PIL at law teachers' conference in Pretoria

PIL abstracts of law teachers' conferenceA special session on Private International Law was held at the conference of the Society for Law Teachers of Southern Africa, held in Pretoria from 21 to 24 January 2008.

The following papers were delivered:
• Classification and liberative prescription in private international law by Jan Neels
• The role of Private International Law in International Trade by Eesa A Fredericks
• Could a South African court be expected to apply the CISG by virtue of article 1(1)(b)? by Marlene Wethmar-Lemmer
• The Strict Approach to Party Autonomy and Choice of Law in E-contracts in South Africa: Does the Approach Render South Africa an Unacceptable Jurisdiction? by Omphemetse Sibanda
• Regional organisations and the jurisdiction of their dispute settlement bodies by Thalia Kruger

(Follow the link at the top for the abstracts and contact details of the authors.)

Max-Planck Event: Brussels Jurisdiction and Common-Law Jurisdiction

Max Planck Institute for Comparative and International Private Law organizes on 4 February 2008 (17:00) a guest lecture to be given by Professor Adrian Briggs (University of Oxford, UK).

Professor Briggs' lecture is titled "**Brussels Jurisdiction and Common Law Jurisdiction: understanding and misunderstanding what courts may be asked to do**".

Essay Competition in Private International Law

We are pleased to announce

The CONFLICT OF LAWS .NET Essay Competition in Private International Law
Sponsored by Clifford Chance LLP and Hart Publishing

The Competition is open to any student of a higher education institution anywhere in the world, writing in English on any aspect of private international law.

First prize: **$500**, plus **$300** worth of Hart Publishing books.
Second prize: **$250**, plus **$150** of Hart Publishing books.
Third prize: **$150**, plus **$100** of Hart Publishing books.
(All figures are in US dollars)

The best essays will also be submitted for consideration to the Journal of Private International Law.

Deadline: **1 September 2008 at 6pm GMT**. All entries, and any questions, should be **submitted by email** to essay@conflictoflaws.net.

For more information, including the rules on eligibility, format and length, please see the **Essay Competition homepage** (https://conflictoflaws.de/essay-competition).

Conference: The new European Choice-of-Law Revolution – Lessons for the United States?

On **Saturday 9th February 2008**, *Duke University School of Law* will host an international conference entitled, "The New European Choice-of-Law Revolution: Lessons for the United States." Here's the blurb:

> *In a globalizing world of interdependent legal systems, determining which laws apply to international private transactions is crucial. Choice of Law, the field that deals with these questions, was once so vibrant in the U.S. that we spoke of a veritable choice-of-law-revolution in the sixties and seventies. At that time, Europeans watched, with a mixture of fascination and disdain, these developments at the forefront of scholarship in this field.*
>
> *Now, the pendulum has swung. The field is in a crisis in the United States, unattractive to scholars, and disliked by courts. By contrast, it is thriving in Europe. The most important choice-of-law questions are being addressed wholesale in the European Union. Rules are being unified in Europe-wide codifications, especially two regulations promulgated in 2007 and 2008 dealing with contractual and non-contractual obligations, respectively.The European Court of Justice is rendering important decisions and academics are engaging in active discussions and debates.*
>
> *After the American choice-of-law revolution in the sixties and seventies, are we now observing a new European choice-of-law revolution? Can European developments incite reforms and rekindle excitement in the U.S., as earlier American developments incited reforms in Europe? Alternatively, are European developments a model of how things should not be done?*
>
> *This conference brings together leading scholars from both the United States and Europe to engage in debate and comparative examination of approaches taken in Europe and the United States, with an eye towards renewing interest here in the United States. Methodological issues to be discussed include, federalization of choice of law, choice of law as an instrument of market regulation and methodological approaches. Substantive issues include choice of*

law in family, tort, contract, and corporate law. There will be ample time for the panelists to field questions and discuss these issues with those attending.

Sponsored by Duke University Center for International & Comparative Law in collaboration with the Tulane Law Review. Students are encouraged to attend.

The programme:

Saturday, February 9, 2008
Registration and Continental Breakfast 8:30 – 9:00

Welcome and Opening Remarks 9:00 – 9:15
Dean David Levi (Duke Law School)
Ralf Michaels (Center for International and Comparative Law)
Haller Jackson (Tulane Law Review)

Part I – Specific Areas of Law
Contract and Tort Law 9:15 – 10:45
Panelists:
Patrick Borchers, Professor of Law, Vice-President for Academic Affairs, Creighton University School of Law
Jan von Hein, Professor of Law, Universität Trier
Dennis Solomon, Professor of Law, Universität Tübingen
Symeon Symeonides, Professor of Law, Dean, Willamette College of Law

Family Law 11:00 – 12:15
Panelists:
Katharina Boele-Woelki, Professor of Law, Universiteit Utrecht
Marta Pertegás, Associate Professor International Private Law, Universiteit Antwerpen
Linda Silberman, Martin Lipton Professor of Law, New York University School of Law

Lunch Break: 12:15-13:30

Corporate Law 13:30 – 14:45
Panelists:
Larry Catá Backer, Professor of Law, Penn State Dickinson School of Law, Visiting Professor of Law, Tulane University Law School

Jens Dammann, Assistant Professor of Law, University of Texas School of Law
Onnig Dombalagian, Associate Professor of Law, Tulane University Law School

Part II -Methodology
Methods and Approaches 14:45 – 16:15
Moderator: TBA
Panelists:
Richard Fentiman, Solicitor, Reader in Private International Law, University of Cambridge Faculty of Law
Ralf Michaels, Professor of Law, Duke University School of Law
William A. Reppy Jr., Charles L. B. Lowndes Emeritus Professor of Law, Duke University School of Law
William M. Richman, Professor of Law, The University of Toledo College of Law

Internal and External Conflicts, Federalism and Market Regulation 16:30 – 18:00
Panelists:
Mathias W. Reimann, Hessel E. Yntema Professor of Law, University of Michigan Law School
Jürgen Basedow, Professor of Law, Max Planck Institute for Comparative and International Private Law
Horatia Muir Watt, Professor of Law, Université Paris I, Panthéon-Sorbonne
Erin O'Hara, Professor of Law, Vanderbilt University Law School
Larry Ribstein, Mildred Van Voorhis Jones Chair in Law, University of Illinois College of Law
Closing Discussion: 18:00 – 18:30

More information can be found on the conference website.

New Law on International

Adoption in Spain

The Spanish Parliament has adopted a new statute on international adoption on 28 December 2007.

Professor Alegría Borrás reports on the site of the French Society of Comparative Legislation (in French).

The Spanish text can be found here.

Article Challenges Canadian Approach to Jurisdiction

Professor Tanya Monestier of Queen's University has published an article challenging the approach in some of the leading cases, including *Muscutt v. Courcelles*, to the taking of jurisdiction over defendants outside the forum: see Tanya J. Monestier, "A 'Real and Substantial' Mess: The Law of Jurisdiction in Canada" (2007) 33 Queen's L.J. 179 (available to those with access to a database containing this journal).

Professor Monestier argues that "By superimposing onto the jurisdictional framework a multiplicity of considerations that are unrelated to the connection between the forum and the action, *Muscutt* has essentially transformed the question of whether a court *can* hear a case (jurisdiction *simpliciter*) into the question of whether a court *should* hear a case (*forum non conveniens*)."

In her conclusions Professor Monestier stresses the importance of certainty in the jurisdictional inquiry and argues, in the (in)famous language of *Tolofson v. Jensen*, for "order" over "fairness".

New French Books on the Conflict of Laws

For long, scholars interested in the French conflict of laws had to refer to a few traditional books, in particular the treaty of Batiffol and Lagarde (8th edition 1993), but also the manuals of Loussouarn and Bourel (9th edition 2007, with professor Pascal de Vareilles-Sommières), of Pierre Mayer (9th edition 2007, with professor Vincent Heuzé), and of Bernard Audit (3rd edition 2006).

In 2005 and in 2007, three new books covering the whole field of conflicts have enriched French private international law. They all bear the title *Droit International Privé*.

The first was published in 2005 by professor Thierry Vignal, who lectures at Cergy-Pontoise University. The publisher is Armand Colin.

The second was published in 2007 by professor Marie-Laure Niboyet and professor Geraud de Geouffre de la Pradelle, who lecture at Paris X (Nanterre) University. The publisher is LGDJ.

The third was published in 2007 by professor Dominique Bureau, who lectures at Paris II (Pantheon-Assas) University, and professor Horatia Muir Watt, who lectures at Paris I (Pantheon-Sorbonne) University. The publisher is PUF.

Guest Editorial: Dickinson on Trust and Confidence in the

European Community Supreme Court?

Throughout 2008, CONFLICT OF LAWS .NET will play host to twelve guest editors: distinguished scholars and practitioners in private international law, who have been invited to write a short article on a subject of their choosing. It is hoped that these guest editorials will provide a forum for discussion and debate on some of the key issues currently in the conflicts world, and I would very much encourage everyone to post comments.

The first editorial is on "**Trust and Confidence in the European Community Supreme Court?**" by Andrew Dickinson.

Andrew Dickinson is a practising solicitor advocate (England and Wales) and consultant to Clifford Chance LLP. He is also a Visiting Fellow in Private International Law at the British Institute of International and Comparative Law. Andrew is the co-author of *State Immunity: Selected Materials and Commentary* (OUP, 2004) and an editor of the *International Commercial Litigation Handbook* (LexisNexis, 2006). He has written widely in the areas of private and public international law – recently published papers include "Third-Country Mandatory Rules in the Law Applicable to Contractual Obligations: So Long, Farewell, Auf Wiedersehen, Adieu?" (2007) 3 *J Priv Int L* 53 and "Legal Certainty and the Brussels Convention – Too Much of a Good Thing?", ch 6 in P de Vareilles-Sommières (ed), *Forum Shopping in the European Judicial Area* (Hart Publishing, 2007).

Trust and Confidence in the European Community Supreme Court

Under Article 10 of the EC Treaty, the relations between the Member States and the Community institutions are governed by a principle of loyal co-operation (Case C-275/00 *Commission v First NV* [2002] ECR I-10943, para 49). In the area of private international law, now within Title IV of the EC Treaty, that principle has manifested itself in the relationship of mutual trust between Member States' judicial systems in the application of the Brussels I Regulation and its predecessor Convention (Opinion 1/03, *Lugano Convention* [2006] ECR I-1145, para 163; Case C-159/02 *Turner v Grovit* [2004] ECR I-3565, para 72). To a certain degree, that

relationship is, of course, a fiction. Some Member State courts are unwilling to trust certain of their continental cousins, whose reputation (deserved or undeserved) precedes them. Others are wholly undeserving of the fiduciary responsibility (see Case C-7/98, *Krombach v Bamberski* [2000] ECR I-1935).

Importantly, however, the principle of loyal co-operation not only requires the Member States to take all measures necessary to ensure the application and effectiveness of Community law, but also imposes on the Community institutions reciprocal duties of sincere co-operation with the Member States (*Commission v First NV*, above). Accordingly, a relationship of "common trust" supposedly exists between the Member States, on the one hand, and the European Court of Justice, on the other, in the performance of the latter's primary function in ensuring that in the interpretation and application of the treaty the law is observed (EC Treaty, Art 220). In this connection, the question arises: "Is the Court of Justice really deserving of our trust?"

Three reasons, in particular, justify hesitation before giving an affirmative answer to that question. The first concerns the judicial, administrative, financial and procedural resources available to the Court. The current restriction on the number of judges and Advocates-General under the EC Treaty (Arts 221-222) inevitably restricts the number of cases that can be heard, particularly if (as is currently the case) the procedural rules entitle intervention by other interested parties and require a fixed, multi-layered procedure to be followed (ECJ Statute, Arts 20 and 23). Further, as the President of the Court of Justice has noted "the accelerated procedure laid down under Article 104a of the Rules of Procedure of the Court is not suited for dealing adequately with a high number of references for a preliminary ruling in areas such as visas, asylum and immigration, or judicial co-operation in civil and criminal matters" (see Council document 11759/1/07 REV 1 (en), p 3).

The result, inevitably, is delay in the administration of justice, a delay which is all the more important in situations in which the private rights and obligations of natural and legal persons are directly at stake. By way of example, of the four decisions of the ECJ in 2006 concerning the Brussels Convention, two (Case C-4/03, *GAT* and Case C-539/03, *Roche Nederland*) had been referred to the ECJ in 2003. Little wonder, therefore, that a reference to the Court is seen in some quarters as a useful way to gum up proceedings (a "Luxembourg torpedo", perhaps) and focus the claimant's mind on settlement.

Happily, the ECJ has itself on more than one occasion taken the initiative in proposing amendments to its statute and rules to create a more streamlined and flexible procedure for certain references for a preliminary ruling in the area of freedom, security and justice (see Council documents 13272/06; 17013/06; 11597/1/07 REV 1 (en); 11824/07). Unfortunately, it appears that the Council and the Member States have yet to act on that initiative.

The second reason concerns the expertise of the Court in matters of private law, and private international law in particular. Thus, the potted biographies of the current members of the Court appearing on the curia website suggest that significantly less than half have any experience of private practice. Unsurprisingly, the background of most lies in the areas of public and European law, and only two CVs (those of the judges from Slovenia and Romania) refer to private international law. This suggests a significant imbalance, particularly given the increasing prominence of "private law" instruments in the Community *acquis*.

The third reason, arguably the most troubling, concerns the unfavourable impression given by the Court's reasoning in recent cases in this area, particularly those concerning the European jurisdiction instruments. Thus, the Court has appeared unconcerned by arguments raised concerning encouragement of abusive practices by litigants (*Turner*, above, para 53) and consequential difficulties in the due administration of justice (Case C-281/02, *Owusu v Jackson* [2005] ECR I-1383, paras 44-45). Suffice it to observe, to use one of the ECJ's favoured expressions, it is not so much the fact that these arguments were rejected as the manner in which the Court curtly swept them under the carpet. More recently, in Case C-98/06, *Freeport v Arnoldsson* (10 November 2007), the ECJ refused to acknowledge the doubts which it had generated through a careless (and unnecessary) comment in its judgment in its earlier decision in the *Réunion* case ([1998] ECR I-6511, para 50), seeking instead to explain away the comment on an implausible basis (see here for the discussion on this website). Had the Court said "we went further than both the decision and the terms of the 1968 Convention required" or even "we went further than the decision required and we can see why it has caused confusion and dissatisfaction in some quarters", its decision in *Freeport* would not have raised doubts. By deploying a judicial sleight of hand, however, the Court calls into question, once again, whether it is deserving of our common trust as the arbiter of an increasingly broad civil justice regime under EC law.

Like the principle of mutual trust in other Member State courts which the ECJ has emphasised, it is a fiduciary relationship from which the "beneficiaries" are not free to withdraw. But the importance of the Court's role in our personal and professional lives is too important to allow the re-writing of history to pass without remark, particularly at a time when the ECJ is likely to exercise an increasingly significant role in the area of private law, as a result both of the recent tide of legislation under Title IV (the legacy of the rush to exercise competences created by the Treaty of Amsterdam and the Commission's scoreboard turning activity in the early years of this century) and the intended removal by the Reform Treaty of the restrictions (currently, EC Treaty, Art 68) on the right of lower Member State courts to refer cases for preliminary ruling on a question of EC law. Improvements in the Court's procedural rules (see above) may address some of the problems, but it is submitted that a more fundamental institutional reform is required. One option, which may merit further thought (and on which comments would be welcomed) would be to create a specialist "civil and commercial court" using the power conferred by Art 225a [256, post-Reform Treaty], with specifically tailored procedures and judges chosen for their expertise in, and sensitivity to, private law issues and the resolution of disputes between private parties. Absent reform of this kind, Europe's supreme court may acquire a reputation as a court of injustice, not of Justice.

(The February Guest Editorial will be by Professor Jonathan Harris; details to follow.)

Choice of Law in the American Courts in 2007: Twenty-First Annual Survey

With the start of a new year, and the concomitant end of an old one, comes the twenty-first instalment of Symeon Symeonides' annual survey of US decisions relating to choice-of-law issues. It is, as always, both a rigorous piece of

research and an excellent resource. Here's the abstract:

> *This is the Twenty-First Annual Survey of American Choice-of-Law Cases. It covers cases decided by American state or federal courts from January 1 to December 31, 2007, and reported during the same period. Of the 3,676 conflicts cases meeting both of these parameters, the Survey focuses on the cases that deal with the choice-of-law part of conflicts law, and then discusses those cases that may add something new to the development or understanding of that part. The Survey is intended as a service to fellow teachers and students of conflicts law, both within and outside the United States. Its purpose is to inform rather than to advocate. The following are among the cases reviewed in the Survey:*
>
> *A California Supreme Court decision involving recordings of cross border communications and another California case raising issues of cross-border discrimination in managing a web site; a product-liability decision of the New Jersey Supreme Court backtracking from its earlier pro-plaintiff decisions, and several other cases continuing to apply the pro-defendant law of the victim's home state and place of injury; several cases arising out of the events of September 11, 2001, and a few cases involving claims of torture (by them and us); the first guest statute conflict in years, as well as a case eerily similar to Schultz v. Boy Scouts of America, Inc.; two cases in which foreign plaintiffs succeeded, and many more cases in which US plaintiffs failed, to obtain certification of a nationwide class action; a case involving alienation of affections and one involving palimony between non-cohabitants; several cases involving deadly combinations of choice-of-law, choice-of-forum, and arbitration clauses; three cases involving the paternity or maternity of children born after artificial insemination, in three different combinations (known sperm donor, unknown sperm donor, and unknown egg donor); a case involving the child of a Vermont civil union and holding that DOMA does not trump the Parental Kidnapping Prevention Act; a case involving the constitutionality of a Missouri statute affecting out-of-state abortions of Missouri minors; and one US Supreme Court decision allowing federal courts to dismiss on forum non conveniens grounds without first affirming their jurisdiction, and another decision exonerating Microsoft from patent infringement charges arising from partly foreign conduct.*

The survey is available to download, free of charge, **from here**. **Highly recommended**.

West Tankers, and Worldwide Freezing Orders

There are two casenotes in the new issue of the *Cambridge Law Journal* worthy of mention. Firstly, Richard Fentiman (*Cambridge*) has written on "Arbitration and the Brussels Regulation" – discussing the recent House of Lords decision (and reference to the ECJ) in *West Tankers Inc v. RAS – Ras Riunione di Sicurata SpA* [2007] UKHL 4. The introduction reads:

> *WHEN, if at all, may English courts restrain claimants from suing in other Member States? The European Court of Justice has declared such relief to be inconsistent with the principle of mutual trust embodied in Regulation 44/2201, governing jurisdiction in national courts: Case C-281/02 Turner v. Grovit [2004] ECR I – 3565. But when does the Regulation engage, so that the ban imposed in Turner applies? Perhaps it does so whenever the foreign proceedings are within the Regulation's material scope. If so, civil proceedings in the courts of Member States can never be restrained. Alternatively, perhaps the Regulation only engages when it governs jurisdiction in both the foreign and the English proceedings. Judicial proceedings in other Member States could thus be restrained, provided relief is sought in English proceedings beyond the Regulation's reach.*

Louise Merrett (*Cambridge*) has written a note on "Worldwide Freezing Orders in Europe" (C.L.J. 2007, 66(3), 495-498). Here's the abstract:

> *Examines the Court of Appeal decision in Banco Nacional de Comercio Exterior SNC v Empresa de Telecomunicationes de Cuba SA on whether the court had jurisdiction under Regulation 44/2001 Art.47 (Brussels Regulation) or the Civil Jurisdiction and Judgments Act 1982 s.25 to grant a worldwide freezing order*

over the defendant's assets where it was not connected to, nor resident in, England and the court had no jurisdiction over the subject matter of the proceedings.

Available to subscribers (both online and in print).