of the goods not as leading necessarily to a qualification as contracts for the provision of services. Rather, the *Bundesgerichtshof* supports a qualification according to the main emphasis of the contract.

Secondly, the referring decision deals with the question of how the place of performance in terms of Art. 5 No. 1 (b) first indent Brussels I Regulation has to be determined if the contract involves carriage of the goods: Is it the place where the goods are handed over to the buyer or the place where the goods are consigned to the first carrier for transmission to the buyer? The

Bundesgerichtshof refers in its decision not only to the – in this respect divided – German case law, but also to Italian and Austrian decisions: While the Italian *Corte Suprema di Cassazione* regarded in its judgment of 27th September 2006 Art. 31 (a) CISG to be applicable and thus regarded the place of performance to be the place where the goods were handed over to the first carrier for transmission to the buyer, the *Oberste Gerichtshof* of Austria held in its decision of 14th December 2004 that the place of delivery was the place where the buyer actually takes the goods as a delivery in conformity with the contract. The *Bundesgerichtshof* tends to regard as the place of performance in terms of Art. 5 No. 1 (b) first indent Brussels I – also with regard to sales of goods involving carriage of the goods – the place where the buyer obtains, or should have obtained under the contract, control over the goods.

However, since both questions raised in this case have not been decided by the ECJ yet, the *Bundesgerichtshof* referred the **following questions to the ECJ for a preliminary ruling**:

1. Has Art. 5 No. 1 (b) of Regulation (EC) No. 44/2001 to be interpreted as meaning that contracts concerning the delivery of goods to be produced or manufactured have to be qualified as sales of goods (first indent) and not as provision of services (second indent) even in cases where the ordering party has made certain specifications regarding the acquisition, processing and delivery of the goods to be produced including the guarantee of the quality of manufacture, reliability of delivery and the smooth administrative processing of the order? Which criteria are decisive with regard to the delimitation?

2. In case a sale of goods has to be assumed: Has – in case the contract of sale involves carriage of the goods – the place in a Member State where, under the contract, the goods were delivered or should have been delivered, to be determined according to the place where the goods are handed over to the buyer or according to the place where the goods are consigned to the first carrier for transmission to the buyer?

(Approximate translation of the German referring decision.)

The decision of the Bundesgerichtshof of 9th July 2008 (VIII ZR 184/07) can be found (in German) at the website of the German Federal Supreme Court.

Update: The case is pending at the ECJ under C-381/08 *(Car Trim GmbH v KeySafety Systems SRL*).

Colloquium on the Choice of Courts Convention

The Hague Convention on Choice of Court Agreements is the result of negotiations that began at The Hague Conference on Private International Law in 1992, when the United States asked for the Conference to develop a convention on jurisdiction and judgments. A more comprehensive convention, which spanned the field of civil jurisdiction, was produced in draft form in 1999, and then revised in 2001. This draft convention proved unsatisfactory to a number of countries, including the United States, and so a less ambitious convention was attempted. The Choice of Courts Convention is the result.

The Choice of Courts Convention was concluded in mid-2005. Its fundamental aim is to improve the international enforcement of judgments made by courts that have been chosen by parties to commercial transactions. As a result, the Choice of Courts Convention is a 'double convention' that gives common rules of jurisdiction and common rules for the enforcement of judgments between Convention countries. The rules of jurisdiction themselves aim to improve the effectiveness of forum selection agreements, and therefore to give greater certainty and predictability to international commercial transactions and international trade.

The Colloquium

The Choice of Courts Convention has been presented as either an important step towards securing the harmonisation of rules of jurisdiction for international commercial and trading relationships or – compared with the draft convention of 1999 – a consolation prize of limited scope and use. This Colloquium will explore the significance of the Choice of Courts Convention, examine its implications for

other areas of transnational law, and investigate legal questions that it raises – in general and specifically for Australia.

The Colloquium is being held at the **Law School, University of Southern Queensland**, Toowoomba, Australia, on **Friday 3 October 2008**. Nine scholars of private international law and transnational law will be giving papers (see the Colloquium Program below). Anyone interested in attending should contact Ms Mary Ann Armstrong: armstrog@usq.edu.au

Colloquium Program

- *The Choice of Courts Convention: Background and Negotiations* – Professor Paul Beaumont, School of Law, University of Aberdeen
- *The Choice of Courts Convention: Is it Worth Implementing?* – Professor Richard Garnett, The Melbourne Law School, University of Melbourne
- *Exceptions under the Choice of Courts Convention* – Associate Professor Mary Keyes, Law School, Griffith University
- *The Choice of Courts Convention and the Exclusion of Maritime Claims* – Dr Craig Forrest, TC Beirne School of Law, University of Queensland
- *The Choice of Courts Convention and the Vienna Convention on the International Sale of Goods (CISG)* – Dr Des Taylor, School of Law, University of Southern Queensland
- *The Choice of Courts Convention – How will it work in relation to the Internet and e-commerce?* – Associate Professor Dan Svantesson, Faculty of Law, Bond University
- *The Hague and The Ditch: The Choice of Courts Convention and the Australia-New Zealand Treaty on Jurisdiction and Judgments* – Professor Reid Mortensen, Law School, University of Southern Queensland.
- *Enforcement of Judgments under the Choice of Courts Convention* – Dr Anthony Gray, School of Law, University of Southern Queensland, Springfield
- *Res Judicata and Forum Shopping under the Choice of Courts Convention* – Mr Justin Hogan-Doran, Wentworth Cambers, Sydney

Submission of Abstracts for the 2009 NYU Conference

 The *Journal of Private International Law* will hold its third major conference at New York University on April 17-18, 2009. As was the practice at the prior conferences at the University of Aberdeen in 2005 and at the University of Birmingham in 2007, we are including a "**call for papers**" to be presented at the conference with a view to having the final papers submitted for consideration for publication in the Journal. Thus, in addition to a number of previously-invited speakers, **a limited number of paper-presenters will be selected on the basis of abstracts of 500 words submitted to Professor Linda Silberman at New York University (linda.silberman@nyu.edu) and Professor Paul Beaumont at the University of Aberdeen (p.beaumont@abdn.ac.uk) by October 31, 2008**. The abstracts will be considered by Professor Silberman and the editors of the Journal, Professor Paul Beaumont and Professor Jonathan Harris, and a decision made by 1 December, 2008.

There are three specific conference panels planned over the course of the afternoon of April 17th and the full day on April 18th. They are

1. International Commercial Law
2. US and European Conflicts Methodologies: Is It Time for a U.S. Restatement?
3. Transnational Litigation and Arbitration

We will be selecting papers and presenters related to these topics. Even if your paper is not selected for presentation at the Conference given the limited number of slots, we hope you will consider submitting the paper to the Journal for eventual publication. In addition, the morning of April 17th will be devoted to presentations of papers by legal scholars at an early stage in their academic or professional careers, and we particularly encourage doctoral students, students completing fellowships, and those who have relatively recently completed their doctoral studies to offer abstracts on any aspect of private international law. We contemplate smaller parallel sessions in order to offer opportunity for presentations by a large number of such scholars.

Also note that on April 16, 2009, there will be a day-long conference in tribute to the work of Professor Andreas Lowenfeld of New York University. Journal Conference participants may wish to attend that event as well.

Further details about both the Lowenfeld tribute and the Journal Conference will follow shortly.

Weintraub on Rome II: Simple and Predictable, Consequences-Based, or Neither?

Prof. Russell J Weintraub (University of Texas at Austin, School of Law) has published an interesting article on the Rome II Regulation in the latest issue of the *Texas International Law Journal* (Summer 2008): "**The Choice-of-Law Rules of the European Community Regulation on the Law Applicable to Non-Contractual Obligations: Simple and Predictable, Consequences-Based, or Neither?**" (43 Tex. Int'l L.J. 401).

The introductory paragraph reads as follows:

> *The European Community Regulation on the Law Applicable to Non-Contractual Obligations ("Rome II") will take effect on January 11, 2009. This regulation is part of a widespread effort to draft new choice-of-law rules. For example, in 2007 a new conflict-of-laws code took effect in Japan. China is drafting a comprehensive civil code, which includes choice-of-law rules. What should be the objectives of these drafting projects? Should the new rules, as law-and-economics scholars urge, be simple and afford clearly predictable results? Or should choice-of-law rules endeavor to select the jurisdiction that experiences the consequences when the chosen law is applied? A third possibility is to draft rules that provide substantial predictability and are likely to be consistent with a consequences-based approach. Rome II falls into this third category: reasonably predictable results that are likely to give effect to the policies of the*

jurisdiction that will experience the consequences when the chosen law is applied.

There is now an extensive law-and-economics literature devoted to choice of law. Sections II and III summarize this economics approach to drafting conflicts rules and evaluate Rome II under this perspective. Sections IV and V outline a consequences-based approach to choice-of-law and appraise the extent to which Rome II is consistent with this methodology.

And here's the conclusion:

Rome II provides reasonably foreseeable answers to choice-of-law issues. The various exceptions to the regulation's rules create the major predictability problems: (1) the cryptic "more closely connected" exception that appears in the general rule of article 4 and in several other articles, (2) the "public policy" exception of article 26, and (3) the "mandatory provisions" exception of article 16. The uncertainty caused by these exceptions can be alleviated by (1) replacing the "more closely connected" language with a reference to the country that will experience the consequences if its law is not applied; (2) providing that if a court refuses on "public policy" grounds to apply the law that Rome II selects, the court is not to seize this excuse to apply its own law, but is to dismiss without affecting the plaintiff's ability to sue elsewhere; and (3) giving some guidance as to what can qualify as internationally "mandatory" forum law.

The common residence exception to application of the law of the place of damage is partially, but insufficiently, consequences oriented. Rome II gets high marks for including time limitations and burden of proof within the scope of its rules. If it is to achieve its main purpose of making the result independent of the forum, Rome II should clearly indicate that quantification of damages is also within its scope.

The article can be downloaded from the Journal's website.

Another interesting article on Rome II has been written by *Prof. Weintraub* at an earlier stage of the regulation's legislative procedure, and was presented at a seminar hosted in March 2005 by the European Parliament's Rapporteur *Diana*

Wallis: "**Discretion Versus Strict Rules in the Field of Cross-Border Torts**". It is available for download, along with papers by other prominent scholars who took part in the seminar, on Diana Wallis' website (Rome II seminars' page).

A slightly revised version, under the title "Rome II and the Tension between Predictability and Flexibility", has been also published in *Rivista di diritto internazionale privato e processuale* (2005, no. 3, p. 561 ff.).

Hamburg Lectures on Maritime Affairs

From 25 August to 20 October 2008 this year's Hamburg Lectures on Maritime Affairs, organised by the International Max Planck Research School for Maritime Affairs and the International Tribunal of the Law of the Sea (ITLOS), will take place in Hamburg.

The lectures feature renowned scholars and practitioners and address current developments in the maritime field.

Registration in advance is required.

The programme and further information is available here.

Rome I Regulation Conference – Now CPD Accredited

Our conference on the **Rome I Regulation: New Choice of Law Rules in Contract**, to take place at Herbert Smith's offices in London on 19th September

2008, is now **accredited with CPD** by both the Solicitors Regulation Authority (5.5 hours) and the Bar Standards Board (5 hours).

The full programme, as well as the details on fees and booking, can be found on our **dedicated conference page**. The speakers are all internationally recognised experts in the fields of private international law, insurance e-commerce and IP, and financial services. The keynote speech is to be delivered by The Honourable Mr Justice Richard Plender, Royal Courts of Justice.

If you intend to attend, then I strongly suggest you book now, as places *are* limited. Hope to see you there.

Drawing a Line in the Sand: Personal Jurisdiction for Acts of Terrorism

The Second Circuit today issued a noteworthy decision on whether and when foreign individuals are subject to personal jurisdiction in U.S. Courts for acts of international terrorism. See In re Terrorist Attacks on September 11, 2001, No. 06-cv-0319 (2d Cir., August 14, 2008). In a case that sought to hold Saudi Arabia and four of its princes liable for the Sept. 11 attacks—because they allegedly provided financial and logistical support to al Quaeda—the court held that the defendants are protected by sovereign immunity from suit in their official capacities, and that there is no personal jurisdiction to sue them in their personal capacities.

On the jurisdictional question (part VI of the decision), the court contrasted this case with "five opinions from other circuits" which held foreign persons amenable to suit for acts of terrorism. Those cases all involved defendants who had consciously and purposely "directed terror" at the United States and/or its citizens (*e.g.* Osama bin Laden, an individual al Quaeda member who fought U.S. forces in Afghanistan, the Republic of Libya with regard to Pan Am Flight 103,

and the Republic of Iraq with regard to the invasion of Kuwait). In this case, however:

> *Th[e] burden [of establishing the necessary jurisdictional nexus] is not satisfied by the allegation that the Four Princes intended to fund al Qaeda through their donations to Muslim charities. Even assuming that the Four Princes were aware of Osama bin Laden's public announcements of jihad against the United States and al Qaeda's attacks on the African embassies and U.S.S. Cole, their contacts with the United States would remain far too attenuated to establish personal jurisdiction in American courts. It may be the case that acts of violence committed against residents of the United States were a foreseeable consequence of the princes' alleged indirect funding of al Qaeda, but foreseeability is not the standard for recognizing personal jurisdiction. Rather, the plaintiffs must establish that the Four Princes "expressly aimed" intentional tortious acts at residents of the United States. Providing indirect funding to an organization that was openly hostile to the United States does not constitute this type of intentional conduct. In the absence of such a showing, American courts lacked personal jurisdiction over the Four Princes.*

"How Appealing" initially reported on the decision, as did the Associated Press.

Article on Rome I Regulation

Stefan Leible and *Matthias Lehmann* (both University of Bayreuth, Germany) have published an article on the Rome I Regulation: "Die Verordnung über das auf vertragliche Schuldverhältnisse anzuwendende Recht ("Rom I"). The article has appeared in the August issue of the German legal journal *Recht der Internationalen Wirtschaft* (RIW), 2008, pp. 528-544.

The authors have kindly provided the following English abstract:

> *The article provides an in-depth-analysis of the Regulation. It covers each of its provisions, starting from the scope of application to the relationship with other*

Community instruments. Major problems are highlighted, such as the application of consumer law (Art. 6), overriding mandatory provisions (Art. 9) or the law governing assignment and subrogation (Art. 14). A number of practical examples is used to illustrate the workings of the Regulation's rules. The authors do not spare their criticism. For instance, they portray the treatment of insurance contracts (Art. 7) as overly complex and unsatisfactory. The Regulation's provision allowing the application of certain foreign mandatory provisions (Art. 9 para 3) is criticized for not achieving the intended results.

See with regard to Rome I also our previous posts which can be found here.