The Applicable Law in Cases Involving the Loi Badinter

Sarah Prager (*1 Chancery Lane*) has written a piece in the Journal of Personal Injury Law on "**The applicable law in cases involving the loi badinter: sections 11 and 12 of the Private International Law (Miscellaneous Provisions) Act 1995 reviewed**" (J.P.I. Law 2007, 4, 338-344). Here's the abstract:

> *Discusses, with reference to salient case law, questions over the applicability of UK law in foreign jurisdictions. Outlines the relevant legal framework for accidents abroad under the Private International Law (Miscellaneous Provisions) Act 1995 s.11 and s.12. Focuses on the Lincoln County Court decision in Prince v Prince concerning the issue of jurisdiction for two British nationals involved in a road traffic accident whilst in France, highlighting the reluctance of the courts to displace the presumption of jurisdiction contained in s.11.*

Available to *J.P.I. Law* subscribers.

Third Issue of 2007's Revue Critique de Droit International Privé

The latest issue of the French *Revue Critique de Droit International Privé* has been released. In addition to 9 comments of French and European cases, it contains two articles. The table of contents can be found here.

The first article is authored by Dr. A. Aldeeb Abu-Sahlieh, who teaches in Lausanne, Marseille and Palermo. It deals with Muslim Family and Inheritance

Law in Swizterland (*Droit musulman de la famille et des successions en Suisse*). The English abstract reads:

> *The fundamental opposition between Coranic family law and the Swiss legal order concerns, on the one hand, the very conception of law, here the work of God, there the work of man, and on the other hand, the divisions of society, which on the one hand follow religious obedience, and on the other, territoriality or nationality. The resulting antagonisms are of daily and practical import, since they affect marriage, parent-child relationship or succession. They will find a solution only if, within the Arab world, sources of religious law are confined to the Coran, and indeed if social governance leaves room for reason, and, in the western world, if the concept of revelation reinvests its reason-liberating dynamic, and if there is a firm reaction to all violations of the principle of secularity and non-discrimination on the basis of race or religion.*

The second article is authored by Professor Hélène Chanteloup, who lectures at Amiens University. It addresses the issue of National Laws Being Taken into Account by EC Courts (*La prise en consideration du droit national par le juge communautaire. Contribution à la comparaison des méthodes et solutions du droit communautaire et du droit international privé*). The English abstract reads:

> *Far from the difficulties raised by the question of the right and duty of national courts when foreign law is applicable, the question of the status of the national laws pleaded in European litigations seems to be sobed with coherence and a relative simplicity. Except the specific case of the arbitration clause (art. 238 CE), the national law cannot be applied by European judges. It is just taken into account like any other factual element of the situation. National law is treated as a question of fact. Therefore, it is not to be imputed to European judges and has to be proved by the party with evidence of all kinds. Furthermore, the European Court of Justice has always considered that this question of proof has to be solved in respect of the interests of the European law which contributes to the coherence and the stability of the procedural treatment of national law.*

Articles of the *Revue Critique* cannot be downloaded.

CLIP conference: Intellectual Property and Private International Law

As we announced in the last posting concerning the CLIP group, they are preparing an international conference on issues arising where in the intersection of intellectual property law and private international law. The conference program includes the following topics and speakers:

Are there any Common European Principles of a Private International Law with regard
to Intellectual Property?
Prof. Dr. Annette Kur, Max Planck Institute for Intellectual Property Law, Munich

The ALI Principles Governing Jurisdiction, Choice of Law and Judgments in Transnational Intellectual Property Disputes
Prof. Dr. Rochelle C. Dreyfuss, New York University

"Contracts Relating to Intellectual or Industrial Property Rights" under the Rome I
Proposal
Prof. Dr. Matthias Leistner, University of Bonn

The Law Applicable to Non-Contractual Obligations Arising from an Infringement of
Registered IP Rights
Prof. Dr. Peter Mankowski, University of Hamburg

The Law Applicable to Infringements of Non-Registered IP Rights
Prof. Dr. Haimo Schack, University of Kiel

Extraterritorial Application of IP Law – An American View
Prof. Dr. Graeme B. Dinwoodie, Chicago-Kent College of Law

The Private International Law of IP and of Unfair Commercial Practices: Coherence or
Divergence?
Prof. Dr. Pedro Miguel de Asensio, University Complutense of Madrid

Cross Border IP Litigation – Still an Issue under the Brussels I Regulation?
Prof. Dr. Paul Torremans, University of Nottingham/University of Ghent

A Spider without a Web? Multiple Defendants in IP Litigation
Prof. Dr. Marcus Norrgård, Swedish School of Economics and Business Administration, Helsinki

The Future of Centralised Patent Litigation in Europe – Between EPLA and the Community Patent Regulation
Dr. Stefan Luginbühl, European Patent Office

Jurisdiction in Cases Concerning IP Infringements on the Internet
Dr. Axel Metzger, Max-Planck Institute for Comparative and International Private Law, Hamburg

The opening speach on behalf of the DFG Graduate School n. 1148 "Intellectual Property and the Public Domain", University of Bayreuth belongs to Prof. Dr. Diethelm Klippel, and the introduction into the conference has been entrusted to Prof. Dr. Stefan Leible and Prof. Dr. Ansgar Ohly of the University of Bayreuth. The conference will take place **in Bayreuth, Germany on 4 and 5 April 2008**.

The detailed program of the conference can be downloaded here.

Article: The Liberalization of the French Law of Foreign Judgments

An interesting article commenting some significant changes in the French rules on recognition of foreign judgments, as established by recent case law of the French *Cour de Cassation*, has been published in the latest issue of the

International and Comparative Law Quarterly (no. 4/2007: see our post here).

The note has been written by *Gilles Cuniberti* (University of Paris Val-de-Marne), editor of conflictoflaws.net for France, who has extensively reported on these landmark judgments for our site (see his posts on the *Prieur, Avianca* and *Fountaine Pajot* cases).

An abstract of the article ("The Liberalization of the French Law of Foreign Judgments", 56 INT'L & COMP. L. Q. 931 (2007)) has been kindly provided by the author:

> *The French highest court for private matters (the Cour de Cassation) has significantly liberalized the French law of foreign judgments between 2006 and 2007. In Prieur, it overruled a century-old precedent which had interpreted Article 15 of the Civil Code as preventing the recognition of foreign judgments when the defendant was a French citizen. In Avianca, it partly overruled a 45-year-old precedent which prohibited the recognition of foreign judgments which had not applied the law applicable pursuant to the French choice-of-law rule.*
>
> *The note presents this evolution and discusses its implications.*

The full article is available for download to *ICLQ* and *Westlaw* subscribers. Highly recommended.

The text of the judgments of the Cour de Cassation is available at the following links: Prieur, Avianca, Fountaine Pajot.

Fourth Issue of 2007's International and Comparative

Law Quarterly

The fourth issue 2007 of the ICLQ (Volume 56, Number 4, October 2007) has been recently published. The full TOC is available here. Contents dealing with PIL include:

- *TD Grant*, International Arbitration and English Courts:

> *The Court of Appeal, Civil Division, Longmore LJ, on 24 January 2007 handed down a decision in Fiona Trust v Privalov which clarifies the relation between sections 9 and 72 of the Arbitration Act 1996; affirms, again, in strong terms the separability (or severability) of an arbitration clause from the contract in which it is included; and, apparently for the first time in English courts, establishes that allegations of bribery may be subject to the jurisdiction of an arbitrator. The decision therefore holds interest in relation to the enforcement in the United Kingdom of agreements to arbitrate and, more generally, supports the position that arbitration has a role to play in international efforts to combat corruption.*

- *Gilles Cuniberti*, The Liberalization of the French Law of Foreign Judgments (see our dedicated post here);
- *Andrea Schulz*, The Accession of the European Community to the Hague Conference on Private International Law.

The articles are available for download to ICLQ and Westlaw subscribers.

Private International Law in Africa: Past, Present and Future

Richard Oppong (*Lancaster Law School*) has written an article on "**Private International Law in Africa: Past, Present and Future**" in the latest issue of the *American Journal of Comparative Law* ((2007) 55 AJCL 677-719.) Here's the

abstract:

The development of private international law has stagnated in Africa for some time now. This is reflected in the neglected and undeveloped state of the subject, and the near absence of Africa in international processes, academic forums, writings, and institutions that have significance for the subject. This article explores the present and future state of the subject in Africa by situating it in a historical context. It challenges the often unarticulated assumption of writers on private international law in Africa that the subject and issues it addresses came to Africa only after the advent of colonization. It suggests that although the specific rules may be difficult to ascertain, conflict of laws problems existed in pre-colonial Africa and were, consistent with current theories on pre-modern societies, addressed by a mixture of practices and mechanisms that tended towards conflicts avoidance and lex forism. It notes that during the colonial period the subject developed without any clear theoretical underpinnings, was deployed to fulfil narrow political and commercial goals, and was largely insulated from international developments. The article argues that a new dawn is rising in which the subject will occupy a prominent place with regard to many issues in Africa. It examines how an emerging academic interest in the subject, current economic integration initiatives, harmonization of laws, drive to promote trade and investment, constitutionalism and human rights, and other developments will impact private international law in Africa.

German Article: The Law Applicable to Voluntary Agency in

a Comparative Perspective

Simon Schwarz (Hamburg) has published a comprehensive article on **"The Law Applicable to Voluntary Agency in a Comparative Perspective"** (*"Das Internationale Stellvertretungsrecht im Spiegel nationaler und supranationaler Kodifikationen"*) in the latest issue of the "Rabels Zeitschrift für ausländisches und internationales Privatrecht" (RabelsZ 71 (2007) pp. 729-801).

Here is the English summary:

> *Questions relating to an agent's authority represent a basic problem of contract law and are of considerable practical importance in international market transactions. The article analyses which law should govern the powers of an agent to bind his principal vis-à-vis a third party. To this end, the article examines, systemises, and evaluates the pertinent solutions adopted in more than twenty jurisdictions as well as in the European Commission's Proposal for a Rome I-Regulation of December 2005. The findings may be summarised as follows:*
>
> *1. Due to the characteristic triangular relationship of the agency situation there is a clear need for a separate conflicts rule dealing with the agent's authority.*
>
> *2. The agent's place of business and the place where the agent acted represent the most commonly accepted and best founded connecting factors in this respect while the place of the habitual residence of the agent should not be taken into account. As to the question which law should prevail if the agent actually does not act in the country of his business establishment, the solutions differ considerably among the various legal systems. Basically, applying the law of the place of business of a professional agent constitutes a sound and sensible solution which particularly meets the needs of international trade. Therefore, this connecting factor should generally take precedence over the lex loci actus provided that the agent's place of business was actually foreseeable to the third party.*
>
> *3. Most of the legal systems recognise party autonomy with regard to the law governing the agent's authority, which appears to be a particularly reasonable concept. As to its implementation, however, there are some variations in detail. Both as a matter of principle and of business practice the most appropriate*

approach seems to be to allow the principal to designate the law applicable to the agent's powers unilaterally, i.e., without the consent of the agent or the third party, provided that this designation is in writing and is foreseeable to the third party. Since the ambit of the law chosen by the principal also extends the possible liability of the agent as falsus procurator the choice must be foreseeable to the agent as well.

4. The scope of the conflict rule on agency should be designed comprehensively rather than restrictively in order to avoid difficult problems of characterisation. Hence, the rule should not merely adjudicate the existence and the extend of the agent's actual or apparent authority but should encompass the legal consequences of the exercise of the agent's powers with regard the principal/third party relation as well as the agent/third party relation, including the liability of the falsus procurator and the effects of an undisclosed agency.

Flying to California to Bypass the French Ban on Surrogacy

You are a French couple and you cannot have a baby? One option is to fly to San Diego and to find a surrogate mother. Now, you should really want it, because 1) California is almost on the other side of the world, 2) it can get pretty warm out there, especially when half of the state is burning and 3) French authorities will give you a really hard time when you will come back.

The French press reports this week-end on how French authorities have been doing everything they could to prevent a French couple who resorted to a Californian surrogate mother from gaining recognition in France of their parental status. The Paris Court of appeal has just ruled in their favour, but I could not see the decision. The article of *Liberation* can be found here (in French).

Californian dream

Meet Dominique and Sylvie. In 1998, they learned that they could not have a baby, as Sylvie discovered she had no uterus. They did not want to adopt, but knew that surrogacy was legal in California (*Liberation* reports that they understood that it was even viewed with favor). They flew there, found a francophile surrogate mother, Mary. Eventually, two girls were born on October 25, 2000. Dominique and Sylvie say that their experience was great. Californian authorities delivered a birth certificate providing that they were the parents. Time to go back home.

Problems began on American soil. Dominique and Sylvie sought to establish a French passport for the children. At the French consulate, they were told that it would not be easy. Several comparable requests were on hold. A French officer told them off the record that the best was probably to get a U.S. passport. They got one easily, and "with big smiles" (i.e. the Americans were happy to deliver the passport).

Welcome back

But that was only the beginning. French consular authorities had liaised with French prosecutors. Upon arrival in France, the couple was investigated by the French police, who searched their home, their offices, even her doctor's office. In 2001, they were charged with a variety of French criminal offences, including attempt to fraud civil registries (because they wanted to have the children registered in France as theirs, i.e. have the American birth certificate recognized in France) and facilitating the dealing of children between a parent willing to adopt and a parent willing to abandon his/her child. In 2004, a French investigating judge dismissed the charges on the ground that French criminal law did not apply to acts which took place abroad, in a jurisdiction where they were legal.

In the meantime, prosecutors had also initiated civil proceedings. The point was to set aside the transcription on the French registries of the parental relationship, and get a judicial declaration that Dominique and Sylvie were not the parents of the children. The Paris court of appeal has just dismissed the proceedings a few days ago. Although I could not read the decision, I understand that it rules that the children should be considered for all purposes as the daughters of the couple.

Recognition of foreign birth certificates

From the perspective of the conflict of laws, the case raises the very interesting issue of the recognition of foreign birth certificates. These are typically not judicial decisions, and I guess that Californian ones are not either. The issue is therefore whether to apply the law of foreign judgments to them, or at least similar rules. Under French law, the answer is clearly that you should apply similar rules. However, there are very few precedents, and French writers do not agree on the requirements that foreign public acts ought to meet to be recognized in France. Yet, most of them would agree on the three following propositions:

1) the foreign public act may not be reviewed on the merits,

2) however, it should not be contrary to public policy (i.e. its solution should not be shocking from a French perspective),

3) there should be no *fraude à la loi* (i.e. it should not have been obtained for the sole purpose of avoiding the application of French law).

In the present case, two arguments could be made against the recognition of the Californian certificate. First, even though the certificate was not to be reviewed on the merits, it could have been argued that it was contrary to French public policy. The issue here was how badly surrogacy is perceived in France. Is it only a remarkable foreign practice, or is it a practice which is repugnant to the French society? The story of Dominique and Sylvie made the front page of *Liberation*, with the following headline: *Ca vient* ("It is coming"). The French law prohibiting surrogacy dates back to 1994, but is meant to be revised in 2009, and it is *Liberation*'s hope that the ban will end then (See the editorial here). It may be, then, that the French society has reached the point where, although it is not a legal practice yet, it is not anymore contrary to French public policy.

However, the second argument which could be made was much stronger. It seems that the French couple had indeed flown to San Diego for the sole purpose of avoiding the French ban. The practice remains illegal in France. Going abroad for no other reason than obtaining the application of another law is a *fraude à la loi*. It will be interesting to see how the court responded to that argument, if the argument was put forward at all.

New Lugano Convention Signed

According to a statement by the Portuguese Presidency, and a press release by the European Commission (DG Freedom, Security and Justice), **the new Lugano Convention** on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters **was signed by the EC, Denmark and the three EFTA States** which are party to the old Lugano Convention (Switzerland, Norway and Iceland) **in a ceremony held on 30 October 2007 in Lugano**. The text was signed on behalf of the European Community by *Alberto Costa*, Portuguese Minister of Justice.

On the negotiating process of the convention, and the Council's decision on its signing on behalf of the Community, see our previous posts here and here. The text of the new convention is attached to the Council's decision: pursuant to Art. 300(2) of the EC Treaty, it is subject to its possible conclusion, by another Council's decision, at a later date.

According to Art. 73 of the convention, the instruments of ratification shall be deposited with the Swiss Federal Council, which shall act as Depositary. The convention will enter into force on the first day of the sixth month following the date on which the European Community and a Member of the European Free Trade Association deposit their instruments of ratification.

On the **jurisdiction of the European Court of Justice** for the interpretation of the provisions of the convention, which becomes part of Community rules, see Protocol no. 2 annexed to the convention, which sets up also a system of exchange of information similar to the one adopted for the 1988 Lugano convention. See also the Swiss Federal Council's website for the annual reports on national case law relating to the old Lugano convention.

Seminar: Recognition of Foreign Insolvency Proceedings in the US

The British Institute of International and Comparative Law holds on Monday 26 November 2007, 17:30 to 19:30 a seminar on Recognition of Foreign Insolvency Proceedings in the US. This seminar is part of the British Institute’s 2007-2008 Seminar Series on Private International Law. For further information, have a look at the Institute´s seminar website.