Lis pendens in Spain (autonomous PIL)

Spanish autonomous PIL regulation is scattered and incomplete. In particular, we still lack of a rule on international lis pendens. The case law position on the matter seems quite clear, however: in the absence of any international agreement, the international lis pendens defense is not allowed: as the foreing ruling does not produce res judicata effect until it is recognized in Spain, there is no real risk of conflicting decisions. That's why the Supreme Court's (Tribunal Supremo, TS) decision of February 23, 2007 has attracted our attention. In that case a lawsuit between the same parties was simoultaneously pending in the U.S. and Madrid. The appellant claimed that the Courts of first and second instance had not observed "the jurisprudence reflected in the Judgments of January 31 1921, June 19 1990 and other consistent case law …"; and that by doing so they had infringed Art. 533.5 º LEC 1881 (old lis pendens rule for purely domestic litigation).

Instead of displaying the customary arguments used for rejecting lis pendens, what the TS said was: "the lis pendens defence can be raised, and the Spanish court would have jurisdiction to decide on it. Whether or not it would be effective remains a different issue, to be solved considering the events taking place throughout the process". Therefore, the Supreme Court seems to recognize that it is possible to plead and discuss the international lis pendens defence in the light of the peculiarities of each case. In the specific case before the Supreme Court, the exception was rejected: but not because there is no international treaty between Spain and the United States, or because the foreign ruling would not be recognized in Spain as long as the issue is still pending before our courts. Instead, the Supreme Court directly assumes that a lawsuit filed abroad requesting for revocation of a contract, and a national claim based on breach of the same contract, may affect each other: if the former is accepted, "there would be res iudicata" in the latter.

Since the Supreme Court's line of arguments is not totally consistent (citations of case law supporting the court opinion are purely internal), we do not dare to say that our TS was really aware of the differences between domestic and international lis pendens. However, we would like to think that his decision adds

interesting data to the Spanish debate on the admissibility, conditions and limits of international lis pendens defence.

Add: Professor Santiago Álvarez González comments the TS decision in Revista Española de Derecho Internacional, 2008, vol. I.

Ghassemi v. Ghassemi: An Interesting Decision from the Louisiana Court of Appeal

This is certainly not the first case, or the last case, to discuss the inherent conflict that results when a state provides that foreign marriages should be recognized, but nonetheless bans a certain form of marriage that is permitted elsewhere. It does, however, illustrate a noteworthy approach where the two states are worlds-apart in their public policies.

The case of *Ghassemi v. Ghassemi* involves divorce proceedings between persons married in 1976. The trial court refused to recognize their marriage for two reasons. First, they were married in Iran. Second, they are first cousins.

On the first issue, the trial court refused to "recognize any document, decree, judgments[,] statutes or contracts . . . whatsoever from the country of Iran." In its view, "that country has been declared by itself and by its leader to be an enemy of the United States. The United States has had no diplomatic relations with that country for 28 years, and they are not a signatory to the Hague Convention with respect to marriages." It didn't seem to matter that when the couple was married in 1976, Iran was a U.S. ally.

This decision seemed quite spurious, and was overturned on appeal. Under this reasoning, all couples married in Iran would have been unmarried for all legal purposes, depriving them of the ability to inherit under the laws of intestate succession, call on the standard legal procedures for property settlement upon

divorce, obtain various insurance benefits that were available only to married couples, etc. This, for no reason other than that the leaders of the country in which they were married are enemies of the United States. According to the Court of Appeal, "[i]t would be a questionable policy indeed to base the status of private individuals on the fluctuation of international relations," and on the poor behavior of the leaders of the country in which they were married.

The second issue took a bit more ink to resolve. Iran permits marriage between first cousins. Like many states, Louisiana law bars marriage between first cousins, but it also provides that foreign marriages should be recognized, even if they would otherwise be illegal, unless it violates "a strong public policy" of the state.

In measuring the "strength" of Louisiana's policy against first-cousin marriage, the Court of Appeal looked, first, to whether Louisiana law categorically prohibits all first-cousin marriages and sexual relationships; the court found that it did not. *Ghassemi*, Slip. op. at 22 ("we note that the Louisiana Legislature has not expressly outlawed marriages between first cousins regardless of where they are contracted as it has emphatically done in the case of purported same sex marriages" (emphasis in original)); see also id. at 24 ("relations between first cousins are not prohibited by our criminal incest statute"). It also noted that "marriage to first cousins has not always been prohibited in Louisiana." Id. at 17-18. (noting that the change in the law came in 1902).

While this may have been enough to reverse the decision of the trial court, the Court of Appeal also looked to various other sources as to the depth of the prohibition on first cousin marriage, including:

• "natural law" (which Louisiana courts seem to refer to much more often than do other state courts, perhaps because of Louisiana's civil law tradition),
• "Bible's Book of Leviticus, the font of Western incest laws" (which does not prohibit first-cousin marriages)
• the views of other U.S. states (of which about half allow some or all first-cousin marriages),
• the views of other "western countries" (interestingly, "the U.S. is unique among western countries in restricting first cousin marriages.")
Id. at 24-26.

Surveying these sources, the court eventually found that "although Louisiana law expressly prohibits the marriages of first cousins, such marriages are not so odious as to violate strong public policy of this state." Id. at 22.

Like other who have commented on this case (Hat Tip to the editors at the Volokh Conspiracy for pointing it out), I also generally agree that American courts shouldn't refer to modern foreign law in interpreting the meaning of the U.S. Constitution; for sure, American constitutional practices have their own history, text, and have been crafted in accordance with American life and our unique political thought. But is it a mistake to cast this decision into that same ilk of those decisions that have sparked controversy and, in some quarters, restrained outrage? *Compare Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down a state sodomy law as inconsistent with the U.S. Constitution, based partly on a survey of laws in other countries) *with id.* (Scalia, J., dissenting) (characterizing the Court's discussion of foreign laws as "meaningless" and "dangerous dicta," since "this Court … should not impose foreign moods, fads, or fashions on Americans") Using a comparative survey of foreign law to determine the scope of non-Constitutional domestic legal principles is often sensible—as even Justice Scalia has agreed, *see Schriro v. Summerlin*, 542 U.S. 348 (2004)—where the question is an empirical one. See id. (referencing the laws of "other countries" to determine whether judicial fact-finding, as opposed to juries, so "seriously diminishe[s]" accuracy as to produce an "impermissibly large risk" of injustice). But here, the case directly involves the scope of the State's "public policy" exception to marriage recognition. Isn't this a classic issue that is necessarily bound-up in the individualized history and political fabric of the forum state, which should be decided by referencing only that State's authorities? Its probably a distinction without a difference here—even had the court stopped before its comparative survey, there was still likely enough evidence that "such marriages are not so odious as to violate strong public policy" of Louisiana.

On Spanish Civil War and Dictatorship: why not claim abroad?

The twentieth century has been the century of human rights vindication. Its last two decades have witnessed a very special phenomenon in this regard: the privatization of lawsuits brought for crimes against the most basic human rights. Individuals, singly or grouped, seek civil redress before domestic courts against the State (its officers, its agents; also multinational corporations), claiming it has incurred in liability through the commission of acts condemned by International Law.

USA has became an unavoidable reference to human rights litigation due to two federal laws: the Alien Torts Claims Act, 1789 (*ATCA*) and the Torture Victims Protection Act of 1991 (*TVPA*). The Acts allow foreign claimants to engage in civil actions against individuals associated with foreign States, claiming damages for conduct prejudicial to human rights, which is proscribed by International Law. Similar ideas are germinating in other countries, like Canada and recently also the United Kingdom: and not only in the academic arena.

While Greece or Italy still evokes the Second World atrocities, Spain focuses in the Civil War (1936-1939) and the Franco regime (1939-1975) outrages. On September 22, associations for the recovery of historical memory published their estimate number of missing persons during that periods- no less than 143,000. Within this figure are the names of Republicans who died in Nazi concentration camps in Germany, Austria and France, and others who died in exile. On Oct. 16 Judge Baltasar Garzon, our most well-known judge thanks to the Pinochet case, declared himself competent to investigate these disappearances and related crimes.

Maybe “dirty line will be washed at home” this time. Judge Baltasar Garzon works at the *Audiencia Nacional*, which has no jurisdiction in civil matters. In Spain, however, the civil claim can be accumulated to the criminal proceedings. But, if there is no luck (or even if any), will the civil action be tried elsewhere? Spaniards have begun to appreciate the advantages offered by U.S. procedural and

substantive law (e.g., in cases of maritime pollution; see also G. Cuniberti "Jurisdiction to prevent the End of the Wordl"). And besides, it may not be necessary to go that far: On February 2008 Lord Archer of Sandwell (United Kingdom) presented the *Torture (damages) Bill.* If the *Bill* becomes law (although it seems unlikely), it would provide the victim of torture with a civil action in England/Wales; that the facts took place elsewhere would be of no relevance at all.

At any rate, the idea of those Spanish cases being judged elsewhere requires more than universal civil jurisdiction covering acts described as crimes against humanity. The foreing judge would have to decide whether to apply -to take into account?- Spanish Law on amnesty (this morning the Spanish Public Prosecutor appealed against Garzon's decision on amnesty grounds); or Law 52/2007, the so-called "Ley de momria histórica", recognizing and extending rights and establishing measures for those who suffered persecution or violence during the Civil War and the Dictatorship. Art. 4 of the Law provides those who suffered retaliation during the Civil War and the Dictatorship with the right to obtain a "Declaración de reparación y reconocimiento personal" (Declaration of apology and personal reconnaissance); but such a statement does not imply recognition of responsibility of the State or of any government, nor does it lead to monetary redress or compensation .

French Supreme Court Applies Blocking Statute

I should have reported much earlier this interesting case of the French Supreme Court for Private and Criminal Matters (*Cour de cassation*) which applied for the first time the French 1980 statute which criminalizes cooperation with U.S. discovery procedures. A lawyer was fined € 10,000 for seeking information for the purpose of Californian proceedings.

The French blocking statute is the amended version of a 1968 statute which, at

the time, prohibited communication to “foreign authorities” of any document or information relating to carriage by sea if such communication would have been contrary to “the rules of international law or likely to hurt the sovereignty of the French state”. In 1980, this provision (art. 1) was amended, and another one (art. 1bis) was added, which prohibits any person from seeking to obtain or communicating documents or information for the purpose of constituting evidence in foreign judicial or administrative proceedings. The new art. 1bis applies to documents or information of almost any kind (i.e. of economic, commercial, industrial, financial or technical kind). The statute imposes criminal penalties, which can go up to 6 months of prison, and a fine up to €18,000.

The first application of the law took place in the context of the Executive Life Insurance case. The lawyer was the counsel in France of the California insurance commissioner. In 1999, the California commissioner had initiated civil proceedings in Los Angeles against various French parties, including Crédit Lyonnais bank and insurance company MAAF. The central issue was the purchase of Californian Insurance company Executive life at the beginning of the 1990’s. Californian authorities wondered whether MAAF had made this purchase in violation of California law. It was thus critical for the American proceedings to get information on the circumstances surrounding the purchase. The American party sought information both through rogatory commissions issued in accordance with the 1970 Hague Convention and through this lawyer, who decided to call directly a member of the board of MAAF in France.

According to the trial judges,the lawyer, Christopher X., talked to Jean-Claude X., who may well be Jean-Claude Lecarpentier, a top executive of MAAF. Christopher alleged that members of the board had made decisions at the time of the purchase of Executive life outside of regular meetings, and that there was a need to provide better information on what had actually happened to some of the members of the board. It seems that he hoped that Jean-Claude would answer that that was not the way things had happened, and would then give him hints on what the members knew and thought they were doing when they decided to purchase Executive Life.

Instead, Jean-Claude answered that he had never been in any board where

decisions were made in the doorway. Jean-Claude then wrote to the French prosecutor about that conversation. Christopher was later charged with infringing the blocking statute and sentenced to pay a € 10,000 fine. In a judgment of 12 December 2007, the *Cour de cassation* rejected an appeal against the sentence.

Is this judgement a signal of the willingness of the French Supreme court to eventually apply the statute? This is unclear. From the French perspective, the Executive Life case is truly exceptional. It was widely perceived by French elites as an unacceptable pressure exercised by Californian authorities over French public entities and thus, eventually, over the French state. This might not be completely foreign to the solution adopted by the judgement.

AG Opinion in Case "Deko Marty Belgium"

Yesterday, the opinion by *Advocate General Ruiz-Jarabo Colomer* in case C-339/07 (*Rechtsanwalt Christopher Seagon als Insolvenzverwalter über das Vermögen der Frick Teppichboden Supermärkte GmbH v Deko Marty Belgium N.V.*) has been released.

The case concerns the delimitation of Regulation (EC) No. 1346/2000 (Insolvency Regulation) and Regulation (EC) No. 44/2001 (Brussels I Regulation) or – more precisely – the question of whether Art. 3 (1) Insolvency Regulation covers actions to set a transaction aside in the context of insolvency, although they are not mentioned explicitly.

The background of the case is as follows: The debtor, a German private limited company, paid an amount of 50.000 EUR to a Belgian company (defendant). Even though it was a Belgian company having its registered office in Belgium, the money was paid into an account in Germany. The day after, the debtor applied successfully for the opening of the insolvency proceedings at a German local court. In the following, the insolvency administrator (claimant) reclaimed the 50.000 EUR from the defendant by means of an action to set a transaction aside.

The Regional Court (LG Marburg, 2 August 2005 – 2 0 209/04) as well as the Higher Regional Court (OLG Frankfurt, 26 January 2006 – 15 U 200/05) held that the Brussels I Regulation had to be applied and consequently stated that German courts lacked international jurisdiction since the defendant's registered office was in Belgium.

In the following, the German *Bundesgerichtshof*, regarding the interpretation of Art. 3 (1) Insolvency Regulation and Art. 1 (2) lit. b) Brussels I Regulation as being ambiguous, referred – with decision of 21 June 2007 (IX ZR 39/06) – the **following questions** to the ECJ for a preliminary ruling:

> *On interpreting Article 3(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings and Article 1(2)(b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, do the courts of the Member State within the territory of which insolvency proceedings regarding the debtor's assets have been opened have international jurisdiction under Regulation (EC) No 1346/2000 in respect of an action in the context of the insolvency to set a transaction aside that is brought against a person whose registered office is in another Member State?*
> *If the first question is to be answered in the negative:*
>
> *Does an action in the context of the insolvency to set a transaction aside fall within Article 1(2)(b) of Regulation (EC) No 44/2001?*

Now, Advocat General *Ruiz-Jarabo Colomer* **suggests** in his **opinion** to answer these questions as follows:

> ***Art. 3 (1) Regulation (EC) No. 1346/2000 has to be interpreted as meaning that the court of a Member State before which insolvency proceedings are pending has jurisdiction with regard to an action in the context of insolvency to set a transaction aside against an addressee of avoidance having its registered office in another Member State.***

(*Approximate translation from the German version of the opinion.)*
In his opinion, the Advocate General first gives an overview of the historical development of the a*ctio pauliana* before outlining the Court's previous judgments in the present context – *Reichert* and *Gourdain*. Here, the Advocate General summarises that the Court has held so far that actions to set aside are considered as bankruptcy or analogous proceedings – and are therefore excluded from the scope of the Brussels I Convention/Regulation – if they are closely

connected with those proceedings. The question whether a close connection in this terms exists, is answered in view of the action's structure in the respective national legal system (para. 39).

In the following, the Advocate General examines whether the entry into force of the Insolvency Regulation has led to any changes in this respect. He argues that the judgment in *Gourdain* is still valuable since it shows that – due to the fact that Community law does not provide for a uniform action to set a transaction aside – the legal nature of the action is of high significance with regard to the question whether it is covered either by the Brussels I or the Insolvency Regulation (para. 55). The fact that the (German) action to set a transaction aside in the context of insolvency is so closely connected with insolvency leads – in the light of *Gourdain* – to the result that it is not covered by the general Community rules on jurisdiction, i.e. the Brussels l Regulation (para. 58). Since, however, an examination of Regulation (EC) No. 1346/2000 shows the Council's intention to regulate the proceeding with regard to the action to set a transaction aside in the context of insolvency (para. 50), the Advocate General supports the view that Art. 3 (1) Insolvency Regulation establishes the jurisdiction of the insolvency court (para. 51). Due to the particularities of actions to set a transaction aside in the context of insolvency, the insolvency court's jurisdiction should be, according to the Advocate General, a relative exclusive jurisdiction, i.e. it is for the insolvency administrator to choose the court which appears to be – in view of the insolvency asset – the most suitable one (para. 69).

The full text of the opinion can be found, inter alia, in Italian, French and Spanish at the ECJ's website.

See with regard to the reference and the background of the case also our previous post which can be found here and our previous post on a related article which can be found here.

ECJ: Judgment in Case “Grunkin and Paul”

Today, the ECJ delivered its judgment in case C-353/06 (*Grunkin and Paul*) which has been awaited with high interest.

As reported in previous posts, the background of the case is as follows: The case concerns a child who was born in Denmark having, as well as his parents, only German nationality. The child was registered in Denmark – in accordance with Danish law – under the compound surname *Grunkin-Paul* combining the name of his father (*Grunkin*) and the name of his mother (*Paul*), who did not use a common married name. After moving to Germany, German authorities refused to recognise the surname of the child as it had been determined in Denmark, since according to German private international law (Art.10 EGBGB) the name of a person is subject to the law of his/her nationality, i.e. in this case German law, and according to German law (§ 1617 BGB) parents who do not share a married name shall choose *either* the father’s or the mother’s surname to be the child’s surname.

The Local Court *(Amtsgericht) Niebüll* which was called to designate the parent having the right to choose the child’s surname, sought a preliminary ruling of the ECJ on the compatibility of Art.10 EGBGB with Articles 12 and 18 EC-Treaty. However, the ECJ held that it had no jurisdiction to answer the question referred since the referring court acted in an administrative rather than in a judicial capacity (judgment of 27 April 2006, C-96/04). In the following, the parents applied again – without success – to have their son registered with the surname *Grunkin-Paul*. The parents’ challenge to this refusal was heard, by virtue of German procedural law, by the *Amtsgericht Flensburg*. The *Amtsgericht Flensburg* held that it was precluded from instructing the registrar to register the applicants’ son under this name by German law. However, since the court had doubts as to whether it amounts to a violation of Articles 12 and 18 EC-Treaty to ask a citizen of the European Union to use different names in different Member States, the court referred with decision of 16th August 2006 (69 III 11/06) the **following questions** to the ECJ for a **preliminary ruling:**

> *In light of the prohibition on discrimination set out in Article 12 of the EC*

> *Treaty and having regard to the right to the freedom of movement for every citizen of the Union laid down by Article 18 of the EC Treaty, is the provision on the conflict of laws contained in Article 10 of the EGBGB valid, in so far as it provides that the right to bear a name is governed by nationality alone?*

Thus, the referring court essentially asked whether Artt. 12, 18 EC preclude authorities of a Member State from refusing to recognise a surname which has been determined and registered in a second Member State in which the person – who has only the nationality of the first Member State – was born and has been resident.

The **Court** now **answered** the question referred by the *Amtsgericht Flensburg* as follows:

> ***In circumstances such as those of the case in the main proceedings, Article 18 EC precludes the authorities of a Member State, in applying national law, from refusing to recognise a child's surname, as determined and registered in a second Member State in which the child – who, like his parents, has only the nationality of the first Member State – was born and has been resident since birth.***

In its reasoning, the Court first (para. 16) states that the case falls within the **scope of the EC-Treaty**. The Court stresses that even though the rules governing a person's surname fall within the competence of the Member States, the latter have to, when exercising their competence, comply with Community law (unless the case concerns an internal situation without any link with Community law).

In the following, the Court holds with regard to **Art. 12 EC**, that the child is not discriminated against on grounds of nationality (para. 19 et seq.).

However, with regard to **Art. 18 EC**, the Court states that "[h]aving to use a surname, in the Member State of which the person concerned is a national, that is different from that conferred and registered in the Member State of birth and residence is liable to hamper the exercise of the right, established in Article 18 EC, to move and reside freely within the territory of the Member States." (para. 22)

The Court refers in this context to its judgment in *Garcia Avello* and sets forth that – also in the present case – **serious inconveniences** may be caused due to the discrepancy in surnames (para. 23 et seq.). Thus, according to the Court "[…] every time the child concerned has to prove his identity in Denmark, the Member State in which he was born and has been resident since birth, he risks having to dispel doubts concerning his identity and suspicions of misrepresentation caused by the difference between the surname he has always used on a day-to-day basis, which appears in the registers of the Danish authorities and on all official documents issued in his regard in Denmark, such as, inter alia, his birth certificate, and the name in his German passport." (para. 26)

This **obstacle to free movement** could only be **justified** if it was based on "objective considerations and was proportionate to the legitimate aim pursued" (para. 29). **This is, however, according to the Court, not the case.** Thus, the Court does not regard the arguments brought forward by the German Government such as, inter alia, that the connecting factor of nationality constituted "an objective criterion which makes it possible to determine a person's surname with certainty and continuity" (para. 30) as sufficient. Rather the Court states that "[n]one of the grounds put forward in support of the connecting factor of nationality for determination of a person's surname, however legitimate those grounds may be in themselves, warrants having such importance attached to it as to justify […] a refusal by the competent authorities of a Member State to recognise the surname of a child as already determined and registered in another Member State in which that child was born and has been resident since birth." (para. 31)

See with regard to this case also our previous post on Advocate General Sharpston's opinion which can be found here as well as our post on the referring decision of the Amtsgericht Flensburg which can be found here and the post on the first judgment in this case (then known as Standesamt Stadt Niebüll) which can be found here.

BIICL Research Fellowship in International Private Law

The British Institute of International and Comparative Law is seeking to appoint a Senior Research Fellow in International Private Law.

The advertisement can be found here and a full job description can be found here. The post is a research post, with no teaching duties. The fellow will be appointed for five years and be expected to lead the Institute research and events programme in international private law.

The closing date for applications is November 10.

Japan Accedes to CISG

We do not usually report on uniform law, but Japan was one of the few major trading powers which had not acceded to the CISG.

The report of the United Nations Information Service is here.

Is the UK next?

EC Commission Presents a Proposal for a Directive on

Consumer Rights

On 8 October 2008, Commissioner Meglena Kuneva (DG Health and Consumers) presented a new Proposal for an EC directive on consumer rights (COM(2008) 614) (see the Consumer Acquis webpage).

The proposal aims to revise four existing directives on consumer contracts (the cornerstones of EC legislation in the field: Dir. 85/577/EEC on contracts negotiated away from business premises, Dir. 93/13/EEC on unfair terms in consumer contracts, Dir. 97/7/EC on distance contracts, Dir. 1999/44/EC on consumer sales and guarantees) merging them into a single horizontal instrument based on full-harmonisation (i.e. Member States cannot maintain or adopt provisions diverging from those laid down in the Directive), which regulates the common aspects "in a systematic fashion, simplifying and updating the existing rules, removing inconsistencies and closing gaps".

The minimum harmonisation approach (i.e. Member States may maintain or adopt stricter consumer protection rules), adopted in the previous EC legislation in the field, was abandoned in order to avoid fragmentation in the level of consumer protection in the Member States (Impact Assessment Report, p. 8):

> *The effects of the fragmentation are felt by business because of the conflict-of law rules, and in particular the Rome I Regulation, which obliges traders not to go below the level of protection afforded to foreign consumers in their country. As a result of the fragmentation and Rome I, a trader wishing to sell cross-border into another Member State will have to incur legal and other compliance costs to make sure that he is respecting the level of consumer protection in the country of destination. These costs reduce the incentive for businesses to sell cross-border, particularly to consumers in small Member States. Such costs are eventually passed on to consumers in the form of higher prices or, worse, businesses refuse to sell cross-border. In both cases consumer welfare is below the optimum level.*

Quite interestingly, under a conflict-of-laws perspective, one of the main concerns of the Commission was to achieve a sound coordination between the proposed directive and the Rome I Regulation.

All the policy options which were assessed to draft the proposed legislation took into account the recent adoption of the regulation on the law applicable to contractual obligations (see the 6 options listed in the Explanatory Memorandum of the Commission, p. 5, and analysed in the Impact Assessment Report, p. 16 ff., and in the Annexes, p. 18 ff.):

1. *Policy option 1: Status Quo or baseline scenario, including the effects of Rome I and forthcoming legislation.*
2. *Policy option 2: Non legislative approaches, including information campaigns and financial contributions and the effects of Rome I.*
3. *Policy option 3: Minimum legislative changes (harmonisation of basic concepts where benefits clearly outweigh costs), including the effects of Rome I.*
4. *Policy option 4: Medium legislative changes (including PO 3 plus and the effects of Rome I).*
5. *Policy option 5: Maximum legislative changes (including PO 4 plus far-reaching proposals granting new consumer rights as well as the effects of Rome I).*
6. *Policy option 6: Minimum legislative changes (PO 3) or Medium legislative changes (PO 4) combined with an internal market clause applying to the non-fully harmonised aspects (such as general contract law aspects outside the scope of the Consumer Acquis).*

The latter option (insertion of an internal market clause) was excluded, since it was considered to be in contrast with the protective conflict rule of Art. 6 of the Rome I Regulation (Impact Assessment Report, p. 24):

> *[A]n alternative to full harmonisation was put forth in the form of a minimum harmonisation approach combined with an Internal Market clause. This approach has been discussed during the consultation process.*
>
> *Such an Internal Market clause could have taken the form of a mutual recognition clause or of a clause on the country of origin principle for the aspects falling within the scope of a future Directive and not subject to full harmonisation. A mutual recognition clause would give Member States the possibility to introduce stricter rules in their national law, but would not entitle a Member State to impose its own stricter requirements on businesses*

established in other Member States in a way which would create unjustified restrictions to the free movement of goods or to the freedom to provide services. A clause based on the country of origin principle would give Member States the possibility to introduce stricter consumer protection rules in their national law, but businesses established in other Member States would only have to comply with the rules applicable in their country of origin.

Both variants of the Internal Market clause met considerable opposition from several categories of stakeholders. […] Regulatory fragmentation combined with the Internal Market clause would achieve legal certainty for traders, but not for consumers, who would be subject to different laws with different levels of protection.

Finally, an Internal Market clause which would systematically subject the contract to the law chosen by the parties (which will normally be the law designated as applicable under the trader's standard contract terms) or to the law of the country of origin (i.e. the country where the trader is established) goes against the newly-adopted Rome I Regulation on the law applicable to contractual obligations. Indeed the clause would contrast with Article 6(1) of the Rome I Regulation, which provides that the law applicable to consumer contracts, in the absence of a choice made by the parties, is the law of the country where the consumer has his habitual residence (i.e. the law of the country of destination). It would also be in contrast with Article 6(2) of the Regulation which provides that the law chosen by the parties (e.g. the law of the country of the trader) cannot deprive the consumer of the protection granted by the law of his country of residence. Such an Internal Market clause would not be acceptable by the great majority of Member States, as evidenced by the public consultation on the Green Paper.

The text of the new directive, in the current version proposed by the Commission, should not, *prima facie*, interfere with the application of the conflict rules of the Rome I Regulation, avoiding problems such as those arising from the e-commerce directive or from clauses inserted in the previous consumer directives (see for instance Art. 6(2) of Directive 93/13 on unfair contractual terms). See Recital no. 10 and no. 59:

(10) The provisions of this Directive should be without prejudice to Regulation

(EC) No 593/2008 of the European Parliament and of the Council applicable to contractual obligations (Rome I);

(59) The consumer should not be deprived of the protection granted by this Directive. Where the law applicable to the contract is that of a third country, Regulation (EC) No 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I) should apply, in order to determine whether the consumer retains the protection granted by this Directive.

Third Issue of 2008's Revue Critique Droit Int'l Privé

The third issue of French *Revue Critique de Droit International privé* for 2008 will be released shortly. It will include four articles, all relating to conflict issues.

In the first article, Charalambos Pamboukis, who is a professor at the university of Athens, Greece, explores the renewal and metamorphosis of recognition as a method to address conflicts problems (*La renaissance-métamorphose de la méthode de la reconnaissance*). The English abstract reads:

The recent renewal of a methodology of recognition is the result of two factors. First, a political factor. Globalisation requires international coherence for private relationships, while the construction of Europe reconstitutes a community of laws. A paradigm change emerges. Second, a technical factor. Traditional conflict rules are not adapted to the recognition of legal relationships which already exist. The characteristic of the method of recognition is its function of confirmation and reception, and its object, which is a concrete, pre-existing legal relationship. It excludes any recourse to the conflict rule, but it does not necessarily represent an underhand form of lex forism nor does it signify reverse discrimination. But its scope is still uncertain, since it covers relationships which have been consecrated by an official but

created by private actors. The latter distinction could contribute to clarify the much debated issue.

In the second second article, Marie-Elodie Ancel wonders what the Rome I Regulation will change for distribution contracts (*Les contrats de distribution et la nouvelle donne du règlement Rome I*). The author, who is a professor of international private law at Paris Val-de-Marne (Paris XII) university, has kindly provided the following abstract:

According to French case law, distribution contracts are governed by the law of the manufacturer in the absence of a choice of law and the forum contractus is determined under Article 5.1 a) of the Brussels I Regulation. This study examines how the French Cour de cassation has been led to these solutions and how Article 4.1 and Recital 17 of the Rome I Regulation take the opposite course.

The third article is a comprehensive study of the Rome II Regulation by Geneva professor Thomas Kadner Graziano (*Le nouveau droit international privé communautaire en matière de responsabilité extracontractuelle*).

Finally, the fourth article is an essay on class actions in international private law building on the American *Vivendi Universal* case (*Régulation de l'économie globale et l'émergence de compétences déléguées : sur le droit international privé des actions de groupe (à propos de l'affaire* Vivendi Universal)). Its author is Horatia Muir Watt, who teaches at Paris I university.

At the present time, I do not have an English abstract for the last two pieces.