ERA Conference on Recent Developments in Private International Law and Business Law

The Academy of European Law (ERA), situated in Trier and with the financial support of the European Commission, organises conferences and summer schools on various topics of EU law. On 5-6 June a conference was held on recent developments in private international law and business law (covering civil jurisdiction, civil procedure, contract, delict, insolvency, and company law).

A report summarising the interventions can be downloaded **here**.

A Divided Opinion on the Hague Abduction Convention, With Some Interesting Discussion on the Proof of Foreign Law

The Second Circuit last week issued a split-panel decision in *Duran v. Beaumont*, No. 06-cv-5614 (2d Cir. 2008). The case concerned a Chilean mothers' decision to take her child to the USA and remain there, in derogation of a Chilean court order. The child's parents—both Chilean—are recently separated, with formal custody not yet determined. However, the child lived with the mother, who—by law—could not leave Chile without the father's consent. When the father withheld consent for a trip to the United States, the mother obtained a court order allowing a limited, 3 month journey with her daughter. At the expiration of that 3 months, the mother and the child did not return.

The father petitioned the court in New York for return of the child. The court's jurisdiction under the Hague Abduction Convention was in issue. If the father had "custody rights" under the law of the child's habitual residence—here Chile—then the court could order the requested relief. If, however, the father only had a "right of access," then the court was without power to order this remedy.

The Chilean Central Authority submitted an affidavit supporting the father, espousing that he had "custody" of the child under Chilean law because the child could not leave the country without his consent. The district court, and later the Second Circuit, gave no weight to this opinion. While recognizing that the interpretation given by a sovereign to its own law is entitled to "some deference" in U.S. courts, it is not entitled to "absolute deference." Where, for instance, such an interpretation conflicts with prior judicial precedent over an issue, that precedent may govern the case. Here, the Second Circuit had already determined that a "ne exeat" right (i.e. the right to determine whether a child will leave the country) does not amount to custody under the Hague Abduction Convention. Under this authority, the father merely had a "right of access" under the Convention, and not custody, giving the New York Court no jurisdiction to order the child's return. The dissenting judge strenuously objected to the panel's refusal to give credence to the Chilean Central Authority.

The decision, and the dissent, can be found here.

This case is interesting not only for the operation of the Convention, but most of all as an illustration of the need (and difficulty) in developing some uniform mechanism for national courts to determine foreign law. Here, even with an international treaty calling on the Central Authority of a contracting state to provide an opinion on its own internal law (art. 3), a court has still chosen to ignore this decision in favor of its own precedent (interpreting Hong Kong law, nonetheless). What develops, then, is a convolution of foreign law concepts in U.S. courts, which tend to be applied over-and-over again in different cases, often erroneously. Can a new international convention on the proof of foreign law adequately address this problem?

Save the Date – Journal of Private International Law Conference 2009

Following on from the success of the *Journal of Private International Law*'s inaugural conference at Aberdeen in 2005, and last year's conference at Birmingham, the 2009 conference will be held on **16th – 18th April 2009 at New York University School of Law**. The conference itself will be over two days (17th – 18th April 2009), but there will also be an event on 16th April dedicated to Prof. Andreas Lowenfeld.

Further information on the conference will follow as it becomes available, but do feel free to enter the dates in your diary now.

The Results of the JHA Council (24-25 July 2008): UK to Opt into Rome I Reg. – Enhanced Cooperation on Rome III Reg.?

On 24 and 25 July the **Justice and Home Affairs Council** held its 2887th session in Brussels, the first under the French Presidency. The official press release is currently available ~~only~~ in French (UPDATE: English version). Among the "Justice" issues, discussed on Friday 25th, **two main points are of particular importance as regards the development of European private international law**.

ROME I – UNITED KINGDOM TO OPT-IN

The United Kingdom has expressed its wish to opt-in to the Rome I Regulation (see p. 26 of the official press release; on our site, see the Rome I section and the programme of the September conference organized by the Journal of Private International Law). The decision follows the public consultation launched in April by the British Ministry of Justice, whose results have not yet been made publicly available.

ROME III – ENHANCED COOPERATION BETWEEN SOME MEMBER STATES?

As we reported in a previous post, the JHA Council of 5-6 June 2008 established that the unanimity required to adopt the Rome III Regulation could not be obtained, and therefore the objectives of the proposed instrument could not be attained within a reasonable period by applying the relevant provisions of the EC Treaty. According to press sources (IrishTimes.com and Reuters), agreement in the Council had appeared difficult to reach since the beginning of negotiations in 2006, due to the opposition of Sweden, which did not intend to put into question the application of its liberal divorce rules.

As a consequence, in the meeting of 25 July, nine Member States informally reported to the Council their decision to launch the "enhanced cooperation" mechanism (see pp. 23-24 of the official press release).

Here is an excerpt of the article published by the EUObserver.com (*emphasis added*):

> ***Austria, France, Greece, Hungary, Italy, Luxembourg, Romania, Slovenia and Spain*** *have teamed up in order* ***to formally request the European Commission launch the so-called enhanced co-operation mechanism*** *– allowing a group of countries to move ahead in one particular area, even though other states are opposed.*
>
> *It is expected that they will make the request on Monday (28 July), one diplomat told the EUobserver. It is the first time such a move has been made.*
>
> *It will then be up to the commission to make a legal proposal based on the request. This proposal will then go back to member states where it needs to be approved by a qualified majority of governments.*
>
> *A controversial and politically sensitive issue anyway, this route for dealing*

> *with the divorce question has further irked some capitals because, under normal procedures, a decision in this area would have to be taken by unanimity.*
>
> *Reacting to the move by the nine member states, EU justice commissioner Jacques Barrot said: "The commission will have to examine all the political, legal and practical implications of such an enhanced co-operation." "We need to get a clearer idea," he added. […]*
>
> ***Malta and Sweden are widely considered the most reluctant** to give the go-ahead to a EU-wide divorce scheme. Strongly Catholic Malta does not recognise divorce, while Stockholm fears that EU harmonisation in the area could threaten its liberal family law.*
>
> *Should the pioneering group achieve closer cooperation in this area, the mechanism must remain open to other countries as well. **Germany, Belgium, Portugal and Lithuania are also believed to be considering joining the initiative**.*

The enhanced cooperation mechanism was introduced by the Treaty of Amsterdam in 1997, creating the formal possibility of a certain number of Member States establishing a closer (as it was formerly known in the English version before the Treaty of Nice) cooperation between themselves on matters covered by the Treaties, using the institutions and procedures of the EU and EC. The relevant provisions of the Treaties (as amended by the Treaty of Nice), laying down the substantive conditions and the procedure for the establishment of the cooperation, are set out in Title VII of the TEU (Articles 43-45, providing the "general framework" of the mechanism) and Articles 11-11a TEC, which add special arrangements for areas covered by the EC Treaty.

A description of the mechanism can be found on this page of the Europa website. Here's an excerpt detailing the procedure in the Community pillar:

> *Member States intending to establish enhanced cooperation within the framework of the EC Treaty shall address a request to the Commission, which may submit a proposal to the Council to that effect. Authorisation shall be granted by the Council, acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament. A member of the Council may still request that the matter be referred to the European Council of*

> *Heads of State and Government. Following this final discussion, the matter is referred back to the Council of Ministers, which may act by the majority provided for in the Treaties. The right of veto granted to the Member States by the Treaty of Amsterdam has thus been abolished. […]*
>
> *Article 11A lays down the procedure applicable to the subsequent participation of a Member State. The Commission shall decide on the request of a Member State to participate in enhanced cooperation. The role of the Commission is thus more important within the framework of the EC Treaty than within the other pillars.*

It is important to note that the provisions on closer/enhanced cooperation were never actually put into effect since their introduction, and that their potential outcome is largely debated (see the controversial issue of the so called "variable geometry", often referred as "two-speed Europe" or "Europe à la carte"): it will be therefore very interesting to see how they will be applied for the first time, and **what will be the impact of this "acceleration" by some Member States in the frame of the general debate on the future of the European integration**, so much troubled after the Irish referendum on the ratification of the Lisbon Treaty.

An interesting article on the matter (in French) has been written by *Jean Quatremer*, over at *Coulisses de Bruxelles* blog, reporting the **negative reactions** of some Member States, such as **Czech Republic, Estonia, Finland, Latvia and Poland**, and the **decision of Ireland, Netherlands and the United Kingdom not to participate** in the enhanced cooperation.

It is paradoxical that the "dismal swamp" of the conflict of laws, one of the last sector to be communitarised, could act as a "front runner" in the progress (or regress?) of the European integration.

Further information will be posted as soon as available.

When the Forum Conveniens Can Be "Convinced" to Refuse the Case

Roger Alford at *Opinio juris* has an interesting post on a recent American case where an American court declined jurisdiction based on *forum non conveniens*, but found out during the appeal that the foreign court had itself declined jurisdiction. As a consequence, the alternative available forum had disappeared, and it seemed like the American court would have to finally take jurisdiction. The question arose, however, whether the foreign decision had been obtained fraudulently, that is by corrupting the foreign judges, and how this should influence the American decision on jurisdiction.

The case was one of many suits filed in American courts against Ford and Bridgestone after some Bridgestones tires installed on Ford Explorers exploded. Many of these accidents had occurred in the United States, but four occurred in Mexico. Three of them involved U.S. residents, but one involved José Samuel Manez-Reyes, a "*Mexican soccer professional of some note*", as the U.S. Court of Appeals put it.

The 700 actions were transferred to a single district court in Indiana. The defendants sought a dismissal of the four cases connected to Mexico on the ground of *forum non conveniens*. The court granted the motion only for Manez-Reyes (that is, for the family, the player died in the accident).

The Manez-Reyes family appealed before the U.S. Court of appeals for the 7th Circuit. But before the case was heard, they also sued Ford and Bridgestone in Mexico, where a first instance court of the state of Morelos declined jurisdiction. The Mexican judgment was shortly after confirmed by an Auxiliary Chamber of the Supreme Court of the State of Morelos. So, when the U.S. Court appeals made its decision, the circumstances had changed. The theoretical availability of the forum conveniens had turned into an actual unavailability.

The availability of the alternative forum is a condition of the U.S. doctrine of *forum non conveniens*. Here, it seemed that it was not the case anymore. However, the U.S. Court of appeals agreed with the defendants that there were reasons to be suspicious about what had happened in Mexico. First,

the plaintiffs had not petitioned the court of the place of accident (Veracruz), but another Mexican court, which was the court of the domicile of the plaintiffs. Second, the defendants had not been informed of the proceedings and had not been heard by the Mexican court. Moreover, it seems that the Mexican court had not been informed of the on-going U.S. proceedings. In a judgment of 24 August 2005, the U.S. Court of appeals remanded the case to the U.S. first instance court so that it could investigate the circumstances of the Mexican proceedings.

The District Court found that the Mexican judgment has been procured in bad faith. The Mexican lawyer of the plaintiff had used family connections and had ex parte contacts with the Mexican judge in order to ensure that the Mexican court would decline jurisdiction. The U.S. Court held that, as a consequence, the Mexican judgment declining jurisdiction should not be recognized, and confirmed its first judgment to dismiss the Manez-Reyes litigation on the ground of *forum non conveniens*. The Court then moved on to sanction the plaintiff's lawyers.

One could argue that the jurisdictional sanction of the parties' behaviour was a bit harsh. What they did in Mexico was certainly not right, but this does not change the fact that the tire of the car had exploded, and that the victim died as a result. The U.S. District Court dealt with the issue by leaving its doors open. It reaffirmed its decision to dismiss the case on the ground of *forum non conveniens* "without prejudice". As the Court of appeals explained in its judgment of 11 July 2008, this means that although the U.S. Court dismissed the case, the plaintiffs are free to refile if they so wish, including in a U.S. Court and as the case may be, before the same court. In other words, should a Mexican court decline jurisdiction after proceedings in good faith, the plaintiffs could come back to the a U.S. court and argue that it should reexamine its jurisdiction in the light of the new circumstances.

New Reference for Preliminary Ruling on Brussels I

A new reference regarding the Brussels I Regulation is pending at the ECJ. The *Bundesgerichtshof* (Germany) has referred the following questions for a preliminary ruling:

> *Is the second indent of Article 5(1)(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 to be interpreted as meaning that in the case of journeys by air from one Member State to another the single place of performance for all contractual obligations must be taken to be the place of the main provision of services, determined according to economic criteria?*
>
> *Where a single place of performance is to be determined: What criteria are relevant for its determination; is the single place of performance determined, in particular, by the place of departure or the place of arrival?*

The case is pending as *Peter Rehder v Air Baltic Corporation* (Case C-204/08).

The referring decision of 22 April 2008 (X ZR 76/07) can be found at the website of the *Bundesgerichtshof*.

Publication: European Enforcement Order for Uncontested Claims

David-Christoph Bittmann: **"Vom Exequatur zum qualifizierten Klauselerteilungsverfahren"**

This new German publication analyses from a comparative perspective as to whether the new procedure introduced by Regulation (EC) No 805/2004 creating a European Enforcement Order for Uncontested Claims actually constitutes an advancement for the creditor without disregarding the debtor's rights in comparison with the previous exequatur proceedings. Further, the Regulation creating an Enforcement Order for Uncontested Claims is compared with Regulation (EC) No 1896/2000 creating a European Order for Payment Procedure, Regulation (EC) No 861/2007 establishing a European Small Claims Procedure as well as the future Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

More information on this book can be found at the publisher's website.

Arbitral Awards Violating European Antitrust Laws: French Courts Cannot Help

Are French courts willing to review arbitral awards on the ground that arbitrators violated European antitrust laws? As a matter of principle, French courts are extremely reluctant to review arbitral awards on the merits. In theory, an exception remains when the award violates French international public policy, but actual instances where French courts have found such violations are very few.

Now, on June 1999, the European Court of Justice held in *EcoSwissChina* that member states ought to consider that article 81 of the EC Treaty belongs to their public policy for the purpose of reviewing arbitral awards. In that case, however, Dutch courts had been unable to review the compatibility of the award with EU antitrust law because the plaintiff had failed to challenge the award in a timely fashion. The ECJ held that it did not intend to change the procedural laws of the member states and that the obligation under Dutch law to initiate the

challenge proceedings within 3 months was such procedural rule which could prevent an actual verification of the proper application of antitrust laws.

Is that changing anything to the French position? Not if the reluctance to review awards can be presented as the consequence of the application of a French procedural rule. Question: could that be a procedural rule which prevents review not only in some cases (say when the plaintiff did not act in a timely fashion), but in all cases? For instance, what about a local rule of procedure providing that courts only review the most obvious violations of public policy rules?

In November 2004, the Paris Court of Appeal had ruled in *Thales Air Defense v. GIE Euromissiles* that there was such a procedural rule in France. The French rule was that only violations of French public policy which were "obvious, actual and concrete" (*flagrante, effective et concrete*) would be sanctioned. As a consequence, in *Thalès*, the Court had dismissed a challenge in a case where the parties had arguably shared the relevant European market. The issue of the validity of the contract had not been raised during the arbitration.

SNF vs CYTEC

In a judgement of June 4, 2008, the French Supreme Court for private matters (*Cour de cassation*) addressed the issue for the first time.

The parties were two European chemical companies, Dutch Company CYTEC and French company SNF. The business of SNF was to sell a given chemical product, PMD, which could only be produced by using another chemical product, AMD. CYTEC was one of the sole producer in Europe of AMD, so SNF had to get it from CYTEC. In the early 1990s, the parties concluded successive exclusive purchase agreements (one in 1991, one in 1993) whereby SNF undertook to purchase AMD exclusively from CYTEC for 8 years. The contract provided for ICC arbitration in Brussels, Belgium, in case of dispute.

In January 2000, SNF stopped purchasing from CYTEC arguing that the contract violated European antitrust laws (Art 81 and 82 of the European Treaty). In May 2000, CYTEC initiated arbitral proceedings seeking compensation for breach of contract. In a counterclaim, SNF argued that the contract was contrary to European antitrust laws and as such ought to be set aside.

In a first award rendered on 5 November 2002, the tribunal found that the

contract did violate article 81 of the European Treaty, as by obliging SNF to purchase exclusively from CYTEC, the exclusive purchase agreement prevented SNF from accessing the market of AMD. The tribunal set aside the contract and held that the parties were equally liable for it. In a second award made on 28 July 2004, the tribunal ruled on the financial consequences of the nullification of the contract but ordered solely SNF to compensate CYTEC.

In that case, competition law issues had been discussed before the arbitrators, so much so that the contract had been annuled on the ground that it violated it. This was not, however, the end of the story. SNF argued that, by compensating CYTEC only, the tribunal had managed to have the contract indirectly produce effect, and had thus violated antitrust laws anyway. It thus challenged the validity of the award before Belgian courts (as the seat of the arbitration was Brussels). On 8 March 2007, the Brussels first instance court accepted the argument and set aside the arbitral awards on that ground (SNF went on to sue the ICC in Paris for failing to verify whether the arbitrators had properly complied with public policy. The French judgement dismissing the action can be found here (in French, at p. 30)).

Meanwhile, however, CYTEC had sought enforcement of the awards in France, where they were declared enforceable in 2004. One after the other, all French courts found that the awards were not contrary to French public policy, as the violations were not obvious. The *Cour de cassation* confirmed last the position of French courts by ruling that no evidence of an "obvious, actual and concrete" violation of public policy had been provided. Note that, from a French point of view, the fact that the awards were eventually set aside by Belgian courts is irrelevant, as the French doctrine is that international arbitration is delocalized.

Interim conclusion: do not provide for arbitration in Brussels for disputes arising out of this kind of contract. Also, avoid rue de la Loi or rue Joseph II.

A critical difference between the *Thales* case and the *CYTEC* case is obviously that, in the *CYTEC* case, EU competition law had been applied. The judgment of the *Cour de cassation* puts this forward as one of the reasons for its decision. Remarkably, the judgment also says that the amount of compensation falls outside of the scope of the public policy ground for review. French judgments are always very short and subject to interpretation, but it seems that the Court rules that it will never find a violation of EU antitrust laws where a party was denied damages

as a consequence of an antitrust violation. So, in this case, there was no chance whatsoever it would deny recognition to the awards. Why should compensation be excluded from public policy? The court does not say.

Final conclusion: one wonders what European institutions will think of all these subtle distinctions.

Judgment in Case "Inga Rinau" – Urgent Preliminary Ruling Procedure

Today, the ECJ delivered its judgment in case *Inga Rinau* (C-195/08 PPU) which seems to be the first case under the urgent preliminary ruling procedure.

The judgment is not available in English yet, however in French, Italian, German and several other languages.

The Court held:

> *1) Une fois une décision de non-retour prise et portée à la connaissance de la juridiction d'origine, il est sans incidence, aux fins de la délivrance du certificat prévu à l'article 42 du règlement (CE) n° 2201/2003 du Conseil, du 27 novembre 2003, relatif à la compétence, la reconnaissance et l'exécution des décisions en matière matrimoniale et en matière de responsabilité parentale abrogeant le règlement (CE) n° 1347/2000, que cette décision ait été suspendue, réformée, annulée ou, en tout état de cause, ne soit pas passée en force de chose jugée ou ait été remplacée par une décision de retour, pour autant que le retour de l'enfant n'a pas effectivement eu lieu. Aucun doute n'ayant été émis en ce qui concerne l'authenticité de ce certificat et celui-ci ayant été établi conformément au formulaire dont le modèle figure à l'annexe IV dudit règlement, l'opposition à la reconnaissance de la décision de retour est interdite et il n'incombe à la juridiction requise que de constater la force*

exécutoire de la décision certifiée et de faire droit au retour immédiat de l'enfant.

2) Hormis les cas où la procédure vise une décision certifiée en application des articles 11, paragraphe 8, et 40 à 42 du règlement n° 2201/2003, toute partie intéressée peut demander la non?reconnaissance d'une décision juridictionnelle, même si une demande de reconnaissance de la décision n'a pas été déposée préalablement.

3) L'article 31, paragraphe 1, du règlement n° 2201/2003, en ce qu'il prévoit que ni la personne contre laquelle l'exécution est demandée ni l'enfant ne peuvent, à ce stade de la procédure, présenter d'observations, n'est pas applicable à une procédure de non?reconnaissance d'une décision juridictionnelle, formée sans qu'une demande de reconnaissance ait été préalablement introduite à l'égard de la même décision. Dans une telle situation, la partie défenderesse, prétendant à la reconnaissance, peut présenter des observations.

See for the full judgment the website of the ECJ and for more information on the case as well as the urgent preliminary ruling procedure also our previous post which can be found here.

Many thanks again to Jens Karsten for drawing our attention to this reference.

Article on the Interaction of Choice of Law Rules and the Australian Constitution

Christopher Kourakis, the Solicitor-General for the State of South Australia, has an interesting article on the interaction of choice of law rules and the Australian Constitution in cases of conflict between state laws in volume 28 of the *Adelaide*

Law Review. The article discusses the decision of the High Court in *Sweedman v Transport Accident Commission* (2006) 226 CLR 362; [2006] HCA 8, which concerned whether a Victorian statutory motor vehicle insurer, which paid compensation to Victorians injured in a car accident in New South Wales, could recover under the Victorian statute from the New South Wales driver who caused the accident. The article considers the common law choice of law rule applicable to claims for statutory indemnification, and then considers the possible ways in which it has been suggested by judges and commentators (including the newly appointed Solicitor-General for the Commonwealth) that the Australian Constitution might provide an alternative approach.

See Christopher Kourakis, '*Sweedman v Transport Accident Commission*: A Simple Crash and Bang?' (2007) 28 *Adelaide Law Review* 23.