Second Issue of 2008's Journal du Droit International

The second issue of French *Journal du Droit International* (also known as *Clunet*) will be released shortly. It does not contain articles which directly deal with conflict issues. Yet, three of them might be of interest for readers of this blog.

This first is authored by Tunisian professor Lofti Chedly and discusses 14 years of application of the Tunisian law on international arbitration (*L'arbitrage international en droit tunisien. 14 ans après le code*). The English abstract reads as follows:

> *On April 26th, 1993 the Code of Arbitration was promulgated in Tunisia, a Code which devotes its third chapter to international arbitration. Fourteen years later, a reflection and an assessment of the contribution of the Code seem obvious and necessary. The adoption of this text, yet strongly inspired by the UNCITRAL type law of 1985 is a significant achievement, following its modernism and its liberalism, does not mean that there are no shortcomings, gaps and even inconsistencies in the current text… In order to allow Tunisia to find a place in international arbitration, certain prospects of the evolution of the code appear essential. An interpretation of these prospects is proposed and focuses in particular on the necessary " re-conceptualization " of the internationality of arbitration, which actually conditions all the system of international arbitration which also deserves a reform in order to clarify the access to this dispute resolution method and to support the autonomy of the arbitration procedure…*

The second article discusses the responsability of multinationals operating in the energy sector as far as local development is concerned (*La responsabilité sociale des multinationales spécialisées dans l'extraction des minerais et hydrocarbures*). The author is Cécile Rénouard, a scholar at ESSEC Business school, who published a book on the topic last year. The English abstract reads as follows:

> *What about the voluntary agreements (Memorandum of Understanding or MoU)*

signed by extractive industries with local communities close to their production sites ? Are they just a mean to get their social licence to operate or do they express a responsible commitment toward local development ? Ethics is needed as a critical tool to assess the activity of multinationals and not only as an instrument in order to make profit (« Ethics pays »). The MoU signed by Total in Nigeria show a paradigm shift in the way the corporation understands its contribution to the areas where it operates and its implementation of ethical principles. This analysis raises the question of the necessary means to consolidate these voluntary commitments, and perhaps to transform them into a compulsory approach.

The author of the third article is Beat Hess, the General Counsel of Royal Dutch Shell PLC. The piece discusses the legal perspectives of the energy industry (*Faire face aux défis juridiques dans l'industrie de l'énergie*). The abstract reads:

Given the " hard truths " of the global energy outlook – accelerating demand, more challenging exploration and production environments, and increasing pressure to deal with carbon dioxide emissions – energy companies have a central role to play in diversifying their portfolios and enhancing energy efficiency. Beat Hess gives a legal perspective on global energy scenarios and offers a choice of requirements that, in his view, lawyers involved in the sector will need to meet.

Symeonides: Result-Selectivism in Private International Law

Symeon C. Symeonides (Dean, College of Law – Willamette University) has posted **Result-Selectivism in Private International Law** (forthcoming on the Roman. Priv. Int'l L.& Comp.Priv. L. Rev., 2008) on SSRN. Here is the abstract:

One of the basic dilemmas of conflicts law, or private international law (PIL), is

whether, in choosing the law applicable to cases involving conflicts of laws, one should aim for: (1) the law of the proper state without concern for the "justness" of the particular result ("conflict justice"); or (2) for the same quality of substantive results as in non-conflicts cases ("material justice").

For centuries, the "conflicts justice" view has been dominant in all countries. The "material justice" view has had some recent following in the United States, but in the rest of the world it has had only marginal influence. In recent years, however, this view has gained significant ground, even in codified PIL systems. Without endorsing this view, this essay examines several recent PIL codifications and identifies a surprisingly high number of result-selective rules, namely choice-of-law rules that are specifically designed to accomplish a particular substantive result.

The fact that these rules are far more numerous now than in the past suggests that the above dilemma is no longer an all-or-nothing proposition. Material-justice considerations are gaining increasing acceptance as one of the factors that should guide the pursuit of conflicts justice. The difficult question is not whether but rather when these considerations should receive preference in uncodified systems in which the choice of law is made by judges rather than legislators.

The complete list of Prof. Symeonides' works available on SSRN can be found on the author page.

ECJ: Judgment in Case "Laboratoires Glaxosmithkline"

Today, the ECJ delivered the judgment in case C-462/06 *(Laboratoires Glaxosmithkline*) dealing with the interpretation of Art. 6 point 1 and Section 5 of Chapter II of the Brussels I Regulation. The French Cour de Cassation had referred the **following question** to the ECJ for a **preliminary ruling**:

> *Does the rule of special jurisdiction stated in Article 6(1) 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, by virtue of which a person domiciled in a Member State may be sued 'where he is one of a number of defendants, in the courts for the place where any of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings', apply to proceedings brought by an employee before a court of a Member State against two companies belonging to the same group, one of which, being the one which engaged that employee for the group and refused to re-employ him, is domiciled in that Member State and the other, for which the employee last worked in non-Member States and which dismissed him, in another Member State, when that applicant relies on a clause in the employment contract to claim that the two defendants were his co-employers from whom he claims compensation for his dismissal or does the rule in Article 18(1) of the regulation, by virtue of which, in matters relating to individual contracts of employment, jurisdiction is to be determined by Section 5 of Chapter II, exclude the application of Article 6(1), so that each of the two companies must be sued before the courts of the Member State where it is domiciled?*

Thus, the Cour de Cassation essentially asked whether Art. 6 point 1 Brussels I Regulation in respect of co-defendants is applicable to an action brought by an employee against two companies established in different Member States which he considers to have been his joint employers.

The **Court** answered the question to that effect that

> ***the rule of special jurisdiction provided for in Article 6, point 1, of the Regulation cannot be applied to a dispute falling under Section 5 of Chapter II of that regulation concerning the jurisdiction rules applicable to individual contracts of employment.***

The Court states that neither a literal nor a teleological interpretation of the Regulation leads to allowing Art. 6, point 1 to apply in employment matters: Section 5 does not refer to Art. 6, point 1 – in contrast to Article 4 and Article 5, point 5, of the Regulation, the application of which is preserved expressly by

Article 18(1) thereof. Thus, a literal interpretation shows that Section 5 of Chapter II precludes any recourse to Art. 6, point 1. Further, the Court emphasises that rules of special jurisdiction have to be interpreted strictly and cannot go beyond the cases expressly envisaged by the Regulation.

See for the full judgment as well as AG Maduro's opinion the website of the ECJ.

German Annotation on first ECJ Judgment on Brussels II bis

In November 2007, the ECJ delivered its first judgment on the Brussels II *bis* Regulation (C-435/06, *Applicant C*).

Anatol Dutta (Hamburg) has now commented on this judgment in the German legal journal "Zeitschrift für das gesamte Familienrecht" (FamRZ): "Staatliches Wächteramt und europäisches Kindschaftsverfahrensrecht. Die Anwendbarkeit der Brüssel-IIa-Verordnung auf staatliche Maßnahmen zum Schutz des Kindes", FamRZ 2008, 835 et seq.

See with regard to the reviewed case also our previous posts on the judgment and AG Kokott's opinion.

Personal Property Securities in Australia

The Commonwealth Attorney-General has recently released a Consultation Draft of the Personal Property Securities Bill 2008 and an accompanying commentary. The Bill aims to provide a national system to regulate security interests in all

property other than land, and would replace over 70 Commonwealth, State and Territory enactments.

As one can imagine, the Bill contains substantial provisions relating to choice of law (Part 2 Div 7) and jurisdiction (Part 11 Div 5).

In general, Australian law will apply to security over property located in Australia (s 45), and in other circumstances the law of the place where the grantor is located will apply (s 46). Specific rules are proposed regarding foreign intellectual property (s 47), minerals (s 48), investment instruments and non-negotiable documents of title (s 49), investment entitlements (s 50), and bank accounts (s 51). Rules will also cover circumstances where property is brought into or taken out of Australia (ss 52-33), or where the grantor relocates to another jurisdiction (s 54).

The Bill appears to envisage that foreign law may govern some aspects of personal property securities that are otherwise regulated by the Bill. If foreign law applies, the Bill only picks up the relevant foreign law governing the rights, obligations and duties of debtor (or grantor of security) against the secured party in relation to collateral (i.e. the property that is subject to the security) (s 43). This would, it seems, exclude aspects of the debtor-creditor relationship unrelated to security, and may also exclude foreign choice of law rules. However, the operation of these provisions is not entirely clear.

So far as jurisdiction is concerned, the Bill is unusual among Commonwealth enactment in excluding the operation of s 39B of the *Judiciary Act 1903*, and the *Jurisdiction of the Courts (Cross-Vesting) Act 1987*. Rather, the Bill contains its own provisions investing Australian state and federal courts with jurisdiction (s 261) and providing for the transfer of proceedings between courts (s 263).

The Attorney-General is seeking public comment on the Bill as a whole, and there are also specific questions raised for discussion. Questions relating to private international law include:

- Does the common law [relating to jurisdiction of Australian courts] provide a sufficient jurisdiction for courts to act in relation to security interests?
- To what extent should the Bill implement rules consistent with the Hague Securities Convention?

- Are there any aspects of the Hague Securities Convention that should be omitted from the Bill (Australia could not adopt the Convention unless Australia's domestic law was consistent with the convention).
- Should the Bill require a securities intermediary who, in Australia, offers investment entitlements governed by the law of another country to operate an office in that other country of the kind contemplated by the Hague Securities Convention (and to comply with any licensing and other regulatory requirements that may exist in that other country concerning the operation of offices of that kind)?

The deadline for submissions is August 15th 2008. More information can be found here.

A short but interesting Australian case

Armacel Pty Ltd v Smurfit Stone Container Corporation [2008] FCA 592 is a recent case in which the judgment of Jacobson J in the Australian Federal Court, though short, raises a number of interesting issues.

The case arose out of a dispute between Armacel Pty Ltd, an Australian company, and Smurfit Stone Container Corporation, a US company, concerning an intellectual property licensing agreement governed by the law of New South Wales, Australia. Shortly before Armacel instituted the Australian proceedings, Smurfit instituted proceedings against Armacel in a US District Court concerning the same dispute. The US Court decided that, applying US principles of contractual interpretation as required by US principles of private international law, a New South Wales jurisdiction clause in the licensing agreement was not an exclusive jurisdiction clause. Accordingly, it dismissed Armacel's motion for dismissal of the US proceedings for want of jurisdiction. Smurfit then applied for a stay of the Australian proceedings on *forum non conveniens* grounds.

Jacobson J refused to allow Armacel to re-argue the question of whether the

jurisdiction clause was an exclusive jurisdiction clause. Armacel was held to be estopped from raising that issue, since it had already been the subject of a decision in the US proceedings. This was so even though that decision was made by reference to US principles of contractual interpretation as the law of the forum, whereas Jacobson J suggested it ought to have been made by reference to New South Wales law as the governing law of the contract — the estoppel operated regardless of any such criticism.

This conclusion was important because, absent the estoppel, Jacobson J would have construed the clause as an exclusive jurisdiction clause. The clause stated:

> *This Agreement must be read and construed according to the laws of the State of New South Wales, Australia and the parties submit to the jurisdiction of that State. If any dispute arises between the Licensor and the Licensee in connection with this Agreement or the Technology, the parties will attempt to mediate the dispute in Sydney, [New South Wales,] Australia.*

The parties also expressly agreed that New South Wales law would prevail in the event of a conflict between those laws and the laws of the jurisdiction in which the equipment the subject of the licensing agreement was located. Perhaps somewhat surprisingly, Jacobson J concluded that even though the jurisdiction clause was not exclusive on its face, it should be construed that way. This was because the parties negotiated at arm's length, must be presumed to have intended some certainty as to where their disputes would be litigated, had agreed to compulsory mediation in New South Wales, and had sought to avoid the circumstance that a New South Wales Court might have to apply the law of another jurisdiction because that was the location of the relevant equipment. Jacobson J further considered that the submission to 'the jurisdiction of [New South Wales]' also included the Federal Court exercising Australian federal jurisdiction in New South Wales.

In any event, because of the estoppel, Jacobson J proceeded on the basis that the clause was non-exclusive. In that light, having regard to the fact that the US proceedings were pending at the time the Australian proceedings were instituted and the closer factual connection with the US than Australia, Jacobson J stayed the Australian proceedings. However, he gave Armacel liberty to apply to have the stay lifted in case developments in the US proceedings made that appropriate.

In particular, in the Australian proceedings, Armacel sought to make claims under the Australian *Trade Practices Act 1974* (Cth) based on alleged misrepresentations by Smurfit during the negotiation of the licensing agreement. Expert evidence from Smurfit's US counsel, which Jacobson J accepted, was to the effect that such claims could be brought in the US proceedings. However, if the US Court ultimately declined to apply the *Trade Practices Act*, Jacobson J said it may be appropriate to lift the stay. Jacobson J also made the stay conditional on Smurfit filing an appearance in the Australian proceedings, and thereby submitting to the Federal Court's jurisdiction, and participating in a mediation in Sydney, both of which Smurfit had declined to do, as required by the licensing agreement.

Conference: International Society of Family Law

From 16th to 20th September 2008, the **13th World Conference of the International Society of Family Law** will take place in Vienna. The topic of the conference is "Family Finances".

A preliminary programme as well as further information on the venue, registration etc. can be found on the website of the University of Vienna.

(Many thanks to Thomas Thiede (Vienna) for the tip-off.)

Annotation on ECJ Judgment in

“FBTO Schadeverzekeringen”

Thomas Thiede and *Katarzyna Ludwichowska* (both Vienna) have written a comment (in German) on the ECJ’s judgment in case C-463/06 (*FBTO Schadeverzekeringen*) in the latest issue of the legal journal Versicherungsrecht (VersR 2008, 631 et seq.).

An English abstract has been kindly provided by the authors:

> *The authors criticise the judgment of the European Court of Justice from 13 December 2007, in which the Court ruled that the reference in Art. 11(2) of Regulation No 44/2001 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters to Art. 9(1)(b) of that Regulation is to be interpreted as meaning that the injured party may bring an action directly against the liability insurer of the person liable before the courts of the Member State where that injured party is domiciled. They present and counter the arguments given by the ECJ and show the possible negative consequences of the solution accepted by the Court, such as the aggravation of forum shopping or the possible multiplicity of proceedings concerning the same incident in various Member States. The authors also emphasise that – although the case decided by the ECJ concerns only motor vehicle insurance – the reference in Art. 11(2) of Regulation 44/2001 applies to all – also non-compulsory – third-party liability insurance, which means that the Court’s interpretation will have a very broad impact.*

See with regard to this case also our previous posts on the judgment, the referring decision as well as an annotation on the referring decision.

Swiss Institute of Comparative Law: Prof. Sturm's Lecture on "Le nom en droit international privé"

On **Thursday 15 May 2008, at 17.00**, the **Swiss Institute of Comparative Law** (ISDC, Lausanne) will host a lecture (in French) by *Prof. Fritz Sturm* (University of Lausanne) on **"Le nom en droit international privé"** ("Name in Private International Law").

The lecture is one of the monthly seminars on private international law and comparative law organized by the ISDC ("Les jeudis de l'ISDC"). A small fee is required for participation (free for students and academics). Further information (and the full list of seminars) is available here.

A Legislative Solution For Cross-Border Defamation Claims

The State of New York, and—recently—the United States Congress—are presently considering enacting laws that would give American authors legal recourse when they are sued abroad for defamation over literary works that would otherwise fall within the broad protections of the First Amendment to the United States Constitution.

In New York, both the Assembly and its Senate have unanimously passed a bill (dubbed the "Libel Terrorism Protection Act" (S.6687/A.9652)) that would give authors who are sued for libel abroad the right to obtain a declaration that such judgments are unenforceable because their works are protected under American law. Both the U.S. House and Senate are now considering federal legislation that would give authors the right to countersue those who have sued them for defamation in foreign courts, and obtain more than three times the amount of the

libel judgment of the foreign court, if the American writer could prove the accuser was trying to intimidate the author from exercising his or her First Amendment rights.

As this article explains, the conflict between foreign judgments and the First Amendment has been brewing since 1941, when the U.S. Supreme Court starkly distinguished American protection of speech from that of England. Only recently, however, as England has become a choice venue for libel plaintiffs from around the world, has that country's libel law come to have a disturbing impact on the First Amendment. The case against Rachel Ehrenfeld in England by Saudi banker Khalid Bin Mahfouz is illustrative. Her 2003 book named Mr. Bin Mahfouz as a possible funder of terrorism. Twenty-three copies of the book were sold in England, which led Mr. Bin Mahfouz to sue there. Ms. Ehrenfeld refused to appear before the English courts, and a judgment against her was entered in the amount of $225,000. Ms. Ehrenfeld has sought a declaratory judgment in New York determining that the English judgment was not enforceable here, and that her work was protected under American law. But the New York Court of Appeals determined that her suit could not be heard under existing state law (because the state's long-arm statute did not authorize personal jurisdiction over Mr. Bin Mahfouz), and it was the duty of the legislature to change that law if it sees fit. *See Ehrenfeld v. Bin Mahfouz*, 9 N.Y.3d 501 (N.Y. App. 2007). It appears now that that some change in that direction is starting to occur. English courts, however, are not the only one's creating this alleged conflict; consider Yahoo!'s cross-border struggle with French authorities over Nazi-era materials on its auction website. *See Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 433 F.3d 1199, 1204 (9th Cir. 2006).

More commentary on this pending legislation is available here.