

# Liberalization of Enforcement of US Judgments in France

In a previous post, I had reported that the French supreme court for private matters (*Cour de cassation*) overruled last year a century old precedent limiting the enforcement of foreign judgments against French nationals. In *Prieur*, the *Cour de cassation* held that Article 15 of the Civil Code should not be construed anymore as giving exclusive jurisdiction to French courts to decide disputes involving French nationals. As a consequence, foreign judgments made against French nationals should be enforced in they meet the other liberal standards of the French law of judgments (as further liberalized by the *Cour de cassation* in *Avianca*).

On May 22, 2007, the *Cour de cassation* confirmed its *Prieur* decision by applying it to a US judgment. The Superior Court of Alameda County, California, had ordered French company Fontaine Pajot to pay damages to two US nationals. The French company resisted enforcement of the Californian judgment in France on the ground that they had not waived their “jurisdictional privilege” (as Article 15 of the Civil code was sometimes known) to be tried by a French court. In other words, the French company was arguing that the foreign court lacked jurisdiction from the French perspective since one of the parties was French, and French courts had exclusive jurisdiction over disputes involving French nationals. The appeal is dismissed by the *Cour de cassation* on the ground that Article 15 only gives optional jurisdiction to French courts, and that it is now irrelevant to determine the jurisdiction of foreign courts, for the purpose of the enforcement of judgments in France.

Eventually, the *Cour de cassation* held that it was for the trial judges to determine whether there was a significant connection between the foreign court and the dispute, and thus jurisdiction of the foreign court.

For those of you who read French, I quote the important part of the decision (it is also available on [legifrance.gouv.fr](http://legifrance.gouv.fr), but I have been unable to make a link to the decision):

*Vu l'article 15 du Code civil; attendu que ce texte ne consacre qu'une*

*compétence facultative de la juridiction française, impropre à exclure la compétence indirecte d'un tribunal étranger, des lors que le litige se rattache de manière caractérisée à l'Etat dont la juridiction est saisie, et que le choix de la juridiction n'est pas frauduleux.*

Two conclusions can be drawn from this case. First and most importantly, *Prieur* is confirmed. Second, denial of enforcement of US judgments will require the identification of a specific issue with the foreign judgment, such as a violation of French public policy for judgments awarding punitive damages. Finally, the new paradigm is doing fine when coping with decisions from jurisdictions where the judiciary is not notoriously corrupt, but a time will come when that will not be the case.

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## **Insolvency Proceedings and Shareholdings: When is a Foreign Judgment not a Judgment?**

Chee Ho Tham has written a casenote in the latest issue of the *Lloyd's Maritime & Commercial Law Quarterly* on “**Insolvency proceedings and shareholdings: when is a foreign judgment not a judgment?**” (L.M.C.L.Q. 2007, 2(May), 129-136). Here's the abstract:

*Comments on the Privy Council judgment in Cambridge Gas Transport Corp v Official Committee of Unsecured Creditors of Navigator Holdings Plc on whether a US bankruptcy ruling could be enforced against a Cayman Islands corporation which owned shares in an Isle of Man holding company. Discusses whether the US plan of reorganisation was a judgment in rem or in personam or was a judgment at all, for the purposes of enforcement in the Isle of Man.*

Available to those with a subscription to the *LMCLQ* (not available online,

unfortunately.)

*(Please note that the site will probably be fairly quiet for the next few days, until the **conference** is over. See you on the other side!)*

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# BIICL Seminar on West Tankers Case

Here's a seminar announcement from the British Institute of International & Comparative Law:

As you will undoubtedly know, the House of Lords has referred the case of *West Tankers Inc v. RAS Riunione Adriatica di Sicurta SpA & Others* [2007] UKHL 4 to the European Court of Justice for a preliminary ruling.

The question raised is **whether Regulation 44/2001 permits anti-suit injunctions to protect an arbitration agreement**. On **11 July (5-7pm)**, the Institute has planned a seminar where the case and its potential implications will be discussed.

Chair: – **Rt Hon Lord Justice Lawrence Collins**.

Speakers:

– **Audley Sheppard**, Clifford Chance LLP

– **Clare Ambrose**, 20 Essex Street

– **Dr Christian Heinze**, Max Planck Institute for Comparative and International Private Law

Participants can download a discussion note. The note introduces the case and further provides an overview of relevant findings of the 2007 Report of the Heidelberg Institute for Private International Law prepared for the European Commission on the application of Regulation 44/2001.

The event will be followed by a reception for all those attending. To register, please visit the Institute's website by clicking [here](#).

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# Reference for a Preliminary Ruling on Brussels II bis

The **Swedish** Supreme Court (*Högsta Domstolen*) has referred the following question to the European Court of Justice for a preliminary ruling on the interpretation of Brussels II bis:

*The respondent in a case concerning divorce is neither resident in a Member State nor a citizen of a Member State. May the case be heard by a court in a Member State which does not have jurisdiction under Article 3 [of the Brussels II [bis] Regulation], even though a court in another Member State may have jurisdiction by application of one of the rules on jurisdiction set out in Article 3?*

This case is pending at the ECJ under C-68/07 (*Kerstin Sundelind Lopez v. Miquel Enrique Lopez Lizazo*). It represents the second reference on Brussels II bis so far.

The first reference for a preliminary ruling on Brussels II bis comes from the the **Finnish** *Korkein hallinto-oikeus* which referred to following questions to the ECJ:

*(a) Does Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, (the Brussels 11a Regulation) apply, in a case such as the present, to the enforcement of a public law decision in connection with child welfare, relating to the immediate taking into custody of a child and his or her placement in a foster family outside the home, taken as a single decision, in its entirety;*

*(b) or solely to that part of the decision relating to placement outside the home in a foster family, having regard to the provision in Article 1(2)(d) of the*

regulation;

*(c) and, in the latter case, is the Brussels IIa Regulation applicable to a decision on placement contained in one on taking into custody, even if the decision on custody itself, on which the placement decision is dependent, is subject to legislation, based on the mutual recognition and enforcement of judgments and administrative decisions, that has been harmonised in cooperation between the Member States concerned?*

*If the answer to Question 1(a) is in the affirmative, is it possible, given that the Regulation takes no account of the legislation harmonised by the Nordic Council on the recognition and enforcement of public law decisions on custody, as described above, but solely of a corresponding private law convention, nevertheless to apply this harmonised legislation based on the direct recognition and enforcement of administrative decisions as a form of cooperation between administrative authorities to the taking into custody of a child?*

*If the answer to Question 1(a) is in the affirmative and that to Question 2 is in the negative, does the Brussels IIa Regulation apply temporally to a case, taking account of Articles 72 and 64(2) of the regulation and the abovementioned harmonised Nordic legislation on public law decisions on custody, if in Sweden the administrative authorities took their decision both on immediate taking into custody and on placement with a family on 23.2.2005 and submitted their decision on immediate custody to the administrative court for confirmation on 25.2.2005, and that court accordingly confirmed the decision on 3.3.2005?*

**This case is pending under C-435/06 (Applicant: C)**

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# Rome I: Parliament's Compromise Amendment on Consumer Contracts

**A compromise amendment to Art. 5 of the Commission's Rome I Proposal has been presented by the Rapporteur *Ian Dumitrescu*** in the last meeting of the EP's Committee on Legal Affairs (JURI). The amendment seems to take into account a number of concerns recently raised on the functioning of the conflict rule on consumer contracts (see our recent posts on the note by the Luxembourg delegation, the document from the Commission on certain financial aspects relating to the application of Articles 4 and 5 and the German position on services supplied to the consumer exclusively in a country other than that of his habitual residence).

The compromise amendment is partly a redraft of the Commission's proposal, with few relevant modifications:

- **the protective rule is not limited to consumers who are habitually resident in a Member State;**
- **the parties may choose the law applicable to the contract pursuant to Art. 3, but such a law "may not have the effect of derogating" from the law of the consumer's habitual residence** (new para. 2a: compare this provision with current Art. 5(2) of the Rome Convention, according to which "a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence");
- according to Art. 5(2) of the proposed amendment, the protective rule applies if "(a) the professional exercises his trade or profession in the Member State in which the consumer has his habitual residence; (b) or **the professional, by means of deliberate acts, directs his activity** towards the Member State in question or a number of countries including the Member State in question";
- **the list of contracts exempted from the protective regime is enlarged** (Art. 5(3)), including

*(a) a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence;*

*[...]*

**[new]** *(d) contracts concluded on a financial market and contracts for the purchase, by way of subscription, of shares, bonds or other newly issued securities;*

**[new]** *(e) contracts relating to the supply of investment services or financial instruments as defined by Directive 2004/39/EC.*

The initial Draft Report under discussion in the JURI Committee, together with two previous sets of amendments, can be found in our previous post [here](#).

The adoption of the Report on the Rome I Proposal is expected in the EP's JURI Committee in one of the forthcoming meetings. According to current forecasts, the vote at first reading in the Parliament's plenary session is scheduled on 10 October 2007 (see the Rome I OEIL page).

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## **Publication: International Family Law for the European Union**

A very interesting compilation of contributions resulting from a research project on the elaboration of international family law rules within the European Union, funded by the European Commission and conducted by the universities of Antwerp, Barcelona, Louvain-la-Neuve, Lund, Milan, Toulouse and Utrecht has been published by *Johan Meeusen, Marta Pertegás, Gert Straetmans and Frederik Swennen*:

**International Family Law for the European Union.**

It contains the following articles:

- *Johan Meeusen/Marta Pertegás/Gert Straetmans/Frederik Swennen*: General Report
- *Masha Antokolksaia*: Objectives and Values of Substantive Family Law
- *Dieter Martiny*: Objectives and Values of (Private) International Law in Family Law
- *Helen Stalford* : EU Family Law: A Human Rights Perspective
- *Alegría Borrás*: Institutional Framework: Adequate Instruments and the External Dimension
- *Marc Fallon*: Constraints of Internal Market Law on Family Law
- *Gert Straetmans*: Non-Economic Free Movement of European Union Citizens and Family Law Matters
- *Johan Meeusen*: System Shopping in European Private International Law in Family Matters
- *Sylvaine Poillot Peruzzetto* : The Exception of Public Policy in Family Law within the European Legal System
- *Michael Bogdan*: The EC Treaty and the Use of Nationality and Habitual Residence as Connecting Factors in International Family Law
- *Marta Pertegás*: Beyond Nationality and Habitual Residence: Other Connecting Factors in European Private International Law in Family Matters
- *Laura Tomasi, Carola Ricci and Stefania Bariatti*: Characterisation in Family Matters for Purposes of European Private International Law
- *Frederik Swennen*: Atypical Families in EU (Private International) Family Law
- *Cristina Gonzáles Beilfuss*: Islamic Family Law in the European Union
- *Jean-Yves Carlier and Sylvie Saroléa*: Migrations and Family Law

*More information can be found on the publisher's website where the book can*



also be ordered.

**Highly recommended.**

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## Article on Non-State Law

Giuditta Cordero Moss (University of Oslo) has written an intriguing article in the *Global Jurist* (Vol. 7 : Iss. 1 (Advances), Article 3) entitled “International Contracts between Common Law and Civil Law: Is Non-state Law to Be Preferred? The Difficulty of Interpreting Legal Standards Such as Good Faith”. Here is the abstract:

*Most commercial contracts are nowadays written on the basis of English or American contract models, irrespective of whether the legal relationship that the contracts regulate is governed by a law belonging to a Common Law system or not. These contract models are drafted on the basis of the requirements and structure of the respective Common Law system in which they were originally meant to operate. These models may therefore be in part ineffective or parts thereof may be redundant, if the governing law belongs to a Civilian system. To overcome this tension between Common and Civil Law, it is sometimes recommended to subject international contracts to non-state sources of law (also referred to as transnational law, lex mercatoria, soft law). This article analyses the tension between the Common and the Civil Law of contracts, and to what extent non-state sources may represent a satisfactory solution to such tension. This is made by analyzing the role that good faith and fair dealing play in contracts according to the respective systems: English law as an illustration of Common Law systems, Norwegian, German and Italian law as illustrations of Civil Law Systems, the UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law as illustration of non-state sources.*

You can download the paper from [here](#).

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# German Article on Rome I

An interesting article by *Boris Schinkels* (University of Heidelberg) has been published recently in the European Community Private Law Review (GPR 2007, 106 et seq.):

## **Die (Un-)Zulässigkeit einer kollisionsrechtlichen Wahl der UNIDROIT Principles nach Rom I: Wirklich nur eine Frage der Rechtspolitik?**


The English summary reads as follows:

*Article 3 (2) of the Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), COM(2005) 650 final, stipulates the autonomy of the parties to choose sets of “rules” as applicable “law” of the contract that do not necessarily form part of the valid law of a state. Yet, current political reluctance towards this extension of party autonomy to non-state rules will presumably result in the deletion of this part of the provision in the legislative process towards the Rome I-Regulation. This contribution especially analyses the assumption that chosen law could be applied “as such”, on which traditional reservation in choice-of-law methodology against the eligibility of non-state law like the UNIDROIT Principles as the substantive “law” of the contract are based. It can be shown that this assumption results from an erroneous concept of “validity” of law. Hence, the traditionalist view not only ignores the general guarantee of freedom for any individual, but also the principle of equal treatment of equal situation as warranted by the EC Treaty with precedence over secondary law such as regulations on choice of law.*

**Highly recommended.**

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# Conference 2007 - Book Now!

The **Journal of Private International Law Conference 2007** is now only a  couple of weeks away. Conference packs are being put together, the state-of-the-art venue is being readied, and a host of internationally-renowned speakers and delegates are preparing to descend on the **University of Birmingham, UK** on **26 - 27 June** for what we will probably be the biggest private international law event this country has ever seen.

There is still time to book your place at the conference and the evening meal. Here are the relevant links:

- **The Programme**
- **The Venue**
- **Booking and Fees**

If you have any questions before or after you book, you can email the Conference Secretary, Miss Emer McKernan at: [conflicts-conference@contacts.bham.ac.uk](mailto:conflicts-conference@contacts.bham.ac.uk).

I hope to see all CONFLICT OF LAWS .NET readers at the conference.

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## A “Major” Federal Copyright Decision on Enforcing Foreign Judgments

Continuing the trend of interesting private international cases coming out of the patent and copyright fields (see previous posts [here](#) and [here](#)), the Second circuit recently decided a case involving the enforcement of a French judgment involving copyrighted dress designs.

In *Sarl Louis Feraud International v. Viewfinder, Inc.*, 2007 WL 1598057 (2d Cir.

June 5, 2007), a French court held, by default judgment, that Plaintiff's copyright in the actual design of dresses was infringed by Defendant's taking photographs of them and placing them on a website. Enforcement was sought in the U.S. under New York State law. Judge Lynch refused to enforce the French judgment on the grounds that it would be repugnant to the public policy of New York as it would violate Defendant's First Amendment rights. 406 F. Supp. 2d 274 (S.D.N.Y. 2005). Lynch said it was obvious that Defendant's activities fall within the protections of the First Amendment, because they are "matter[s] of great public interest, for artistic as well as commercial purposes. . . . [T]he extensive coverage given to such events in various mass media makes clear that there is widespread public interest in these matters."

Judge Lynch said a conflict arises when U.S. courts are asked to enforce judgments from countries that do not have First Amendment protections.

*"Many democratic countries, which share our general commitment to human rights and maintain free and open societies in which freedom of speech and thought is fully respected, differ from us in the resolution of certain questions involving the balance between freedom of expression and the maintenance of ordered liberty, particularly in areas where freedom of expression may be in tension with the protection of other human rights, such as equality or human dignity. . . . Even in those areas, however, where reasonable people and decent societies may reasonably disagree, American courts have recognized that foreign judgments that run afoul of First Amendment values are inconsistent with our notions of what is fair and just, and conflict with the strong public policy of our state."*

The judge noted that the First Amendment protects speech that can be banned in other democratic countries, and courts in the United States have refused to enforce foreign judgments such as one that restricted access to Nazi propaganda in France. American courts also have refused to recognize English libel judgments that would be inconsistent with the U.S. Constitution or the laws of the states.

The Second Circuit just reversed, 2007 WL 1598057 (2d Cir. June 5, 2007). The court began by noting the rule of comity inhering to default foreign judgment, and held that, "for the purposes of this action, we must accept that Viewfinder's conduct constitutes an unauthorized reproduction or performance of plaintiffs'

copyrighted work infringing on plaintiffs' intellectual property rights, and the only question to consider is whether a law that sanctions such conduct is repugnant to the public policy of New York." In so considering, however, the Court held that Judge Lynch had not "conducted a full analysis" of the issue.

In particular, the Second circuit refused to allow Defendant to rest its defense entirely upon its status as a news magazine covering a public event. Because "[i]ntellectual property laws co-exist with the First Amendment in this country, . . . [t]he First Amendment does not provide such categorical protection." Rather, in deciding whether the French Judgments are repugnant to the public policy of New York, the district court should:

*"first determine the level of First Amendment protection required by New York public policy when a news entity engages in the unauthorized use of intellectual property at issue here. Then, it should determine whether the French intellectual property regime provides comparable protections."*

On the first prong of the test, the court directed exclusive use of the "fair use doctrine," which "balances the competing interests of the copyright laws and the First Amendment" under a four-factor test. Because the district court analyzed the "fair use doctrine" in a single sentence, and the record as it stands was insufficient for the court to decide it here, the decision was vacated and the case remanded to be addressed on a "fully-developed record." The court also directed a more in-depth examination of the second prong of the analysis under Fed. R. Civ. P. 44.1, i.e. "the manner of protection afforded plaintiff's fashion shows by French law."

Because the court seemed to place any First Amendment defense to foreign judgment enforcement exclusively within, and not in addition to, the "fair use doctrine," Commentators have already acknowledged that "[t]his is a major decision." The court also seems to acknowledge that, if Judge Lynch concludes that Defendant's use of plaintiff's intellectual property would be fair under U.S. law (regardless of whether it would be permitted under French law), then the judgment cannot be enforced.