Lecture on European Private Law at Southampton

On Tuesday 24 April 2007, the *Annual Bond Pearce Lecture in European Law* at the University of Southampton, School of Law, will be delivered by **Alexander Layton QC**, 20 Essex Street. Its title is:

> ***The Growth of European Private Law: Some Reflections on the 50th Anniversary of the Treaty of Rome.***

Time and Venue: 5.45 pm; Main Lecture Theatre, Room 1027, Nightingale Building, Highfield Campus, Southampton (UK).

Please visit this Website for more details, or contact: Sotirios Santatzoglou, School of Law, Southampton University, Tel. 023 8059 5333.

Mixed Contracts, the Vienna Sales Convention and the Brussels Convention

Ulrich G Schroeter (University of Freiberg – Faculty of Law) has posted "**Vienna Sales Convention: Applicability to 'Mixed Contracts' and Interaction With the 1968 Brussels Convention**" on SSRN; it originally appeared in the *Vindobona Journal of International Commercial Law and Arbitration, Vol. 5, pp. 74-86, 2001*. The abstract reads:

> *The present article discussed various questions pertaining to the interpretation of Article 3(1) and (2) of the United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980 (CISG), the provisions which deal*

which so-called 'mixed contracts', i.e. contracts that involve elements of a 'sale' proper alongside obligations to manufacture or produce goods or to supply labour or other services.

In its second part, the paper elaborates on the interaction between the CISG's provisions defining the place of performance (Articles 31 and 57 CISG) on one hand and Article 5(1) of the Brussels Convention of 27 September 1968 on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters and its successor, Article 5(1) of the EC Council Regulation 44/2001 of 22 December 2000 on the Recognition and Enforcement of Judgements in Civil and Commercial Matters on the other hand.

You can download the paper from **here**.

Conflict of Laws in Mexico

Jorge A. Vargas (*University of San Diego – School of Law*) has posted "**Conflict of Laws in Mexico as Governed By the Rules of the Federal Code of Civil Procedure**." Here's the abstract:

Since NAFTA entered into force in 1994, international litigation between the United States and Mexico has grown- and continues to grow-exponentially. In recent years, the application of foreign law in California and Texas has become equivalent to Mexican law, and soon other states will follow suit, including Arizona, New Mexico, Florida and Illinois.

Prior to 1988, the Mexican legal system was not legally equipped to consider the application of foreign law in that country. In other words, until that year, only Mexican law was applied by Mexican judges in Mexican courts. At the same time, Mexico's legal system virtually lacked legal provision in its codes and statutes that allowed for the conduct of certain procedural acts requested by foreign judges (i.e., American judges) such as serving summons, taking evidence, recording depositions and enforcing judgments in that country.

However, all of this changed in 1988 when President Miguel de la Madrid made the necessary legislative amendments both to the Federal Civil Code and to the Federal Code of Civil Procedure with the addition of Book Four titled: International Procedural Cooperation.

This article discusses in detail the principles and rules governing the conduct of International Judicial Cooperation between Mexico and other countries, notably the United States, involving service of summons, taking of evidence, and enforcement of foreign judgments and arbitral awards by means of letters rogatory with the assistance of Mexico's Central Authority (i.e., Secretaría de Relaciones Exteriores (SRE) or Secretariat of Foreign Affairs) or that of the members of Mexico's consular service. These principles and rules are found in Articles 543-577 of Mexico's Federal Code of Civil Procedure.

Download the article from **here**.

Exclusive Jurisdiction, Cross-Border IP Infringement and the Brussels I Regulation

Paul Torremans (Nottingham University) has published "**Exclusive jurisdiction and cross-border IP (patent) infringement: suggestions for amendment of the Brussels I Regulation**" in the *European Intellectual Property Review* (E.I.P.R. 2007, 29(5), 195-203). Here's the abstract:

Calls for amendments to Council Regulation 44/2001 (the Brussels I Regulation) concerning cross-border patent infringement claims, in the light of European Court of Justice rulings on claims of invalidity raised in infringement proceedings, and the consolidation of claims against related defendants in more than one Member State. Suggests reform proposals to facilitate the effective enforcement of patents.

The ECJ ruling in question is, of course, *Gat v Luk*. The article is available to those with a subscription to the EIPR.

GEDIP: Working Sessions of the Sixteenth Annual Meeting (2006)

A very interesting **report of the working sessions of the 16th Annual meeting of the European Group for Private International Law (GEDIP-EGPIL)**, held in Coimbra on 22-24 September 2006, has been recently published on the new site of the Group. The summary (in French) has been compiled by *N. Ascensão Silva*, *R. Pereira Dias* and *G. Rocha Ribeiro* (University of Coimbra).

Here's a list of the matters discussed by the Group, as organized by the authors (in brackets the rapporteurs; *our translation and free adaptation from French*):

I. EC Private International Law and Third States:

1. The external competence question (*C. Kessedjan*);
2. The revision of the Lugano Convention (*A. Borrás*).

II. The Commission's "Rome III" Proposal and the Green Paper on matrimonial property regimes:

1. The Rome III Proposal (*A. Borrás*) [on the Green Paper on applicable law and jurisdiction in divorce matters, see also the report of *M. Struycken* presented at the 2005 meeting (Chania) of the Group and the draft articles on applicable law discussed at the 2003 meeting (Wien)];
2. The Green Paper on matrimonial property regimes (*K. Kreuzer*) (see also the Response of the EGPIL to the Green Paper, prepared after the meeting of Coimbra).

III. The "Rome I" Proposal [on the revision of the Rome Convention, see also a number of previous proposals and comments on the Group's site]:

1. Article 3(5) of the Rome I Proposal (Choice of the law of a Third State and mandatory rules of Community law) (*E. Jayme*);
2. The Report of the Financial Market Law Committee on «Rome I» Proposal («Legal assessment of the conversion of the Rome Convention to Community instrument and the provisions of the proposed Rome I Regulation») (*T. C. Hartley*).

IV. The mutual recognition method (*P. Lagarde*) (in particular, the ECJ cases *Standesamt Stadt Niebüll/Grunkin*, C-96/04 and C-353/06).

V. The codification of European Private International Law (*M. Fallon*).

VI. Current events:

1. Private international law and human rights – ECHR case *Eskinazi and Chelouche v. Turkey* (application no. 14600/05) (*P. Kinsch*);
2. New developments in EC secondary legislation (*E. Jayme* and *C. Kohler*);
3. New developments in the Hague Conference (*H. van Loon*);
4. Current status of EC projects in Private International Law matters (*M. Francisco Fonseca*).

The report is available here, along with the minutes of all the previous meetings of the Group, since 1991, and a number of related documents and proposals. Highly recommended.

Accession of the European Community to the Hague Conference on Private

International Law

Since yesterday, 3 April 2007, the European Community is a formal member of the Hague Conference on Private International Law.

The accession of the European Community, which comes in addition to the individual membership of all 27 EU Member States, has been facilitated by amendments to the Statute of the Hague Conference entered into force on 1 January 2007 which made it possible for certain Regional Economic Integration Organisations – and thus the EC – to become a Member of the Hague Conference.

The deposit of the instrument of accession took place during a ceremony at the Academy of International Law in The Hague.

The significance of the accession has been emphasised by the German Minister of Justice, *Brigitte Zypries*, representing the Presidency of the Council of the European Union by stating:

> *International commercial relations are continually increasing. Europe´s citizens are becoming increasingly mobile as well; more and more people are living and working not only in other Member States but outside the EU as well. Given these developments, we need clear rules on how claims may be asserted beyond the borders of the European Union. Despite differing legal systems, our aim is to attain the greatest possible degree of legal certainty and transparency, for both private individuals and companies. With today´s accession to the Hague Conference, the European Community will be able to bring these interests of EU citizens directly into the negotiations on future Hague Conventions.*

as well as Vice-President *Franco Frattini*, Commissioner responsible for Freedom, Security and Justice who pointed out:

> *Our aim is to facilitate EU citizens' life setting clear rules as regards jurisdiction of the courts, applicable law and the recognition and enforcement of judgments not only within the EU territory, but also at international level. The accession of the European Community to the Hague Conference will allow for increased consistency as regards private international law, making life*

easier for those who decide to move and reside abroad.

More information can be found on the website of the German EU Council Presidency, the website of the Hague Conference as well as the website of the European Union.

See also our older post on the EU Council decision on the accession to the Hague Conference which can be found here.

Revision of the Lugano Convention: Final Round of Negotiations in Brussels

As stated by recent news on the European Judicial Network (EJN) website, **a final version of the text of the new Lugano Convention** on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters **was agreed upon at a diplomatic conference held in Brussels on 28 March 2007** by the EC, Denmark and the three EFTA States which are party to the old Lugano convention (Switzerland, Norway and Iceland).

The definitive text of the Convention, resulting from the final round of negotiations, has not been made available on the EJN website yet: **a final draft in English (as initialled by the Contracting Parties) is available on the website of the Swiss Federal Office of Justice**, where a summary of the negotiation history is provided, including the several delays that the revision process has incurred:

At the end of April 1999, an EU-EFTA working group completed a draft of the substantive part of the revision of the Lugano and Brussels Conventions. Shortly afterwards, in May 1999, the Treaty of Amsterdam came into force for the EU member states. This treaty provides the basis for EC competence in civil

justice cooperation. The revised text of the new agreement was consequently moulded into an EC regulation known as the Brussels I Regulation, without having any substantive effect on the outcome of the negotiations. […]

The formal revision of the Convention was delayed for several reasons: firstly, there was a difference in interpretation of the paragraph on consumers by the Internet providers and consumers. This question had to be resolved before the Brussels I Regulation (Council Regulation (EC) No 44/2001) was passed on 22 December 2000 (entry into force 1 March 2002). The Lugano negotiations were further delayed because a separate instrument had to be negotiated with Denmark, which under the EC Treaty is not a party to the EC-driven integration of police and judicial affairs.

Moreover, it was unclear for a long time whether the European Community had exclusive or shared competence to conclude the new Lugano Convention. The opinion of the European Court of Justice dated 7 February 2006 ruled that the conclusion of the new agreement fell entirely within the sphere of the Community's exclusive competence, which means that Switzerland, Norway and Iceland now only have to negotiate with one single contracting party ? the European Community, acting through the EC Commission. The EU member states enjoy observer status.

The final negotiations on the formal revision of the Lugano Convention took place at the Diplomatic Session in Lugano from 9 to 12 October 2006 where nearly all the controversial issues were resolved. The remaining issues were resolved in the course of subsequent informal negotiations. In March 2007, a final text was agreed upon, subject to possible subsequent linguistic corrections and to signature by the Contracting Parties […].

The initialled text of the Convention will now be translated into the official languages of the Contracting Parties (all the languages of the EU and those of the other Contracting States, all texts being equally authentic: see art. 79 and Annex VIII to the Convention). The signature of the Convention should take place in Lugano in the coming months, probably in June 2007. The ratification procedures in the Contracting Parties will most likely not allow the Convention to enter into force before 2009.

(Many thanks to Pietro Franzina, University of Ferrara, for the tip-off, and to

Rodrigo Rodriguez, Swiss Federal Office of Justice, for providing the latest information on the status of the Convention, along with Andrew Dickinson, BIICL and Clifford Chance.)

More Reflections on Sinochem

This post is written by Greg Castanias and Victoria Dorfman, attorneys with the law firm of Jones Day in Washington, D.C. who represented Sinochem before the Supreme Court. It originally appeared on Opinio Juris last week, and is cross-posted with their generous permission. The decision, briefs and other reflections on Sinochem also previously appeared on this site.

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We're grateful to have the opportunity to give you some preliminary views on the Sinochem decision issued last week—*Sinochem International Co., Ltd. v. Malaysia International Shipping Corp.*, 127 S. Ct. 1184 (2007). Since we are lawyers, after all, we need to start with a disclaimer: These are our views alone—not those of our law firm, our partners, or our other colleagues; and not those of our client in this case (indeed, not those of any of our clients, past, present, or future).

Obviously, we are pleased about the result in the case, and about the central holding in the case, which embraced the argument we made to the Court: a district court has the power (which is to say the discretion) to dismiss a lawsuit on forum non conveniens grounds before making a conclusive determination of its own jurisdiction (either subject-matter jurisdiction, which is the power of the court itself, or personal jurisdiction, which is the power of the court over a defendant). As your readers probably know, this resolved a split in the circuits on this issue which, somewhat to our surprise at first, was four-to-two against our position (after we filed our merits brief in the case, the Seventh Circuit, in a case called *Intec USA, LLC v. Engle*, 467 F.3d 1038 (7th Cir. 2006), switched sides on the split, distinguished its prior decision in Kamel *v. Hill-Rom Co.*, 108 F.3d 799 (7th Cir. 1997), and the Supreme Court ended up quoting from Intec several times in its opinion).

But the longer-term contribution of the Sinochem decision may not be as much in the narrow area of forum non conveniens, but more broadly in its clarification of what *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998) means. *Steel Co*. had held that "[w]ithout jurisdiction the court cannot proceed at all in any cause," and further held that a federal court may not assume jurisdiction for the purposes of deciding the merits of the case. Only one Term later, the Court in *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999), held that there is no mandatory "sequencing of jurisdictional issues," and thus, a court may dismiss for lack of personal jurisdiction without first establishing subject-matter jurisdiction.

This left quite a bit of confusion in the lower courts, and it was that confusion that led to the split on the forum non conveniens issue. As one law-review article we quoted in the Petition put it, the Supreme Court's "failure to categorically redefine the limits of the Steel rule has effectively opened Pandora's box to the speculating minds of courts and legal scholars." What ended up happening in the forum non conveniens area is that the Third Circuit (and the Fifth, Seventh—at least at the time—and Ninth Circuits) had read the *Steel Co*. bar on "hypothetical jurisdiction" as requiring courts to resolve personal and subject-matter jurisdiction both (even though Ruhrgas told them they could take those two in whatever order they chose) before taking up any other issue.

So we urged the Supreme Court that taking up our Petition would not only allow it to resolve the split that had emerged on the forum non conveniens issue, but would also provide a golden opportunity to clarify what the Steel Co. bar on hypothetical jurisdiction meant—that is, it meant that courts had to decide jurisdiction before reaching the merits, but not before reaching another "threshold, non-merits issue"—like forum non conveniens. The Court agreed with us, stating its holding as: "[A] district court has discretion to respond at once to a defendant's forum non conveniens plea, and need not take up first any other threshold objection," including subject-matter and personal jurisdiction. The Court further explained that forum non conveniens is a "threshold, non-merits issue" because "[r]esolving a forum non conveniens motion does not entail any assumption by the court of substantive law-declaring power."

We think it's a fair reading of the Sinochem decision that the Court clarified, for all contexts, and not just forum non conveniens, that the *Steel Co*. ban on hypothetical jurisdiction is only a ban on merits determinations. As the Court put it, quoting the Intec decision from the Seventh Circuit, "Jurisdiction is vital only if

the court proposes to issue a judgment on the merits." Certainly, this understanding harmonizes the Court's rulings—both before and after *Steel Co*.—in a wide variety of contexts, e.g., declining to adjudicate state-law claims on discretionary grounds without first determining whether the court has pendent jurisdiction over those claims, *Moor v. Alameda County,* 411 U.S. 693 (1973); abstaining under Younger v. Harris, 401 U.S. 37 (1971), without first determining whether the case presented an Article III case or controversy, *Ellis v. Dyson*, 421 U.S. 426 (1975); or dismissing under *Totten v. United States*, 92 U.S. 105 (1876), which prohibits suits against the Government based on covert espionage agreements, before addressing jurisdiction, *Tenet v. Doe*, 544 U.S. 1 (2005).

The logic of the Court's decision also suggests that suits involving international interests may be properly dismissed at the outset on other non-merits grounds, such as international comity, or exhaustion, or the political-question doctrine. In fact, the D. C. Circuit has already held that the political-question doctrine can be addressed before subject-matter jurisdiction under the Foreign Sovereign Immunities Act because the political question doctrine is itself a "jurisdictional limitation." *Hwang Geum Joo v. Japan*, 413 F.3d 45, 48 (D.C. Cir. 2005), cert. denied, 126 S. Ct. 1418 (2006).

But at the same time, it's important to understand the limits of the Court's holding. For one, the Court's decision does not say that courts ordinarily should dismiss a suit on forum non conveniens grounds at the outset. Quite the contrary: The Court emphasized that "[i]n the mine run of cases, jurisdiction will involve no arduous inquiry and both judicial economy and the consideration ordinarily accorded the plaintiff's choice of forum should impel the federal court to dispose of those issues first." (Emphasis added.) The only issue here was a federal court's power to do that in appropriate cases—as the Court said, "when considerations of convenience, fairness, and judicial economy so warrant," "[a] district court . . . may dispose of an action by a forum non conveniens dismissal, bypassing questions of subject-matter and personal jurisdiction."

For another, there's the lurking issue of conditional dismissals for forum non conveniens. (In our case, the dismissal was unconditional, because Sinochem itself had initiated a now-fully-completed suit in China's admiralty court, so there was no need for the district court to impose a condition that Sinochem agree to jurisdiction in China, or that Chinese courts accept jurisdiction.) While the Court technically left open the conditional-dismissal question, the logic of the opinion

suggests that even a conditional forum non conveniens dismissal issued prior to ascertaining jurisdiction would be permissible—that, too, would be a non-merits ruling, and the court would not be "propos[ing] to issue a judgment on the merits." Furthermore, as Doug Hallward-Driemeier, the Assistant to the Solicitor General (who was supporting us as amicus curiae), said at oral argument, when a court conditionally dismisses a case, it bases its ruling on its understanding of the facts as they bear on the analysis, such as that defendant agrees to waive any objection to jurisdiction; that "understanding of fact is a condition of the dismissal."

As our economy (and hence litigation) becomes more global (Greg will add that that's been a major change that he has seen over his 17 years of practicing law—the shift in his U.S. practice from mostly domestic disputes to mostly disputes having some international flavor), there are greater chances for foreign defendants to be haled into U.S. courts over mostly or entirely foreign disputes. So to what classes of cases might this ruling be particularly applicable? Obviously, where the asserted ground for federal jurisdiction is the Foreign Sovereign Immunities Act, the defendant is almost always a foreign individual or company, and the jurisdictional analyses can be lengthy and complicated: The Solicitor General noted in his brief that it would have been particularly convenient to dismiss on forum non conveniens grounds a suit against the Republic of Austria to obtain allegedly stolen Gustav Klimt paintings, *see Republic of Austria v. Altmann*, 541 U.S. 677 (2004), because it would have avoided years of litigation over Austria's sovereign immunity under the FSIA, and the parties also noted the recent decision in Turedi *v. Coca Cola Co.*, 2006 WL 3187156 (S.D.N.Y. Nov. 2, 2006), which allowed the district court to avoid resolving "immensely complex" questions of subject matter and personal jurisdiction in a suit brought by Turkish citizens alleging that they had been attacked and tortured by Turkish police at the direction of a Coca-Cola bottling joint venture in Istanbul. Another jurisdictional ground that comes to mind as bringing essentially foreign disputes into U.S. courts is the Alien Tort Claims Act, an ancient statute which has been the subject of some recent controversy and litigation, and which provides federal jurisdiction over tort claims made by aliens, alleging that the tort was "committed in violation of the law of nations or a treaty of the United States." Finally, of course, there are admiralty-jurisdiction cases like the Sinochem case itself. Here, it bears noting that, at least in the earliest days of forum non conveniens in the United States, that doctrine applied mostly in admiralty cases.

We have joked to one another that this is "the sort of case that only federal-jurisdiction dorks like us could love." And certainly it was a stealth decision the day it came out—the press covered some of the denials of certiorari issued that day with far more interest and enthusiasm. But we also think that this decision is going to play out over time as a profoundly important one in the way that litigation is pursued in the federal courts of the United States. On a personal note, the case was a lot of fun for both of us; we were proud to represent Sinochem in what we believe to be one of the first cases where a Chinese company came before the U.S. Supreme Court; and we are grateful to Opinio Juris for giving us an opportunity to relive this great experience.

Conference 2007 – A Reminder

As some of you will be aware, the **Journal of Private International Law Conference 2007** will be taking place at the **University of Birmingham on 26 – 27 June 2007**.

There is a full programme of international speakers, with both academics and practitioners presenting, as well as a keynote address by the **Right Honourable Lord Hope** together with Professor Jonathan Harris.

As we mentioned during the original conference announcement, *places are limited* and quite a few tickets have already been sold. If you wish to attend the conference, as well as the exclusive dinner on the evening of the first day, then I strongly encourage you to book your place as soon as possible.

If you have any questions, please email the conference secretary, Miss Emer McGahan, at conflicts-conference@contacts.bham.ac.uk.

I very much look forward to meeting you at the conference.

Rome I: New Rapporteur (and New Amendments) in the European Parliament Legal Affairs Committee

Following the appointment of *Maria Berger*, in January 2007, as Minister of Justice of Austria, the role of rapporteur on Rome I Proposal in the European Parliament Committee on Legal Affairs (JURI) has been taken on by *Cristian Dumitrescu*, vice-chairman of the JURI Committee, named on February 23rd 2007 (see the OEIL page on Rome I).

In order to allow Mr Dumitrescu to set out his proposed approach and timetable, the Committee decided in its meeting of February to re-open the deadline for tabling amendments (cf. the JURI-newsletter n. 3/2007).

At the meeting of 19 March 2007, a document was released (doc. n. PE 386.328v01-00 of 5 March 2007) containing 11 new amendments, 6 of which were presented by the rapporteur. The 'Rome I' file currently being examined by the JURI Committee is thus formed by three documents:

- **the original Draft report by Maria Berger** (doc. n. PE 374.427v01-00 of 22 August 2006: see our resumé here);
- **the first set of 54 amendments** (amendments 32-85: doc. n. PE 382.371v01-00 of 7 December 2006), presented at the meeting of the Committee of 20 December 2006: most part of the modifications proposed by the MEPs deals with art. 3 (amendments nn. 40-46), art. 4 (nn. 47-52) and art. 5 (nn. 53-67);
- **the second set of amendments** (amendments 86-96: doc. n. PE 386.328v01-00 of 5 March 2007), referred to above.

In addition, an **opinion was delivered** for the JURI Committee **by the Committee on Employment and Social Affairs** (rapporteur: Jan Andersson;

doc. n. PE 374.323v02-00 of 14 September 2006), exclusively focused on the conflict rule for employment contracts, in the light of the Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.

A closer look at some of the amendments presented by rapporteur *Dumitrescu* shows some potentially controversial issues:

- Recital 7, as modified by amendment 87, would **limit the party autonomy to a very narrow scope**:

[T]he parties' freedom to choose the applicable law can be exercised only in favour of the law of a Member State or of principles adopted by the Community legislator in accordance with the codecision procedure. In cases where the parties choose such principles as the applicable law, those principles apply without prejudice to the imperative provisions of the law applicable in the absence of choice and of other Community legal instruments.

- accordingly to recital 7, art. 3(2) of Rome I Proposal, on the **choice as the applicable law of a non-State body of law**, would be redrafted as follows (amendment 90):

The parties may also choose as the applicable law the principles and rules of the substantive law of contract, provided that those principles and rules have been incorporated in a Community instrument adopted in accordance with the procedure referred to in Article 251 of the Treaty. However

(a) questions relating to matters governed by such principles or rules which are not expressly settled by them shall be governed in accordance with the law applicable in the absence of a choice under this Regulation;

(b) the imperative provisions of the law applicable in the absence of choice under this Regulation shall remain applicable, in particular in the case of consumer protection. The application of these principles and rules shall not affect the application other relevant provisions of Community law.

- a **new art. 4a** is introduced **on the law applicable to real property rights** (amendment 91):

Notwithstanding Articles 3 and 4, the law applicable to real property rights,

including security rights in the form of immovable property, shall be the law of the place in which the immovable property is situated.

Other amendments presented by the rapporteur deal with voluntary agency (amendment 94: art. 7), form of contract on rights in immovable property (amendment 95: art. 10(4)) and art. 13 on voluntary assignment and contractual subrogation (amendment 96).

The Draft 'Rome I' report is scheduled for adoption in the JURI Committee on 3 May 2007. The subsequent vote at plenary session by the Parliament is scheduled on 22 May 2007 (cf. the OEIL page on Rome I proposal).