First Issue of 2007's Revue Critique de Droit International privé

The last issue of the French *Revue Critique de Droit International Privé* has just been released. It contains two articles, written in French.

The first deals with immigration law, which has traditionally been regarded as part of private international law in France. It is authored by professor Dominique Turpin and presents the last legislative reform in the field.

The title of the second article is "Le Reglement communautaire sur l'obtention des preuves: un instrument exclusif?" (The European Regulation on the Taking of Evidence: an Exclusif Instrument?). It is authored by Belgian professor Arnaud Nuyts. Unfortunately, the author does not provide any abstract.

Comments on Rome I

The latest volume of the German legal journal *Rabels Zeitschrift* (Vo. 71, No. 2, April 2007) contains "Comments on the European Commission's Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual oblitations (Rome I)" (in English) elaborated by the Working Group on Rome I of the Max Planck Institute for Comparative and International Private International Law.

The Mozambique Rule and IP Rights in New Zealand

In a recently reported judgment, McKenzie J of the High Court of New Zealand has held that the New Zealand courts can exercise jurisdiction over claims for the infringement of foreign copyright, at least where the defendant is served within the jurisdiction and where the existence and validity of the foreign copyright is undisputed.

The case, *KK Sony Computer Entertainment v Van Veen* (2006) 71 IPR 179, concerned the sale and distribution in New Zealand, Hong Kong and the UK of a computer program which enabled the user to circumvent the embedded copy protection in Sony PlayStation 2 computer games. The plaintiff alleged breaches of the New Zealand, Hong Kong and UK copyright statutes, and the defendant entered a statement of defence in which he admitted the facts that would make him liable under each of those statutes. Beyond entering that statement, the defendant did not otherwise appear.

McKenzie J entered judgment for the plaintiff. His Honour declined to follow previous New Zealand and Australian authority on the point, and instead applied the English Court of Appeal decision in *Pearce v Ove Arup Partnership Ltd* [1999] 1 All ER 769. His Honour drew a distinction between cases in which the plaintiff's title or rights were in dispute (in which the *Mozambique* rule would apply), and those cases in which the title or rights were undisputed (in which the court would be free to exercise jurisdiction).

His Honour then characterised the copyright infringement as a "wrong", and then asked whether the double actionability rule in *Phillips v Eyre* precluded the court from entering judgment for the plaintiffs. The problem was that the infringements of UK and Hong Kong copyright "do not constitute a wrong against New Zealand copyright, since New Zealand copyright is territorial in effect." The solution, again, was to be found in *Pearce v Ove Arup*: one simply "effect[s] a notional transfer to New Zealand, for consideration under New Zealand law, of both the infringing act, and the intellectual property right infringed."

The decision is a curious one in some respects. On the proffered reasoning, what

difference did it make that the defendant was resident in New Zealand? And if all jurisdictional complexities could be resolved by a "notional transfer", why should the court's jurisdiction be limited to those cases in which the existence of the IP right is undisputed? Cross-border infringement of IP rights is a real and topical problem: whether *Sony v Van Veen* (or, more importantly, *Pearce v Ove Arup*) offers a satisfactory response lies very much in the eye of the beholder.

Australian Article on Enforcing a Judgment on a Judgment

P St J Smart (University of Hong Kong) has written an article in the latest *Australian Law Journal* (2007 vol 81, p 349) on the question of whether an Australian court may enforce a foreign judgment which is itself founded upon the judgment of another, different foreign court. The abstract continues:

> *The enforceability of a so-called "judgment on a judgment" has been canvassed by academic writers and has the support of at least one recent case (albeit not in an Australian court). Yet this commentator suggests that an Australian court should not enforce the judgment of an intermediary foreign court because such judgment will not meet the requirement that it is a decision on the merits of the parties' dispute.*

The article takes as its starting point the recent Hong Kong decision in *Morgan Stanley & Co International Ltd v Pilot Lead Investments Ltd* [2006] 4 HKC 93; [2006] HKCFI 430, which concerned the enforcement in Hong Kong of an Singaporean order which was in turn based upon the registration of an English judgment.

The article is available on the internet to Lawbook Online subscribers.

French Judgements on Article 5(1)(b) of the Brussels I Regulation, Part II

In a recent post, I presented two 2006 judgements of the French supreme court for private matters (*cour de cassation*) on the application of Article 5 (1)(b) to distribution contracts. The *Cour de cassation* had held twice that the distribution contracts were Contracts for the Provision of Services in the meaning of article 5.

On January 23, 2007, the same court held in *Waeco* that another kind of distribution contract, a *concession exclusive* (exclusive concession in English?) was neither a Sales of Goods, nor a Provision of Services in the meaning of article 5(1)(b), and that, as a consequence, article 5(1)(a) had to be applied.

In *Waeco*, a distribution contract of *concession exclusive de vente* (Sale exclusive concession agreement) had been concluded in 2000 between a German seller, Waeco Int'l, and a French distributor, Waeco France. When the German party terminated the contract in December 2002, the French party decided to initiate proceedings in France. The Court of appeal of Aix-en-Provence had found that article 5 (1)(b) applied. The Cour de cassation reversed and held that article 5(1)(a) applied as exclusive concession agreements were neither sales of goods, nor provisions of services. It then went on to determine the applicable law pursuant to article 4 of the Rome convention to assess where the obligation in question was being performed. It held that the characteristic obligation was the provision of the sales exclusivity by the German seller to the French distributor, and that German law thus applied.

French judgements never mention previous cases. It is thus left to commentators to guess whether what may appear as a contradiction is not, or is. The only way to reconcile these cases that I can think of is to distinguish them on the nature of the distribution contract involved. In the 2006 cases, the distributor was not buying to resell, but was only making the sale happen: he was either facilitating the sale, or

an agent. The distribution contract did not entail any sale. In *Waeco*, the distributor was buying the goods from the seller to resell them, and had the exclusivity of the sales on his commercial territory. The distribution contract involved both a sale and a service. For choice of law purposes, the Cour de cassation rules that one (sales exclusivity) is more important than the other, but for jurisdictional purposes, it refuses to choose and comes back to the good old article 5(1)(a) rule.

Brussels IV – The Problems of Trusts and Characterisation

Richard Frimston (*Russell Cooke solicitors*) has written a note in the new issue of *Private Client Business* on "**Brussels IV – The Problems of Trusts and Characterisation in the Civil Law**" (P.C.B. (2007) No.3 Pages 170-180). The abstract reads:

> *Discusses European Commission plans to propose rules on jurisdiction and enforcement of judgments concerning succession (Brussels IV), considering how these plans may affect succession planning with lifetime gifts and settlements. Anticipates what the Commission may propose, and speculates how Brussels IV may interact with the Hague Convention on the Law Applicable to Trusts and on their Recognition 1985. Examines how the UK and Ireland may be particularly affected, because of the different classification of trusts in civil law countries.*

A little bit from the conclusion:

> *In the past, jurisdictions have attempted to protect trust assets from foreign succession law claims on a unilateral basis. With the probability that succession law will become more, rather than less, directly enforceable between European jurisdictions, even more care needs to be given to the legal implications of the initial transfer, especially since change is also in the air, as to the relevant law*

> *of such transfer, particularly for dematerialised securities. It is to be hoped that issues of classification will be a matter to be decided by the law of the forum.*

The European Commission Green Paper on Succession and Wills (i.e. Brussels IV) can be found here. The UK response to the Green Paper is here. The *P.C.B.* article can be found on Westlaw for those with access.

French Judgements on Article 5(1)(b) of the Brussels I Regulation

In 2006, the French supreme court for private matters (*Cour de cassation*) held in two cases that distribution contracts ought to be considered as Contracts for the Provision of Services for the purpose of article 5 (1)(b) of the Brussels I Regulation.

The first judgement was delivered on July 11, 2006. In 1997, the German company Wema Post Maschinen had undertaken to pay a 3% commission to several "intermediaries" (*intermediaires*) (whose names do not appear in the judgement) if they could make happen the sale of a machine to the Delrieu company (seemingly French). The exact nature of the 1997 contract is unclear, and is certainly not characterised by the *Cour de cassation*, which may mean that the court did not find it material. The sale happened in 2002, and the "intermediaries" sued the German party before a French Court for payment of the commission. In 2005, the Court of Appeal of Limoges held that it did not have jurisdiction over the dispute, as the payment ought to have been made in Germany. The *Cour de cassation* reversed. It held that the contract between the parties was a Contract for the Provision of Services in the meaning of article 5, and that, as the service had been been provided in France, French courts had jurisdiction.

On October 6, 2006, the *Cour de cassation* held in *Solinas* (reported in the last issue of the *Journal de Droit International*) that a commercial agency contract was a Contract for the Provision of Services for the purpose of article 5. Solinas was the French agent of a Portuguese company, Fabrica Textil Riopele. In 2003, Solinas sued its principal before the Paris Commercial Court and sought payment of an indemnity for increasing the customers of Fabrica Textil Riopele and payment of damages for abusive termination of the (agency) contract. Fabrica Textil Riopele argued that the French court lacked jurisdiction. In 2004, the Paris Court of Appeal held that French courts lacked jurisdiction over the claim for payment of the indemnity, as it ought to be performed in Portugal, at the domicile of the principal. The *Cour de cassation* reversed and held that the contract between the parties was a Contract for the Provision of Services in the meaning of article 5, and that, as the service had been been provided in France, French courts had jurisdiction.

It is tempting to interpret these two cases as indications of the willingness of the *Cour de cassation* to rule that all distribution contracts are Contract for the Provision of Services, and that only mere sales contracts will be considered as Sales of Goods in the meaning of article 5. But after *Waeco*, it seems that these solutions should be confined to contracts which do not involve sales.

If you know of other European cases that would have ruled on the same issue, feel free to post a comment and to share this information.

Italian Society of International Law's XII Annual Meeting (Milan, 8-9 June 2007)

The **Italian Society of International Law (Società Italiana di Diritto Internazionale – SIDI)** will hold its **XII Annual Meeting at the University of Milan on 8-9 June 2007**. The conference is devoted to **"International**

Economic Relations and the Evolution of Their Legal Regime – Subjects, Values and Instruments" ("I rapporti economici internazionali e l'evoluzione del loro regime giuridico – soggetti, valori e strumenti").

The meeting is structured in three sessions: the first one deals with the topic in a public international law perspective, the second one focuses on contracts in international trade law and the third one on arbitration as a dispute resolution method.

Here's the programme of the second and third sessions (*our translation; the sessions will be held in Italian, except otherwise specified*):

Second session (Friday 8 June 2007, 15:00)

Contracts in International Trade ("La disciplina dei contratti nel commercio internazionale")

Chair and introductory remarks: *Giorgio Sacerdoti* ("Luigi Bocconi" University, Milan)

- The Law Applicable to Contracts: Conflict of Laws and Substantive Rules (in English): *Richard Plender* (QC, London)
- Party Autonomy in International Economic Relations and its Limits ("L'autonomia privata nelle relazioni economiche internazionali e i suoi limiti"): *Sergio Maria Carbone* (University of Genoa)

Shorter reports:

- EC Rules on Jurisdiction in Contracts ("I criteri comunitari di giurisdizione in materia di contratti"): *Francesco Salerno* (University of Ferrara)
- Protection of the Weaker Party ("La protezione del contraente debole"): *Andrea Bonomi* (University of Lausanne)
- The Impact of EC Antitrust Rules on Enterprise Autonomy ("L'incidenza delle norme comunitarie antitrust sull'autonomia delle imprese"): *Francesco Munari* (University of Genoa)
- Party Autonomy vis-à-vis *lex contractus*, *lex societatis* and *lex mercatus* in the EC Market of Rules ("L'autonomia negoziale tra *lex contractus*, *lex societatis* e *lex mercatus* nel mercato comunitario delle regole"): *Massimo Benedettelli* (University of Bari)

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Third Session (Saturday 9 June 2007, 9:00)

Dispute Resolution: Arbitration ("La soluzione delle controversie: la via arbitrale")

Chair and introductory remarks: *Riccardo Luzzatto* (University of Milan)

- International Commercial Arbitration: Evolution Trends ("L'arbitrage commercial international: tendances évolutives") (in French): *Pierre Mayer* (University of Paris I, Panthéon-Sorbonne)
- Arbitration in Investment Disputes: Developments and Uncertainties ("L'arbitrato in materia di investimenti: sviluppi e incertezze"): *Andrea Giardina* (University of Rome "La Sapienza")

Round Table:

Luca Radicati di Brozolo (Università Cattolica del Sacro Cuore, Milan); *Stefano Azzali* (Chamber of National and International Arbitration of Milan); *Lucy Reed* (Freshfields Bruckhaus Deringer, New York); *Alexis Mourre* (Castaldi Mourre Sprague, Paris); *Cesare Fabozzi* (University of Milan).

For further information and registration, see the website of SIDI-ISIL.

German Publication on Rome I

A very interesting collection of papers held at a symposium in Bayreuth in September 2006 on the Proposal for a Regulation on the law applicable to contractual obligations ("Rome I") has recently been published: ***Ferrari/Leible* (eds.), Ein neues Internationales Vertragsrecht für Europa**

An English abstract has been kindly provided by the editors:

> *There is still insecurity for transborder-trade. In spite of the Brussels I-Regulation, the rules applied to a dispute within the Community cannot always*

be predicted. This situation is due to the fact that the national courts will determine the applicable law in different ways. They all follow the conflict rules of their forum, which can diverge. The result is that the identical claim may be submitted to a different law in Munich and in Manchester.

To help this situation, the Member States of the EC had adopted a Convention on the law applicable to contractual obligations during a conference held in Rome in 1980. It had a considerable success in harmonizing the rules of private international law regarding contracts and contractual relationships.

Yet the days of the so-called Rome Convention will soon be over. The Commission is planning to transform it into a regulation as part of the judicial cooperation in civil matters. It has published a "Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I)", COM (2005) 650 final, in December 2005.

This proposal has been discussed during a conference in September 2006 in Bayreuth, Germany, which was jointly organized by Stefan Leible and Franco Ferrari. The conference united eminent specialists from Germany and other countries, as well as a representative of the Commission. Their papers, written in German, have now been published by Sellier. The collection is an indispensable tool for any lawyer working in the field of cross-border transactions.

The collection includes the following contributions:

- *Matthias Lehmann* (University of Bayreuth) defines in his contribution key notions regarding the scope of application, namely „contract" and „pre-contractual relationship" and shows that both terms – "contract" as well as "pre-contractual relationship" – have to be interpreted autonomously, which leads to the result that not all legal relationships which would be classified under German law as "pre-contractual" are exluded from the scope of the prospective Rome I Regulation.
- *Stefan Leible's* (University of Bayreuth) contribution is dedicated to choice of law-clauses. He addresses in particular the requirements of an implicit choice of law, the question which law can be chosen as well as the rule provided for in Art.3 (5) Rome I Proposal according to which the

choice of law shall be, in a case where the parties choose the law of a non-member State, without prejudice to the application of such mandatory rules of Community law as are applicable to the case.

- *Franco Ferrari* (University of Verona) attends to the law applicable in the absence of a choice of law-clause. He compares Art.4 Rome Convention with Art. 3 Rome I Proposal and examines the consequences of the new rule on particular contracts.

- *Dennis Solomon* (University of Tübingen) deals with consumer contracts and addresses in particular questions of the scope of application of Art. 5 Rome I Proposal.

- *Abbo Junker* (Zentrum für Arbeitsbeziehungen und Arbeitsrecht, Munich) addresses contracts in the field of labour law, in particular questions of the planned Regulation's scope of application with regard to labour law, party autonomy (choice of law) as well as Art. 6 Rome I Proposal.

- *Karsten Thorn* (Bucerius Law School, Hamburg) tackles the notoriously known problem of mandatory rules. He turns in particular to the question how Art. 8 Rome I Proposal can be classified within the system of Rome I as well as to Art. 8 (3) Rome I Proposal, which is very controversial among the Member States.

- *Ulrich Spellenberg* (University of Bayreuth) attends to contracts concluded by agents. He examines the internal relationship (between the principal and the agent) as well as the external relationship (between the principal and third parties). Further, also questions of form as well as the agent's liability for breach of warranty of authority are dealt with.

- *Eva-Maria Kieninger's* (University of Würzburg) and *Harry C. Sigman's* (Los Angeles, member of the Law Revision Committee on UCC Article 9 and member of the US delegation on the evolution of UNCITRAL recommendations on security interests) contribution is dedicated to assigment and statuatory subrogation. The first part, dealing with voluntary assignment and contractual subrogation (Art. 13) deals with Art. 13 (3) Rome I Proposal, which gives now an answer to the (so far) contentious problem which law is applicable to the question whether the assignment or subrogation may be relied on against a third party.

Furthermore, it is dealt with questions such as the material scope of application of Art. 13. In the second part, the rule of Art. 14 dealing (only) with statutory subrogation is discussed, *inter alia* in view of Rome II.

- *Ulrich Magnus* (University of Hamburg) writes on multiple liability and set-off. With regard to statutory offsetting, regulated in Art. 16 Rome I Proposal, the legal situation under the Rome Convention – which does not contain a separate rule on the law applicable with regard to statutory offsetting – as well as the ECJ's case law and the scope of application of Art. 16 Rome I Proposal are illustrated. The second part deals with Art. 15 Rome I Proposal (multiple liability), in particular with questions of the provision's scope.

- *Ansgar Staudinger* (University of Bielefeld) attends to insurance contracts by describing in a first step the system of the Rome I Proposal with regard to insurance contracts which is criticised in view of the coexistence of two regimes: Rome I on the one side and directives on the other side. Thus, in a second step an alternative approach is developed according to which only the choice of law rules of the prospective Rome I Regulation should be applied.

As the contents show, the book includes contributions on the most important and most discussed issues with regard to Rome I and can therefore be highly recommended.

Further information can be found on the publisher's website, where it can also be purchased.

See also the report on the conference by *Robert Freitag* (University of Hamburg) which has been published in the latest issue of the Praxis des Internationalen Privat- und Verfahrensrecht (IPRax 2007, 269).

Norwegian Court of Appeals on the Lugano Convention Article 8 nr.2

The Norwegian Court of Appeals (Borgarting lagmannsrett) recently handed down a decision on the Lugano Convention Art 8 pursuant to the notion "insurer". The decision (Borgarting lagmannsrett (kjennelse)) is dated 2007-02-13, was published in LB-2007-8743, and is retrievable from here. Following is a brief note on the case.

Parties, facts, contentions, court instances and conclusions

The plaintiffs, Hege Skarprud and Kristine Larneng, both domiciled in Norway, served the defendants, the insurance agent Euro Accident Insurance AB, domiciled in Sweden, and the general insurance agent Pinnacle Forsäkring AB, domiciled in Sweden, with a subpoena in a Norwegian court (Oslo tingrett).

The plaintiffs' object of action was to ask the court to give a judgment on the defendants' obligation to pay compensation in accordance with an insurance against accidents, which the sports club "Bekkelaget", as policy holder, had made for its members, including the plaintiffs. Bekkelaget had entered into the insurance agreement with the insurer Pinnacle Insurance plc, domiciled in England, but the agreement was entered into through the insurance agent Euro Accident Insurance AB, whereas Pinnacle Forsäkring AB, a subsidiary of Pinnacle Insurance plc., had acted in Sweden as the general insurance agent for the insurer Pinnacle Insurance plc.

The plaintiffs asserted both the agent and general agent, first, acted under the authorization of the insurer, and, second, outward represented the insurer towards co-contractors, and, third, could establish legal obligations, rights and responsibilities on behalf of the insurer. Therefore, both the agent and general agent must be identified with the insurer. With this in view, the plaintiffs further maintained that since the objective of the Lugano Convention Articles 7-12 is to protect the policy-holder, who is deemed as the weaker party, against the insurer, who is deemed as the stronger party, it must be possible, first, for everyone with an insurance claim to sue the insurer where the policy-holder is domiciled in accordance with Art 8 nr.2 of the Convention, and, second, to sue the agent and

general agent, both of which can receive the subpoena and be sued on behalf of the insurer.

The defendants asserted the court must reject to hear the case and subsequently dismiss the case from becoming a member of the Norwegian adjudicatory law system based on lack of Norwegian adjudicatory authority, since neither the agent nor the general agent can be qualified to count as the "insurer" in accordance with the notion of "insurer" in the Lugano Convention Art 8. The notion of "insurer" cannot be given so wide an interpretation as also to encompass the agent and general agent of the insurer.

The decisions of the court of first instance (Oslo tingrett), in its decision on 13 November 2006 (TOSLO-2006-142186) (case number 06-142186TVI-OTIR/09) excluded adjudicatory authority to Norwegian courts. The Norwegian Court of Appeal agreed with the lower instances on lack of adjudicatory authority for Norwegian courts, and subsequently rejected to hear the case.

Legal basis

The relevant provision for determining the adjudicatory authority of Norwegian Court was the Lugano Convention Art 8. That provision reads:

> *An insurer domiciled in a Contracting State may be sued:*
> *2. in another Contracting State, in the courts for the place where the policy-holder is domiciled…*

In general, the legal basis for conferring, delimiting (and thus both attribute and exclude adjudicatory authority to Norwegian courts) is regulated by chapter 2 of the Norwegian Civil Procedural Law of 13 August 1915 nr. 6 (Lov om rettergangsmaaten for tvistemaal) where § 36a decides that the Norwegian Civil Procedural Law Chapter 2 is limited by "agreements with a foreign state". Such an agreement is the Lugano Convention, which was ratified by Norway on 2 February 1993 and adopted and implemented by incorporation as law of 8 January 1993 nr. 21 (Luganoloven). The law entered into force on 1 May 1993 and regulates international civil and commercial matters between persons domiciled within EFTA-States, and between persons domiciled in an EFTA-State and an EU-State.

The decision of the Norwegian Court of Appeals

First, the Court understood the Lugano Convention Art 8 so as the insurer can be sued in the courts where the policy-holder is domiciled. Second, the Court, referring to the author Rognlien, p. 164, found no legal basis for interpreting the notion of “insurer” so wide as to encompass agents and general agents, and further that the Lugano Convention Articles 7-12 contain an exhaustive set of rules of adjudicatory jurisdiction as already stated in the judgment of the Norwegian Court of Appeals (22 August 1996 (LB-1995-2372)). Second, the Court gave emphasis to the plaintiffs´ interests, which the Lugano Convention Art 8 was meant to protect, were well attended to since the plaintiffs in the courts of their domicile, in accordance with the Lugano Convention Art 8, could sue the insurer Pinnacle Insurance plc. Hence, the Court lacked adjudicatory authority and dismissed the case.