First Electronic Apostille in Europe

The report of the Hague Conference on Private International Law is here.

Fourth Issue of 2008's Journal du Droit International

The fourth issue of French *Journal du Droit International* (also known as *Clunet*) will shortly be released. It contains three articles dealing with conflict issues.

The first is authored by Mathias Audit, a professor of Private International Law at the University of Cergy Pontoise. The article deals with Procurement Contracts Concluded by International Organizations *(Les contrats de travaux, de fournitures et de services passés par les organisations internationales*). The English abstract reads:

> *In order to carry out assigned missions or merely to ensure their proper functioning, international organisations enter into procurement agreements that have the specificity to bring together a subject of international public law and a subject of internal law, namely the institution's co-contractor. This peculiar legal status, on the verge of several legal systems, gives a special quality to the rules applicable to tender offer procedures as well as the final contracts themselves.*

In the second article, Didier Lamethe, the Secretary General of French electricity company Electricité de France (EDF International) discusses Closing Memorandums in the Context of Share Purchase Agreements (*L'accord de cloture : l'exemple des cessions internationales de participations. Antropologie d'une création contractuelle empirique*). The English abstract reads:

With regard to Shares Purchase Agreements, the Closing Memorandum was developed by practitioners in order to achieve better legal certainty. Meeting some opposition, it first remained unknown and proved in practice difficult to enforce. Organised as a categorised and detailed chronology of actions to be performed prior and subsequent to the transfer, it includes a financial aspect and covers several administrative items to comply with in order to achieve the transfer. The scope of the memorandum progressively got larger with time and practice to such an extend that it now belongs to the category of useful and recognised international contractual practices. Yet this framework could still evolve in a unexpected manner.

Finally, I am the author of the third article. The paper revisits the Principle of Territoriality of Enforcement (*Le principe de territorialité des voies d'exécution*). Here is the abstract:

The French law of enforcement has long been dominated by a principle of territoriality. The principle was understood as prohibiting attachments purporting to reach foreign assets. However, recent cases of the French supreme court have accepted that French enforcement authorities could validly reach accounts opened in foreign branches.

The article revisits the foundation of the principle of territoriality of enforcement. As the principle has traditionally been presented as a direct consequence of a rule of international law, the first part of the essay discusses the relevance of the rules of international law which could be the source of the principle. It finds that the relevant rule is the territoriality of the actions of state organs, and that international law does not prohibit the attachment of assets situated abroad as long as enforcement operations are conducted in the state of origin. As a consequence, it is critical of the judgement of the House of Lords in Société Eram Shipping. The second part of the Article explores whether Article 22-5 of the Brussels I Regulation instituted a different principle of territoriality or merely incorporated the rule of international law in European law. Finally, in the third part, the issues of the risk of double payment and the recognition of foreign enforcement acts are discussed.

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

Enforcement in Netherlands of German ex parte decision under Brussels Regulation

In a case between Realchemie Nederland BV (The Netherlands) and Fa. Feinchemie Schwebda GmbH (Germany) the Dutch Supreme Court ruled that a German "Kostenfestsetzungsbeschluss" (decision on the costs of the procedure), based on an "einstweilige Verfügung" (provisional measure) was to be recognized and enforced pursuant to the Brussels Regulation (Hoge Raad, 7 November 2008, No. 07/12641; LJN: BD7568), even though both were granted *ex parte*.

Referring to the ECJ cases Denilauler v. Couchet (ECJ, 21 May 1980, case 125/9) and Maersk v. De Haan (ECJ, 14 October 2004, case C-39/02) the Supreme Court argued that measures that (a) concern the granting of provisional and protective measures, (b) ordered without the party against whom they are directed having been summoned, and (c) which are intended to be enforced without prior service, are not covered by Chapter III of the Brussels Regulation, dealing with recognition and enforcement . However, since both the "einstweilige Verfügung" and the "Kostenfestsetzungsbeschluss" were served on the defendant, and were, according to German law, subject to challenge after service, these decisions – although granted *ex parte* – are to be regarded as decisions within the meaning of Chapter III of the Brussels Regulation.

Further, the ground of refusal laid down in Article 34(2) Brussels Regulation is, according to the Supreme Court, applicable in a situation where the decision was rendered in default, and does not apply where the defendant was not summoned and did not have to be summoned (see also Hoge Raad, 20 June 2008, No. R07/124HR; LJN: BD0138, German Graphics Graphische Maschinen GmbH v. Van der Schee).

Publication: Dickinson on the Rome II Regulation

On 18th December 2008, Oxford University Press will publish Andrew Dickinson's new work on **The Rome II Regulation – The Law Applicable to Non-Contractual Obligations**. Here's the blurb:

> *Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (the so-called "Rome II Regulation") is the product of almost 40-years work by the institutions and Member States of the European Community. From 11th January 2009, it will introduce an entirely new set of rules for determining the law applicable to non-contractual obligations (including tort/delict, unjust enrichment and some equitable obligations). This work, written by an experienced practitioner, provides a user-friendly article-by-article commentary to assist practising lawyers in understanding the structure and practical application of the Regulation. The book also considers the background to, and treaty base, of the Regulation and its relationship to other EC instruments creating or affecting rules of private international law. Links to primary materials, news and updates will appear on the companion website at www.romeii.eu.*

You can also view a table of contents, as well as an endorsement from Lord Mance, on the OUP website.

Price: £145.00 (Hardback)**.** ISBN: 978-0-19-928968-4. Andrew has kindly offered a **20% discount** for pre-publication orders to readers of Conflict of Laws .net (reducing the price from £145 to **£116**) – the code to enter is **ALCWDICK08**. Needless to say, it is *highly recommended*.

Exception to the Arbitration Exception: the 1896/2006 Regulation

It is hardly necessary to remind readers of this blog that the Brussels I Regulation contains an Arbitration Exception. It is pretty difficult not to have heard of, or read about, the *West Tankers* litigation lately.

Of course, the Arbitration Exception is not peculiar to the Brussels I Regulation. It is of general application in European civil procedure. All regulations in the field include the same exception. All? Well, not really. There is an exception to the exception.

Regulation 1896/2006 creating a European Order for Payment Procedure does not keep the Arbitration Exception. In the most usual way, article 2 of Regulation 1896/2006 defines the scope of the regulation, first by stating that it applies to civil and commercial matters, and then by excluding certain fields. As could be expected, social security or bankruptcy appear, but not arbitration (and not status and legal capacity of natural persons either, actually).

So it seems that Regulation 1896/2006 does apply to arbitration. Is it a new direction for European civil procedure? That prospect might make some people happy in Heidelberg, but we are not quite there yet. Regulation 861/2007 Establishing a European Small Claims Procedure (article 2) reincludes the Arbitration Exception.

This remarkable exception to the exception beggs two questions:

First, why? What are the reasons which led the drafters of the regulation to delete the Arbitration Exception? Are there any?

Second, what are the consequences? At first sight, not many. After all, if there is an arbitration agreement, courts will lack jurisdiction to do anything, or almost. And when courts will be petitioned to help constituting an arbitral tribunal, it will be hard to use the European Order for Payment Procedure in any meaningful way. But the issue of the availability of the European remedy in aid of the arbitral

proceedings may well arise.

And if it does, a second issue will arise, as discussions in a recent conference at the Academy of European Law (ERA) on Cross-Border Enforcement in European Civil Procedure have shown. It will be necessary to coordinate with the Brussels I Regulation, which governs the jurisdiction of European courts granting European Orders for Payment.

Enforceability of a Judgment and State Immunity: a Recent Decision of the Italian Court of Cassation

Following the post by Marta Requejo Isidro on jurisdiction over civil claims against States for violation of basic human rights, and the related comments, we would like to report an interesting decision recently handed down by the United Divisions ("Sezioni Unite") of the Italian *Corte di Cassazione*, on the declaration of enforceability against a foreign State of a foreign judgment condemning that State in respect of war crimes. Even if the declaration of enforceability was limited to the part of the decision related to the costs of the proceedings (this being the claim brought before Italian courts by the plaintiff), the court's reasoning dealt with the issue in more general terms.

The ruling of the Italian Supreme Court (29 May 2008, no. 14199, available on the Court's website) has been kindly pointed out to us by *Pietro Franzina* (University of Ferrara), who has commented it in an article forthcoming on the Italian review "Diritti umani e diritto internazionale" (n. 3/2008). The article is also available for download on the website of the Italian Society for International Law (SIDI).

The facts of the case, that is part of a "legal saga" involving a number of judicial actions brought before Italian and Greek tribunals for atrocities committed by the Nazi troops in the final years of World War II (1943-1945), are as follows.

In 2000, the Federal Republic of Germany had been condemned by the Greek Court of Cassation (Areios Pagos) to pay damages to the victims of the massacre made by the German army in the Greek village of Distomo in 1944, and to bear the costs of the judicial proceedings (see a partial translation of the ruling, and a comment by *B.H. Oxman*, *M. Gavouneli* and *I. Banterkas*, in Am. J. Int'l L., 2001, p. 198 ff.). The enforcement of a judgment against a foreign State is, under Greek law (Art. 923 of the Greek Code of Civil Procedure), subject to an authorization by the Ministry of Justice, which in the present case refused to grant it.

Thus, the Administration of the Greek Region of Vojotia (the plaintiff) sought a declaration of enforceability of the Greek judgment, limited to the decision on costs, before the Italian courts. The exequatur was granted by the Court of Appeal (Corte d'Appello) of Firenze, and confirmed by the same court on a subsequent opposition by the German State. The case was then brought before the Italian Supreme Court (Corte di Cassazione).

Germany's challenge to the declaration of enforceability of the Greek judgment rested on three main grounds:

1) the decision cannot be declared enforceable, as the Court of Appeal of Firenze did, on the basis of Reg. 44/2001, since its subject matter is outside the scope of application (either *ratione materiae* and *ratione temporis*) of the EC uniform rules;

2) even taking into account the Italian ordinary regime on recognition and enforcement of foreign judgments (Articles 64 ff. of the Italian Act on Private International Law, no. 218/1995) the Greek judgment does not fulfil all the conditions set out by the Italian provision, since it cannot be considered an enforceable "res iudicata", as requested by Art. 64, lit. d), of the Italian PIL Act, because in the Greek legal system it lacks the authorization of the Greek Ministry of Justice in order to be enforced; and

3) its effects are contrary to the Italian public policy (Art. 64, lit. g)), since it was rendered in violation of the jurisdictional immunity enjoyed by the German State in respect of *acta iure imperii*, such as the ones committed by the German army during WWII.

The Corte di Cassazione, while agreeing on the first argument (quoting the ECJ judgment in the *Lechouritou* case, on the scope of application *ratione materiae* of

Reg. 44/2001: see our posts here), rejected the second and the third, and held the Greek decision enforceable under the Italian ordinary rules.

On the second ground, the Court made a distinction between the enforceability "in abstracto" of a foreign judgment and the actual enforcement of it (i.e., the concrete taking of executive measures), which is a different and subsequent step. The simple fact that the execution of a decision against a foreign State is made dependent, in the legal system of origin, upon a governmental authorization does not imply that the judgment is not "per se" enforceable, in a different context of time and space, provided that it is final and binding upon the parties.

On the third ground, the Court held that denying foreign State immunity, when the defendant State is accused of serious violations of fundamental human rights, is not only non-incompatible with Italian public policy, but moreover perfectly in line with the reasoning already upheld by the Corte di Cassazione itself in a previous ruling (the well-known decision in the "Ferrini" case – judgment no. 5044 of 11 March 2004 – in which the United Divisions of the Corte di Cassazione had denied foreign State immunity to Germany in respect of an action brought by an Italian victim of deportation and forced labour).

The judgment of the Corte di Cassazione in the Ferrini case is published in an English translation in International Law Reports (vol. 128, p. 658 ff.): see also the article by Prof. Carlo Focarelli (University of Perugia), "Denying Foreign State Immunity for Commission of International Crimes: the Ferrini *Decision", in* International and Comparative Law Quarterly*, 2005, p. 951 ff. Other comments in English to the decision can be found in Prof. Focarelli's article.*

On the practice of national courts in Europe with regard to enforcement immunity, see the detailed analysis carried on by A. Reinisch in his article "European Court Practice Concerning State Immunity from Enforcement Measures", in Eur. J. Int'l Law, 2006, p. 803 ff. (abstract available on SSRN).

(Many thanks to Marta Requejo Isidro and Gilles Cuniberti)

Sovereign Immunity of Germany for WWII Actions: France

After the recent case of the Italian *Corte di Cassazione*, we thought that some of the readers might be interested by the decision of the French *Cour de cassation* of 2 June 2004.

In this case, proceedings had also been initiated against Germany for actions which had taken place during World War II. The plaintiff, M. Gimenez-Exposito, had been arrested in France during the war for actions of resistance against the Germans. He had then been sent to Dachau where he had been forced to work for BMW from June 1944 to May 1945.

In 2000, he (eventually) decided to sue the German state and BMW before a French labour court for payment of his wages and for damages.

The *Cour de cassation* dismissed the action in respect of Germany on the ground of state immunity. It applied the traditional French rule on the scope of sovereign jurisdictional immunity. Since 1969, the court has ruled that the immunity covers actions where foreign states acted in a public capacity (*de jure imperii*). In that case, the court held that when Germany forced prisonners to contribute to its war effort, it was acting in a public capacity.

The argument was made before the court that Nazi Germany ought not to benefit from any immunity, as it violated international conventions, and was not a democratic state. The court answered that the defendant was the Federal Republic of Germany, and not Nazi Germany.

In respect of BMW, the court held that it lacked jurisdiction under article 5 of the Brussels Convention. Applying the Brussels Convention in this context was quite surprising, as the court had just held that the activity of the plaintiff in Germany could not possibly fall within the realm of private law.

Weighing Disputed Facts in Forum Non Conveniens Motions

The Court of Appeal for Ontario has released its decision in *Young v. Tyco International of Canada Ltd.* (available here). Those interested in the common law doctrine of *forum non conveniens* might find aspects of the decision of interest.

First, Justice Laskin states at para. 28 that "on a *forum non conveniens* motion, the standard to displace the plaintiff's chosen jurisdiction is high". For this notion he relies on the language of the Supreme Court of Canada's leading decision on the doctrine, *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, where that court notes that the existance of the more appropriate forum must be "clearly" established.

There is room for concern about Justice Laskin's statement. Many commentators have taken the language in *Amchem* to only indicate that in the very close cases, the benefit of the doubt goes to the party that does not bear the onus of establishing the more convenient forum. But in most cases, the court should be able to establish the more convenient forum on a balancing exercise. Justice Laskin's statement seems to suggest there could be cases in which another forum was shown to be more appropriate, but not more appropriate enough, than the plaintiff's chosen forum. For the most part Canadian courts have avoided deciding cases on such a basis. There is also room to debate whether the plaintiff should be entitled to the support contained in Justice Laskin's statement. In an era of tactical proceedings and multiple available jurisdictions, why should the plaintiff's choice be given particular protection under the doctrine?

Second, there is disagreement between the judges on how to handle facts in dispute on the stay motion. Justice Laskin holds that if, to resolve the motion, the court needs to get into the underlying facts of the case, the court should adopt the plaintiff's version of those facts as long as there is a reasonable basis for those facts in the record (paras. 32-34). In separate concurring reasons Justice Simmons disagrees with this approach. In her view (see paras. 67-70), if the motions judge cannot either resolve the motion against the plaintiff on the plantiff's view of the facts or resolve the motion against the defendant on the

defendant's view of the facts, he or she should conduct the *forum non conveniens* analysis on the basis that both views of the facts have a reasonable prospect of being adopted at trial. To some extent this will neutralize the role that facts in dispute will play in the analysis, since they will cut both ways depending on the plaintiff's or the defendant's view of the facts. Justice Simmons' approach aims to be fair, on the stay motion, to both parties, and so rejects Justice Laskin's quite pro-plaintiff analysis.

Neither approach addresses those situations in which the court, in order to resolve a motion for a stay, needs to actually reach a conclusion on a factual question on the balance of probabilities. I have argued that one of those situations arises when the parties dispute the existance of a jurisdiction clause: see Stephen Pitel and Jonathan de Vries, "The Standard of Proof for Jurisdiction Clauses" (2008) 46 Canadian Business Law Journal 66.

Third, the court discusses what will qualify as a legitimate juridical advantage which the plaintiff would lose if a stay were ordered (at paras. 56-61).

In the end, all of the judges agree that the defendant has not shown that Indiana was the more appropriate forum, and so the stay motion fails.

Spanish homosexual couple and surrogate pregnancy

While some countries, like the U.S.A., accept surrogate pregnancy among permitted techniques of assisted reproduction, Spanish law considers it illegal. That is why a certificate issued in the U.S.A. establishing the parenthood of a baby born in this country to a surrogate mother would not be registered in Spain; accordingly the baby would not have Spanish nationality; and consequently, he would need a visa to come to Spain.

This apparently neutral facts may not describe a theoretical situation but correspond whit a quite real one. A Spanish homosexual married couple from

Valencia decided to try surrogate pregnancy after several failed attempts of international adoption; as for a national adoption, they feared they would not be awarded the “certificado de idoneidad” due to their homosexual condition. They therefore moved to the USA looking for better chances. Today, the intended parents and (their?) two twin babies born in the USA to a surrogate mother are the major figures of a complicated situation. The couple is in the U.S. since the Spanish embassy has denied the babies the visa to enter Spain. So far, the twins bear American nationality to prevent them from being stateless.

According to press reports, the couple has ruled out the option of returning to Spain by registering the babies as born to a Spanish female mother; they want them to be acknowledged as their children, and them to be granted the Spanish nationality. Faced with the Spanish refusal they might decide to remain (to exile?) in the U.S.A., where they have been offered a residence permit. They have warned the Spanish government that they will start a legal battle both in the U.S.A. and before the European Court of Human Rights, claiming violation of the Declaration of the Rights of the Child. Considering the importance of their aim, how much it is worth; but also knowing how exhausting such processes will be, we can only wish them courage and luck.

Cross-Border Consumer Disputes in Victoria

In light of Martin’s post about Jonathan Hill’s new book on Cross-Border Consumer Contracts, it’s worth noting a recent decision of the Victorian Civil and Administrative Tribunal (the main forum for small claims and consumer disputes in Victoria) that VCAT does not have jurisdiction over foreign persons or companies because the *VCAT Act* does not permit service outside the jurisdiction: *Apollo Marble and Granite Imports Pty Ltd v Industry + Commerce* (Civil Claims) [2008] VCAT 2298 (14 November 2008).