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.

Rome II Regulation Applicable in EU

Starting from today, 11 January 2009, Regulation no. 864/2007 on the law applicable to non-contractual obligations (Rome II) is applicable in the Member States (see its Art. 32), excepting Denmark.

In the comments to one of our previous posts, some **debate was raised as to the proper construction of Art. 31 ("Application in time") of the Regulation**, according to which the new regime applies to "events giving rise to damage which occur after its entry into force". A very large majority of scholars (almost all the published articles) takes the view that, for the purposes of Art. 31, the date of entry into force coincides with the date of application of the Regulation, so that it would be applicable to events giving rise to damage occurring on or after 11 January 2009.

Other elements, taken from the legislative process (see the comments to the abovementioned post), would suggest the opposite view that, following the ordinary rules set by Art. 254(1) of the EC Treaty, the Regulation entered into force on 20 August 2007, thus applying to events occurred on or after this previous date. The latter interpretation is shared by the SCADplus (summary of EU legislation) webpage on Rome II, which holds no official value, and is referred to by Prof. *Hartley* in his article on the Rome II Reg. ("Choice of Law for Non-Contractual Liability: Selected Problems Under the Rome II Regulation", in ICLQ (2008), p. 899 ff., at footnote 2 on p. 899, quoting Prof. *Morse* in *Dicey and Morris*).

Two others points are worth mentioning, as regards the final provisions of Rome II:

1. according to Art. 29(2), the Commission is expected to publish in the OJ the **list of existing international conventions** "to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to non-contractual obligations" (mainly, the 1971 Hague Convention on Traffic Accidents and the 1973 Hague Convention on Products Liability): the deadline for Member States to notify of such conventions was set to 11 July 2008. To my knowledge, the list has not yet been published;

2. according to the review clause in Art. 30(2), not later than 31 December 2008 **the Commission** was expected **to present a study** "on the situation **in the field of the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality**, taking into account rules relating to freedom of the press and freedom of expression in the media, and conflict-of-law issues related to Directive 95/46/EC […]". Neither this study has been released, as yet, as far as I know.

Readers are encouraged to report on first cases of application of the new Regulation before national courts.

Conferences at MPI for Private Law, Hamburg

Private Law in Eastern Europe – Autonomous Developments or Legal Transplants?

The MPI website informs: On **27 and 28 March 2009** a conference will be held at the Max Planck Institute for Comparative and International Private Law on the topic "Private Law in Eastern Europe – Autonomous Developments or Legal Transplants?".

Structure and Effects in EU Competition Law – Studies on Exclusionary Conduct and State Aid

The MPI website informs: The Commission of the European Community has since the end of the 1990's pursued a reform agenda which has led to broad changes in European competition law policy. A central axis of this reform has been an increasing economisation of competition law. Also known as "the more economic approach", this paradigm shift has found expression, for example, in the newly drafted Merger Regulation (139/2004) and in the regulations for evaluating horizontal mergers. In the course of 2008 this reorientation of the European Commission was further solidified in respect of EC state aid law and the regulation of exclusionary practices by dominant firms (Art. 82 EC).

It is against this background that Prof. Dr. Dr. h.c. Jürgen Basedow has, with the assistance of Dr. Wolfgang Wurmnest, organised an international and interdisciplinary conference to be held on **23 and 24 January 2009** at the Hamburg MPI: „Structure and Effects in EU Competition Law – Studies on Exclusionary Conduct and State Aid".

Alongside foundational presentations on the aims of European competition and state aid law, the speakers will examine the legal and economic implications of this reorientation as concerns selected exclusionary practices of dominant firms and selected problems of state aid control.

The conference draws from both academia and practice. Speakers will include scholars from both in- and outside Germany, officials of the European

Commission, representatives of national competition agencies and a judge of the Court of First Instance.

Maintenance Regulation Published in the OJ

The maintenance regulation, and its 11 Annexes, have been published in the Official Journal of the European Union no. L 7 of 10 January 2009. The official reference is the following: **Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations** (OJ n. L 7, p. 1 ff.)

Due to its coverage of all the conflictual aspects of maintenance obligations, and its interactions with other EU and international instruments (such as the ones adopted in the frame of the Hague Conference on Private International Law), the regulation provides a complex set of transitional provisions as regards its entry into force and application (see Articles 75 and 76). In this regard, it must be stressed that, pursuant to Art. 76, **the application of the new EC regime on maintenance is made dependent, *ratione temporis*, upon the application in the Community of the 2007 Hague Protocol on the Law Applicable to Maintenance Obligations**, which the EC is planning to sign and conclude in the very near future (see Recital no. 20 and Council doc. no. 15226/08, p. 4-5).

The consultation procedure leading to the adoption of the regulation is summarized as follows in Council doc. n. 17102 of 15 December 2008 *(external links and parts in italics added)*:

> *1. By letter of 12 January 2006, the Commission transmitted to the Council a proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, based on Articles 61(c) and 67(2) of the Treaty establishing the European Community [COM(2005) 649 fin. of 15 December*

2005].

2. The European Parliament delivered its opinion on 13 December 2007. In view of the major changes made to the original Commission proposal during discussions within the Council's subordinate bodies, a decision was taken to reconsult the European Parliament on the basis of the text approved by the Council (Justice and Home Affairs) on 24 October 2008. The European Parliament delivered its new opinion on 4 December 2008.

3. The European Economic and Social Committee issued its opinion on 20 April 2006 following non-compulsory consultation.

4. In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Ireland has given notice of its wish to take part in the adoption and application of the Regulation.

5. The United Kingdom is not taking part in the adoption and application of the Regulation since it did not exercise its right to take part under Article 3 of the above Protocol. However, the United Kingdom stated at the Council meeting (Justice and Home Affairs) on 28 November that it wished to take part in the application of the Regulation by accepting it after its adoption in accordance with Article 4 of the above Protocol.

6. In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark is not taking part in the adoption of this Regulation, and is not bound by it or subject to its application, without prejudice to Article 3 of the Agreement of 19 October 2005 between the Community and Denmark. [see Recital no. 48 and Art. 68(1) of the Reg.: can the new regulation, which provides derogations to the Brussels I regime insofar matters relating to maintenance obligations are concerned, be properly construed as an "amendment" to Reg. no. 44/2001, for the purposes of Art. 3 of the "parallel agreement" between the EC and Denmark?]

7. With an eye to adoption of the draft Regulation by the end of 2008 the Council (Justice and Home Affairs) endorsed on 24 October 2008 an overall compromise aimed at resolving the last outstanding issues regarding substance and at reaching agreement on the enacting terms of the Regulation. Following

that compromise, the Council (Justice and Home Affairs) approved the recitals and annexes as an "A" item at its meeting on 27 and 28 November 2008.

Links to other relevant documents can be found in the OEIL page of the procedure. As usual, the whole set of Council's preparatory documents relating to the new regulation will be shortly made available on the Council Register.

An excellent presentation of the structure and the main features of the regulation can be read in this post by our friend *Federico Garau*, over at the Conflictus Legum Blog.

(Many thanks to Federico for the tip-off)

ABA practitioner survey on the functioning of the Hague Evidence and the Hague Service Conventions

In connection with the February 2009 Hague Conference on Private International Law meeting that will consider the practical operation of a number of Hague Conventions, the US State Department has asked the International Litigation Committees of the International and Litigation sections of the ABA to survey its members in order to get practitioner input about the functioning of the Hague Evidence and the Hague Service Conventions.

The International Litigation Committees of the International and Litigation sections of the ABA has established two short surveys, one for each Convention, that invite practitioners to complete with practitioners` first hand experiences. The surveys will be open until January 15, after which date the responses will be compiled and provided to the Hague Conference.

This input is particularly valuable in the decentralized US federal system; under the Evidence Convention, for example, the State Department as the US Central Authority receives incoming Letters of Request from abroad, but does not centralize all outbound requests to foreign jurisdictions, which in the US are most often addressed directly by litigants or their counsel to the foreign Central Authority (either directly or through a vendor). As a result, the only way to bring pertinent information about the practical operation of certain aspects of these conventions is by way of informal survey, and the Section has worked closely with the State Department in recent months to identify those questions that would be most relevant to the Hague Conference meeting that is scheduled for early February 2009.

The online survey for the Hague Evidence Convention is here, and for the Hague Service Convention Survey here.

Conference: Hague Conference on Private International Law

A Special Commission on the practical operation of the Hague Apostille, Service, Taking of Evidence and Access to Justice Conventions will be held in The Hague from 2-12 February 2009. The meeting is open ONLY to experts designated by the Members of the Hague Conference, invited non-Member States and International Organisations that have been granted observer status. A provisional programme for the Special Commission meeting is taking shape as follows: the first week (2-6 February) will be devoted to discussions on the Service, Evidence and Access to Justice Conventions, to be followed by a discussion of the draft Conclusions & Recommendations relating to these three Conventions (Saturday morning 7 February). The Apostille Convention will be the subject of discussions during the second week of the meeting (9 12 February), with the draft Conclusions & Recommendations relating thereto to be discussed on Thursday morning (12 February). A detailed agenda will be published in due course. On the conference

website, there are links to documentation relating to the four Conventions.

New Release of DeCITA, the leading Latin American Legal Review on Private International Law and International Trade Law

DeCITA (Derecho del Comercio Internacional – Temas y Actualidades) (semi-annual publication in spanish, english, portugese or french) has released its 9th issue. As usual it covers topics concerning not only Latin American Private International Law but also European and North American Law. Each issue is devoted to one specific subject and adresses also the latest development of Private International Law in Latin America and the law of international organizations such as Mercosur or Andean Community as well as the current works in matter of international unification of the law (UNCITRAL, Hague Conference, CIDIP/OAS, UNIDROIT). (for further information, see here.)

The 9th issue (Winter 2008) deals with International Contracts (Contratos Internacionales). The contents:

On the main topic "International Contracts":

Doctrina

- Opiniones del CISG-AC: Consejo Consultivo en materia de compraventa internacional de mercancías
  Alejandro M. GARRO / Pilar PERALES VISCASILLAS
- Interpretación del derecho mercantil uniforme internacional: el artículo 7.1 de la Convención de las Naciones Unidas sobre compraventa internacional de mercaderías
  Anselmo MARTÍNEZ CAÑELLAS

- Os Princípios do UNIDROIT na prática arbitral:
  Uma análise de casos (1994-2007)
  Lauro GAMA JR.
- La cesión de la posición contractual en el derecho colombiano y los Principios de UNIDROIT
  Jorge OVIEDO ALBÁN
- Los INCOTERMS en el derecho internacional privado
  Jorge R. ALBORNOZ
- La Convención de México (CIDIP-v, 1994) como modelo para la actualización de los sistemas nacionales de contratación internacional en América Latina
  Eugenio HERNÁNDEZ-BRETÓN
- Les contrats conclus par les consommateurs dans la Convention de Lugano révisée
  Andrea BONOMI

Jurisprudencia

- Argentina
  Jurisprudencia argentina sobre contratos internacionales
  María Blanca NOODT TAQUELA, con la colaboración de Julio C. CÓRDOBA
- Brasil
  Contratos Internacionais no Brasil: posição atual da jurisprudência no Brasil
  Nadia DE ARAUJO / Daniela Corrêa JACQUES
- Uruguay
  Jurisprudencia uruguaya en materia de contratos internacionales
  Cecilia FRESNEDO DE AGUIRRE
- Venezuela
  Los contratos internacionales en la jurisprudencia venezolana
  Claudia MADRID MARTÍNEZ
- Europa
  Jurisprudencia europea en materia de contratos
  Aurelio LÓPEZ-TARRUELLA MARTÍNEZ

Novedades legislativas

- Unión Europea
  Aprobación del Reglamento de Roma I sobre ley aplicable a las obligaciones contractuales

On the "Actualidades":

Doctrina

- Tendencias anti-arbitraje en América Latina
  Emmanuel GAILLARD
- La sentencia arbitral parcial desde la perspectiva del orden jurídico brasileño
  Carlos Alberto CARMONA

Jurisprudencia

[…]

Actividades de los organismos internacionales

- UNIDROIT
  Actividades del Instituto Internacional para la Unificación del Derecho Privado durante el año 2007
  Carolina HARRINGTON
- Conferencia de La Haya de Derecho Internacional Privado
  Actividades de la Conferencia de La Haya de Derecho Internacional Privado
  María Mayela CELIS AGUILAR
- UNCITRAL
  The Year in Review: The Work of the United Nations Commission on International Trade Law (UNCITRAL) from 2006 to 2007
  Kate LANNAN
- OEA
  Informe sobre la Séptima Conferencia Especializada Interamericana sobre Derecho Internacional Privado
  John M. WILSON

Sistemas de integración regional

- MERCOSUR

La CSJN (Argentina) aprueba Acordada para reglamentar la elevación de opiniones consultivas al Tribunal Permanente de Revisión del MERCOSUR
Adriana DREYZIN DE KLOR

- Novedades y avances en materia de cooperación y asistencia jurisdiccional en el marco del MERCOSUR y sus Estados asociados
  Juan José CERDEIRA CAN
- Novedades de la Comunidad Andina
  María Clara GUTIÉRREZ
- SICA
  Aspectos relevantes del año 2007
  Ana E. VILLALTA VIZCARRA
- Tratado de Libre Comercio de América del Norte
  Actividad durante el año 2007
  Carolina HARRINGTON

[…]

American Surrogacy and Parenthood in France: Update

In earlier posts, I had reported how the Paris Court of Appeal had accepted to recognize Californian birth certificates after a French couple had resorted to surrogacy in San Diego. Surrogacy is illegal in France.

An appeal was lodged before the French Supreme Court for private and criminal matters (*Cour de cassation*). The *Cour de cassation* delivered its decision on December 17, 2008. It allowed the appeal and set aside the judgment of the Paris Court of Appeal, but did so on purely procedural ground (standing of French prosecutors). The case will have to be relitigated before the same Paris Court of Appeal, with different judges.

Not much to say from a conflict perspective then. The decision, as it is often the case with judgments from the *Cour de cassation*, is hard to interpret. There is

much debate at the moment in France as to whether surrogacy should be allowed. It might be that the solution of the court is a convenient one enabling the judiciary to wait for a political decision. All this, of course, will be at the expense of the children, who might not be told who their parents are before they are teenagers, if not young adults.

The decision of the court can be found here (in French). As French cases are barely understandable, the court also had to make a press release.

Australian difficulties for "service of suit" clauses in insurance contracts

AIG UK Ltd v QBE Insurance (Europe) Ltd [2008] QSC 308 (28 November 2008) reveals some of the difficulties that can be created for insurers and reinsurers of Australian liabilities by the form of "service of suit" clauses often found in Lloyds and other non-Australian insurance contracts. Typically of such clauses, the service of suit clause in the insurance contract in this case provided that any dispute concerning the contract would be governed by "Australian Law" and that the insurers and the insured agreed "to submit to the jurisdiction of any Court of competent jurisdiction within Australia" and that "[a]ll matters arising hereunder shall be determined in accordance with the law and practice of such Courts". The reinsurance contract defined "jurisdiction" as "Commonwealth of Australia and New Zealand only, as original", and this appears to have been accepted to "pick up" the service of suit clause in the underlying insurance contract.

The case arose out of an accident which occurred during a motor race in New South Wales. The driver sued the Confederation of Australian Motor Sports ("CAMS") in Victoria, apparently attempting to avoid the operation of a New South Wales statute which would have barred the claim. The proceedings settled. CAMS was insured by QBE. QBE was reinsured by AIG and two other

reinsurers (together, "the reinsurers"). The reinsurers took action against QBE in the Supreme Court of Queensland, seeking a declaration that they were not liable to indemnify QBE on the reinsurance contract, because QBE had failed to comply with a condition precedent to liability that it advise the reinsurers of any loss which might give rise to a claim as soon as practicable and without undue delay.

QBE sought orders staying the proceedings or setting aside the originating process. Mackenzie J refused to make such orders, considering that the effect of the service of suit clause was that QBE and the reinsurers had submitted to the jurisdiction of the Supreme Court of Queensland, it being a "Court of competent jurisdiction within Australia".

QBE also sought a transfer of the proceedings to the Supreme Court of Victoria pursuant to the Australian Cross-Vesting Scheme, which provides for a transfer from the Supreme Court of one Australian state to the Supreme Court of another state if it is "more appropriate" that the proceedings be heard in another state. QBE's application appears to have been motivated, at least in part, by the fact that a provision in the Victorian *Instruments Act* 1958 of assistance to insureds and reinsureds in cases of non-disclosure had no analogue in Queensland. Indeed, the absence of such a provision in Queensland may have been the reason the reinsurers instituted proceedings there. Mackenzie J declined to order the transfer, considering that any connection with Victoria was incidental and that no preference was expressed in the service of suit clause for one Australian jurisdiction over another.

This case serves as a reminder that service of suit clauses like the one considered often mean that proceedings may be instituted in the courts of *any* Australian state, and that obtaining a stay or a transfer in the face of such a clause may be difficult.

One issue not decided by this case is whether the Victorian *Instruments Act* will apply even if the proceedings continue in Queensland, if the governing law of the reinsurance contract is Victorian law. This highlights a difficulty with the specification in the service of suit clause of the governing law as "Australian Law", together with the submission to the jurisdiction of any Court of competent jurisdiction within Australia and the reference to matters being determined "in accordance with the law and practice of such Courts", rather than the selection of the law of a particular Australian state.

As part of the argument in this case, the parties disagreed as to the effect of this clause. QBE submitted that it mandated the application of the law of the Australian state with the closest and most real connection with the transaction. This was said to call for consideration of the particular claim in question, with its Victorian connections, and consequently the application of Victorian law, ie Commonwealth statutes, the common law of Australia and Victorian statutes (including the Victorian *Instruments Act*). In contrast, the reinsurers submitted that the service of suit clause could not be read as directing application of the law of any particular Australian state, and either was not a choice of law clause at all (resulting in the application of English law as the proper law of the contract) or mandated only the application of Commonwealth statutes and the common law of Australia, ignoring any state statutes.

Mackenzie J did not need to resolve this issue for the purposes of QBE's application, but it is one which will presumably need to be resolved if the proceedings continue. More generally, it is an issue which inevitably can arise in cases involving service of suit clauses such as that considered here. Perhaps a clearer choice of law clause would be advisable.