# No More Lis Pendens between Swiss Courts and Arbitrators

Article 186 of the Swiss Law of International Private Law (the Swiss Law) was amended on October 6, 2006. A new paragraph 1bis was added to that provision. It reads:

> *[Le tribunal arbitral] statue sur sa compétence sans égard à une action ayant le même objet déjà pendante entre les mêmes parties devant un autre tribunal étatique ou arbitral, sauf si des motifs sérieux commandent de suspendre la procédure.*
>
> *Free translation: The arbitral tribunal rules on its jurisdiction without taking into consideration proceedings involving the same cause of action and between the same parties already pending before another arbitral tribunal or a court, unless there are serious reasons to stay the proceedings.*

My understanding is that the rationale of the amendment is to abrogate the 2001 *Fomento* ruling of the Swiss Federal Court. In *Fomento*, the Swiss highest court held that the lis pendens provision of the Swiss Law (art. 9) applied between a foreign court and an arbitral tribunal sitting in Switzerland. As the foreign court has been seized first (and as the judgement could be enforced in Switzerland), the arbitral tribunal had to decline jurisdiction. Because it had not done so, the award was set aside.

Whether there can be lis pendens between an arbitral tribunal and a court is a hotly disputed issue. It could be argued that they cannot both have jurisdiction. This is certainly the French view. But *Fomento* was a good example of an actual lis pendens situation. The reason why the foreign court had taken jurisdiction was that the parties had failed to challenge it in a timely fashion.

New paragraph 1bis of article 186 is applicable as of March 1st, 2007.

# Swiss Institute of Comparative Law: Conference on International Successions and Colloquium on Lugano Convention

Two interesting events dealing with private international law will take place in March 2007 at the Swiss Institute of Comparative Law (ISDC, Lausanne).

The first one, **on Thursday, 15th March, at 17h00**, is the inaugural conference of the Association of Alumni and Friends of the Swiss Institute of Comparative Law (AISDC): ***Prof. Andrea Bonomi*** (University of Lausanne) will lecture on "La scission des successions internationales", focusing on problems arising from **international successions** in legal systems which adopt the so-called **"principle of scission"** (i.e. different conflict rules determining the law applicable to the succession for movable and immovable property). A small fee is required for participation (free of charge for students).

**On Friday, 16th March**, **the *19th Journée de droit international privé***, organised by the ISDC and the University of Lausanne (Center of Comparative Law, European Law and Foreign Legislations), **will analyse the present and future perspectives of the Lugano Convention**, providing an overview of recent case law and focusing on some specific provisions of the Convention. Here's a short presentation of the programme (*our translation from French*):

**19e Journée de droit international privé:**

**"*La Convention de Lugano. Passé, présent et devenir*"**

**MORNING SESSION**

Chair: *Eleanor Cashin Ritaine* (Director of the ISDC)

**The new Lugano Convention**

- *Monique Jametti Greiner* (Federal Office of Justice, Bern)

**Recent case law on Lugano Convention**

- *Gian Paolo Romano* (ISDC)

**Jurisdiction in matters relating to a contract**

- *Alexander Markus* (Federal Office of Justice, Bern)
- *Eva Lein* (ISDC)

**Protective rules for the weaker party**

- *Andrea Bonomi* (University of Lausanne)
- *Anne-Sophie Papeil* (University of Neuchâtel)

**Round Table**, with the participation of:

- *Hélène Gaudemet-Tallon* (University of Paris II)
- *Fausto Pocar* (President of the ICTY – Rapporteur of the new Lugano Convention)

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**AFTERNOON SESSION**

Chair: *Andrea Bonomi* (University of Lausanne)

**Lis pendens and connected claims**

- *Jolanta Kren Kostkiewicz* (University of Bern)
- *Bart Volders* (ISDC)

**Recognition and enforcement of judgments**

- *Anton K. Schnyder* (University of Zurich)
- *Valentin Retornaz* (University of Neuchâtel)

**Round table and final discussion**, with the participation of:

- *Monique Jametti Greiner* (Federal Office of Justice, Bern)
- *Andreas Bucher* (University of Geneva)
- *Yves Donzallaz* (Avocat in Sion)

The conference will be held in French, German and English (no translation is

provided).

For the detailed programme and further information (including fees), see the ISDC website and the downloadable leaflet. An online registration form is available.

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# First Issue of 2007's LMCLQ and Private International Law

There is a veritable feast of articles, casenotes and book reviews in the latest issue of the *Lloyd's Maritime & Commercial Law Quarterly*. They are:

**"Piercing the corporate veil: searching for appropriate choice of law rules"** by Chee Ho Tham (*L.M.C.L.Q. 2007, 1(Feb), 22-43*)

> *Analyses case law on whether the English courts will exceptionally disregard the separate legal personality of foreign incorporated entities in litigation, applying English or foreign company law. Discusses the jurisdiction to order remedies against shareholders on the ground that incorporation was a sham. Considers the nature of limited liability under English law.*

**"Substance and procedure and choice of law in torts"** by Andrew Scott (L.M.C.L.Q. 2007, 1(Feb), 44-62)

> *Discusses the House of Lords judgment in Harding v Wealands on the choice of law in actions for tort under the Private International Law (Miscellaneous Provisions) Act 1995 s.14. Interprets the scope of procedural matters to be determined in accordance with the laws of the forum. Reviews UK and Commonwealth cases. Considers potential problems if substantive and procedural issues must be determined according to different national laws.*

**"EU Private International Law: Harmonization of Laws, 2006, Peter Stone"**

Reviewed by Adrian Briggs (*L.M.C.L.Q. 2007, 1(Feb), 123-126*) (see our items on this publication here).

**"Concise Introduction to EU Private International Law, 2006, Michael Bogdan"** Reviewed by Adrian Briggs (L.M.C.L.Q. 2007, 1(Feb), 123-126)

**"EU Private International Law: An EC Court Casebook, 2006, Edited by Michael Bogdan and Ulf Maunsbach"** Reviewed by Adrian Briggs *(L.M.C.L.Q. 2007, 1(Feb), 123-126)*

The LMCLQ isn't available online – paper subscription only.

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# French Conference: Dialogue Between Courts at the International Level

A conference will be held in Paris on March 19 on the *Dialogue Between Courts at the International Level*. The speakers will be Guy Canivet, the former chair of the French supreme court in civil, commercial and criminal matters (Cour de cassation), who was appointed last week to the Constitutional Council (Conseil constitutionnel), and professor Horatia Muir Watt from Paris I Panthéon Sorbonne university. The speakers should be speaking in French.

The conference will take place at 7 pm in the Centre Pompidou. It is free of charge.

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# Unseen Jurisdiction Clause Upheld by the Court of Appeal

The judgment in *7E Communications Ltd v Vertex Antennentechnik GmbH* [2007] EWCA Civ 140 was handed down on Monday. The OUT-LAW team at international law firm Pinsent Masons have written an excellent summary of the case, and have kindly given us permission to reproduce it here:

> *A German company can fight an English customer in the German courts because its terms and conditions said that German jurisdiction applied – albeit those conditions were never sent to the English firm, the Court of Appeal ruled this week.*
>
> *Vertex Antennentechnik makes and sells satellite antennae and related equipment. 7E Communications is a telecoms engineering consultancy based in Surrey. 7E agreed to buy some equipment from Vertex which it then declared faulty. Before that dispute could be settled the two parties had to decide in which jurisdiction it could be fought.*
>
> *When Vertex faxed 7E an offer to sell the equipment its quotation said that the sale was offered "according to our general terms and conditions". No copy of those Ts&Cs was supplied.*
>
> *An executive with 7E replied by fax with a new document, a purchase order, which referenced the sale offer quotation by name and reference number. Both parties agreed that the contract between them was concluded when that fax was sent to and received by Vertex, but the terms of that contract were disputed.*
>
> *Vertex claimed that the relevant jurisdiction should be Germany for any disputes arising from the contract, and that it should be exclusively Germany. It pointed to a law known as the* Brussels-I Regulation *(23-page / 212KB PDF), properly called the "Council Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters".*
>
> *"If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to*

*settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction," says article 23 of the Regulation. "Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be in writing or evidenced in writing."*

*The dispute concerned, then, whether or not the reference to terms and conditions constituted an agreement in writing under the Regulation.*

*Presiding judge Sir Anthony Clarke* ***MR*** *distinguished 7E's circumstances from those in a landmark European Court of Justice (ECJ) case on jurisdiction clauses. That ruling was given in 1976 in a dispute over a German company's sale of upholstering machines to Italian firm Salotti. The signed contract made no reference to the terms and conditions which were on the back. The ECJ said the jurisdiction clause in those terms did not form part of the contract.*

*"Where the contract signed by both parties expressly refers to general conditions which include a clause conferring jurisdiction, article 17 (now 23) is satisfied," wrote Sir Anthony. "They do not suggest that the general conditions have themselves to form part of the contractual document. An express reference to the general conditions in the contract is enough. There is no suggestion in those paragraphs that in such circumstances there must be an express reference, not only to the general conditions which contain the jurisdiction clause, but also to the jurisdiction clause itself."*

*7E also argued that authorities cited by Vertex could not apply because there were two signed documents, not one.*

*"The question is therefore whether the fact that the parties did not sign one but two documents is a critical distinction," wrote Sir Anthony. "We have reached the clear conclusion that it is not. If both parties had signed the original quotation as evidencing the contract between them, there can be no doubt that the principles stated above would apply and that the quotation would be, in the words of the Court of Justice, 'a writing' evidencing a contract on the terms of the defendant's terms and conditions, including the German jurisdiction clause, and that both parties including the claimant would be bound by the clause, just as Mr Mossler was bound by the clause in [a previous case involving] Credit Suisse, even though he had not seen and did not have a copy either of the*

*relevant terms or of the jurisdiction clause."*

*"In our judgment, no distinction in principle is to be drawn between a case in which a contract is contained in one document signed by both parties and a case in which a contract is contained in or evidenced by two documents, one of which is signed by one party and one by the other," said Clarke.*

*Jon Fell, a partner with Pinsent Masons, the law firm behind OUT-LAW.COM, described the ruling as pragmatic. "The court recognised that most people don't read the small print but it's saying that this is no excuse for a company that was told that small print existed. 7E should have asked to see the small print."*

*Fell added that if a dispute between a company and a consumer would likely see a different outcome. "A court would probably bend over backwards to support a consumer's argument that unseen conditions should not form part of a contract," he said.*

You can find out more about the excellent OUT-LAW website **here**. The judgment can be found in full **here**.

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# Collisions of Economic Regulations and the Need to Harmonise Prescriptive Jurisdiction Rules

Milena Sterio (*Cleveland-Marshall College of Law*) has posted "**Clash of the Titans: Collisions of Economic Regulations and the Need to Harmonize Prescriptive Jurisdiction Rules**" (to appear in the *UC Davis Journal of International Law and Policy, 2007*). Here's the abstract:

*The traditional field of conflict of laws involved clashes of private laws: what law should apply to a vehicular accident that took place in Canada, but involved a victim coming from New York? In the United States, as well as abroad, such clashes involved mostly private actors, and a specific set of rules was developed to address this area of law. More recently, however, a new paradigm has emerged, involving clashes of public laws and regulations, which I refer to as "titans" because they represent what is traditionally known as mandatory law and because they carry implications of state sovereignty and particular regulatory importance with them. Clashes of such titans are not easy to resolve, and often involve not merely economic operators, but also states or state agencies, causing diplomatic tension and foreign relations concerns.*

*Conflict-of-law rules seem ill-adapted for the resolution of this new regulatory puzzle. In the United States, for example, courts and scholars have advocated the need to resort to either territorial-based rules or substance-based rules to resolve clashes of public laws. Under the territorial approach, courts and scholars focus on when a given conduct causes effects or has other links with American territory that would warrant the application of American public laws. Under the substantive approach, courts and scholars determine, by looking at the content of applicable laws and regulations, whether it is reasonable to apply American public laws. However, the general approach followed domestically has been unilateral: the inquiry is to determine simply when American laws and regulations should apply to a given situation. Although the substance-oriented approach gives some thought to global considerations of overlapping regulatory jurisdiction, economic inefficiency, and comity, little concern is raised about possibly harmonizing jurisdiction-allocating rules among multiple countries, so that the clashes themselves can be resolved with more uniformity across the globe.*

*This Article advocates the need to start contemplating the development of global jurisdiction-allocating rules, at least among some countries and at least in some important domains where regulatory clashes frequently occur, such as antitrust, securities and Internet commerce and publishing. Harmonized jurisdiction-allocating rules could decrease instances of overlapping regulatory jurisdiction, thereby increasing predictability of outcomes for economic operators and reducing diplomatic tension caused by some of the important clashes. While challenges to such harmonization seem overwhelming at first,*

*this Article argues that it may be possible to achieve some degree of unification. Some developed countries already have similar jurisdiction-allocating rules, thereby facilitating harmonization among them. Moreover, some domains, such as Internet regulations, may lend themselves better to harmonization. It also may be easier to harmonize jurisdiction-allocating rules that are perceived essentially as procedural, rather than to seek to change substantive regulations themselves. Finally, harmonization may be more easily accomplished within specific fora, such as the World Trade Organization, the World Bank, or similar global bodies. This Article argues that harmonization would work toward the achievement of a global optimum, which would eventually benefit most states and most economic operators.*

Download the article from **here**.

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# Review of Stone's EU Private International Law

**Book review of Peter Stone, *EU Private International Law Harmonisation of Laws* [Elgar European Law, Cheltenham, 2006, *lvi*+462pp, ISBN 1-84542-015-2].** *(Reviewed by Dr Lorna Gillies, Leicester)*

This book is part of a series collection on European Law by Edward Elgar Publishing. According to the blurb, the book offers a "critical assessment of four main areas of concern: civil jurisdiction and judgments; the law applicable to civil obligations ; family law ; and insolvency." The premise of the text is the development of EU international private law rules from Article 95 EC. For the first time, principles of international private law are analysed, considered and presented in the context of EU law. This is one of the key strengths of the book. The book will be of particular interest to academics, practitioners and postgraduate students. Whilst a number of key EU proposals had yet (and still remain) to be finalised when the book was written, this book is nevertheless of significant and relevant interest to the target audience. Whilst the author

admittedly does not consider in depth the proposals for the Rome I or II regulations, a further strength of the book is the inclusion of the author's proposed new articles of these instruments in, most often, his concluding analysis of current instruments. Furthermore, the book also makes reference to the EU accession to the Hague Conference on Private International Law.

The book contains detailed case tables of UK, EU Member State and ECJ cases as well as an international case section listing cases from Singapore and the United States. The table of cases also conveniently provides particular page references throughout the text. Mirroring the influence of EU policy, the book is divided into an introduction and four substantive parts comprising nineteen chapters. Part I contains the introduction which succinctly considers the basis for harmonisation of international private law rules (ie those on civil jurisdiction, choice of law, family law and insolvency) at EU level.

Part II is the largest part of the book and focuses, not surprisingly, on civil jurisdiction and judgments across nine chapters. The main focus of the text in this Chapter is, as expected, Regulation 44/2001. A historical assessment of the changes from the Brussels Convention 1968 to the final version of the Regulation is provided. The Chapter consider the application of English cases with frequent reference to ECJ cases. At the end of Chapter Two there is a helpful table providing all of the commencement dates for the Brussels and Lugano Conventions and Regulation 44/2001. Chapter Three focuses on domicile as the connecting factor in the Brussels Convention and Regulation 44/2001. This Chapter usefully considers the concept of domicile and the application of the concept vis-à-vis local, other European and external (ie non EU) defendants. Chapter Four then considers the alternative grounds of jurisdiction in Regulation 44/2001 and assesses the changes to Article 5 in particular. The author assesses the merits of Article 5(1) and comments on the possible reform of Article 5(3). Unlike many other texts on international private law, a strength of this book is that it offers a separate chapter on the jurisdiction rules for protected contracts, namely consumer, employment and insurance contracts. The jurisdictional and governing laws of such contracts are becoming increasingly important as (the (would-be) "reasonably informed and circumspect") consumers purchase goods and services from sellers in different jurisdictions and as employees move between (an ever increasing number of) Member States to seek work. This text is different to other international private law texts as it recognises the legal and

commercial importance of such (supposedly minor) contracts to EU policy and the application of international private law rules in the day-to-day lives of ordinary EU citizens. As one would expect, there are also chapters on the rules on exclusive jurisdiction, submission and concurrent proceedings. The latter contains an interesting and reflective analysis of the recent cases *Gasser v MISAT* and *Turner v Grovit*. There is also a shorter chapter on provisional measures. The final two chapters in this Part provide an assessment of the rules on recognition and enforcement and enforcement procedure. These succinct chapters provide key summaries of the relevant case law plus, in respect of enforcement an analysis of Regulation 805/2004, the European Enforcement Order for Uncontested Claims.

Part II of the book focuses on the law applicable to civil obligations. Part II contains four chapters which focus on contracts, protected contracts (mirroring Part I), torts and restitution. The main focus on Chapter Twelve is the replacement of the Rome Convention 1980. Regular reference is made in this Part to the proposals for the Rome I Regulation. The basis of the Rome Convention is considered as is its application and relationship with other conventions. The author does comment on the Green Paper which considered the replacement of the Rome Convention with a Community Instrument. The author recommends the further clarification of the rules governing implied choice of law by the inclusion of a range of factors in Article 3(1A) with the emphasis on establishing the commercial expectations of the parties. Articles 3 and 4 of the Rome Convention are considered in depth. The case is then put by the author for possible reform thereof. Importantly, the author devotes Chapter Thirteen separately to protected contracts, in recognition of the important and difficult task in reconciling party autonomy in selecting the governing law with the overriding need to protect consumers, employees and insured parties. The author provides commentary on the replacement of the Rome Convention with the Rome I Regulation and in concluding his analysis suggests in particular, a revised Article 5. On the matter of insurance contracts, Chapter Thirteen assesses and considers possible reform of Directives 88/357 and 90/619 on non-life and life insurance contracts respectively. Chapters Fourteen and Fifteen are devoted to the proposal for the Rome II Regulation. Chapter Fourteen considers the proposed Regulation vis-à-vis torts in depth, including, *inter alia*, its scope and relationship with other international convention. This Chapter also offers critical assessment and suggested amendments to, *inter alia*, Articles 3(2) and (3) and analysis of a number of specific torts including product liability, unfair competition, intellectual

property, defamation, environmental damage, industrial disputes and traffic accidents. Chapter Fifteen provides a concise analysis of the proposals in Rome II vis-à-vis claims in restitution.

Part III of the book contains three, and by comparison shorter, chapters on family matters comprising matrimonial proceedings, parental responsibility and familial maintenance and matrimonial property. Part III of the book focuses on Regulations 1347/2000 (Brussels II) and 2201/2003 (Brussels IIA). Chapter Sixteen includes a table on the transitional operation of these two regulations amongst the Member States. Chapter Seventeen examines parental responsibility and contrasts the Brussels IIA Regulation with the Hague Convention 1996 on Parental Responsibility and Measures for the Protection of Children and the 1980 Child Abduction Convention.

The final part of the book, Part IV, is on the matter of insolvency. Chapter nineteen examines the jurisdiction, choice of law and enforcement aspects of insolvency as contained in Regulation 1346/2000. A noticeable feature of this Chapter is the author's criticism of the rational for secondary proceedings and his suggestion for harmonisation of "the substantive laws of the Member States as regards the definition and extent of preferential rights […] by means of a directive under Article 95 EC."

In conclusion, this book is warmly welcomed and will be an important research resource to its readership. Purchase the book from here or direct form the CONFLICT OF LAWS .NET bookshop.

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# Conference: "EU Harmonization of Private International Law and External Relations in Family and

# Succession Matters”

An international conference (held in English) is organised by **University Carlo Cattaneo (LIUC) on 9-10 March 2007**. It will present the results of the **Research Project "EU Harmonisation of Private International Law and External Relations in Family and Succession Matters"**, carried out by a group of European scholars and funded by the European Community under the Framework Programme for Judicial Cooperation in Civil Matters 2005.

The conference will deal with the increasing legislative activity of the EC in the field of private international law of family and successions, starting from Regulation (EC) No 2201/2003 (Brussels IIbis) to the recent Draft regulations and Green Papers adopted in 2005 and 2006, which embrace all P.I.L. aspects (jurisdiction, recognition and enforcement of judgments and applicable law).

Special attention will be devoted to the external dimension of EC action in the field:

> *Among the various issues raised by these acts, those concerning the relations with third States are particularly important and delicate, even because they shed light on the general characters of the emerging EC system of private international law. On the one hand, the issue of the external competence in this field is to be assessed, in the light of the ECJ’s ruling in the Lugano Opinion of 7 February 2006. On the other hand, special attention will be given to the scope of these acts in so far as private relations connected with third countries are concerned.*

Here’s a short presentation of the programme:

**Friday 9 March 2007**

15.00 Welcome and Introduction

- *Mario Zanchetti* (Dean of the Law Faculty)
- *Alberto Malatesta* (Director of the Law Department)

**EC EXTERNAL RELATIONS AND PRIVATE INTERNATIONAL LAW**

Chair: *Fausto Pocar* (University of Milan)

**The Lugano Opinion and its Consequences in Family and Succession Matters**

- *Alberto Malatesta* (University Carlo Cattaneo – LIUC)
- Discussant: *Andrea Santini* (Catholic University of Milan)

**Bilateral Agreements with third States after the Lugano Opinion**

- *David McClean* (University of Sheffield)
- Discussant: *Stefania Bariatti* (University of Milan)

18.00 General Discussion

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**Saturday 10 March 2007 – Morning Program**

**GENERAL PROBLEMS OF EC PRIVATE INTERNATIONAL LAW WITH REGARD TO RELATIONS WITH THIRD STATES**

09.50 FIRST SESSION:

**JURISDICTION, RECOGNITION AND ADMINISTRATIVE COOPERATION IN FAMILY AND SUCCESSION MATTERS**

Chair: *Alegría Borrás* (University of Barcelona)

**Conflicts of Jurisdiction**

- *Etienne Pataut* (University of Cergy Pontoise)
- Discussant: *Andrea Bonomi* (University of Lausanne)

**Recognition and Enforcement of Judgments**

- *Marta Pertegás* (University of Antwerp)
- Discussant: *Roberto Baratta* (University of Macerata)

**Administrative Cooperation**

- *William Duncan* (Hague Conference on Private International Law)

12.15 General Discussion

13.00 Lunch

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**Saturday 10 March 2007 – Afternoon Program**

14.30 SECOND SESSION:

**APPLICABLE LAW IN FAMILY AND SUCCESSION MATTERS**

Chair: *David McClean* (University of Sheffield)

**Connecting Factors, Renvoi, Party Autonomy**

- *Kurt Siehr* (University of Zurich)
- Discussant: *Peter McEleavy* (University of Dundee)

**Public Policy**

- *Ted M. de Boer* (University of Amsterdam)
- Discussant: *Johan Meeusen* (University of Antwerp)

**Characterisation and Interpretation**

- *Carmen Parra* (University Abat Oliba CEU)
- Discussant: *Luigi Fumagalli* (University of Milan Bicocca)

17.20 General Discussion

**17.40 Final Report**

- *Alberto Malatesta* (University Carlo Cattaneo – LIUC)

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The Conference is funded by the European Community under the Framework Programme for Judicial Cooperation in Civil Matters 2005 (Agreement No JLS/2005/FPC/50 – CE-0036594/00-04).

**Participation is free of charge**. For the full programme and contact information (including registration), see the LIUC website and the downloadable leaflet.

# Analysis of Non-Exclusive Jurisdiction Agreement by Ontario Court

In *Sugar v. Megawheels Technologies Inc* (available here) a judge of the Ontario Superior Court of Justice has analysed the role of a non-exclusive jurisdiction agreement in favour of a foreign forum on a motion to stay proceedings in the domestic forum. The judge ends up giving the agreement relatively little weight, in part in reliance on the approach of the English Court of Appeal in the *Ace Insurance* decision (see para. 28), and the stay is refused.

Is this decision open to question? It would seem at least some English cases have relied on a non-exclusive jurisdiction agreement to stay proceedings under a forum non conveniens analysis, at least where the other connections were spread relatively evenly across the jurisdictions. The Ontario judge thought the approach adopted was essential to preserve the distinction between exclusive and non-exclusive jurisdiction clauses, but arguably that distinction can and has been maintained at common law without giving so little weight to a non-exclusive jurisdiction clause on a motion to stay.

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# The First US Conflicts Restatement Through the Eyes of Old: As Bad as its Reputation?

Symeon C. Symeonides (*Willamette*) has posted "**The First Conflicts Restatement Through the Eyes of Old: As Bad as its Reputation?**" on SSRN.

Here's the abstract:

> *The first Conflicts Restatement (1934) and its drafter, Professor Joseph Beale, have been the favorite punching bags of every conflicts teacher, well before the Restatement was toppled by the conflicts revolution of the 1960s. Because history is often written by the victors, it is worth asking whether Beale and his Restatement were as bad as their reputation.*
>
> *This Article is not an attempt to rehabilitate them. Rather it is a necessary historical journey undertaken with all the trepidation of a traveler who expects the worst but hopes for at least some small pleasant surprises. It revisits Beale and the Restatement in the context of their own time–the 1920s–and examines Beale's life and work, the state of American conflicts law before him, the criticisms of his contemporaries, and the imperfect process that produced the Restatement. For the impatient reader, the short answer to the above question is that, generally, the bad reputation is deserved. However, the journey is rewarding for what one discovers along the way.*
>
> *Without Beale, there would not have been a Conflicts Restatement and, primarily because of Beale, the Restatement could not have been any better than it was. Even so, it is not clear that American conflicts law would have been better of without a Restatement at all. The prevailing view that the Restatement impeded the development of American conflicts is partly offset by some byproducts of the Restatement process. The Restatement is the beginning of modern American conflicts law. Although it is better to start on the right foot, sometimes starting on the wrong foot is better than not starting at all. The Restatement unified and systematized the previously scattered and neglected conflicts law, brought it to the attention of bar and bench, earned for it a place in the curriculum of all law schools, and galvanized the opposition among the legal realists and other academics. In turn, this led to the production of outstanding scholarship that brought the renaissance of American conflicts law during the next generation and eventually the conflicts revolution. Understanding the Restatement and the forces that produced it is essential in understanding the revolution, but also in avoiding similar mistakes in the future.*

Highly recommended indeed. You can download the article from the Social

Science Research Network. If you wish to do some further reading, a large portion of Beale's seminal 1935 treatise on the conflict of laws can be found here.