Seminar: Non – Justiciability: Reappraisal of Buttes Gas in the Light of Recent Decisions

This seminar is part of the British Institute's seminar series on private international law which will run throughout the Autumn of 2006 and well into 2007 entitled *Private International Law in the UK: Current Topics and Changing Landscapes*.

Date: Monday 15 January 2007, 17:30 to 19:30

Location: British Institute of International and Comparative Law, Charles Clore House, 17 Russell Square, London WC1B 5JP

Speakers:

- (Chair) The Rt Hon. Lord Bingham
- Lady Fox CMG QC, Vice President British Institute of International and Comparative Law
- Professor Richard Garnett, University of Melbourne
- Dapo Akande, St Peter's College, Oxford
- Henry Forbes Smith, One Essex Court

Sponsored by *Herbert Smith*. More information, including pricing, can be found on the **BIICL website.**

Private International Law Applied to Business

Yasmine Lahlou & Marina Matousekova have written an article in the latest issue of the *International Business Law Journal* on "Private International Law Applied to

Business" (No.4, 2006, p.547-573). The abstract states:

In the field of conflicts of laws, French courts were referred disputes relating to employment and factoring agreements. The issues of procedural agreements and court's duty in applying foreign laws were dealt with, as well as the impact of public policy rules on insurance contracts. French courts also ruled on the issue of court's jurisdiction as regards agency agreements and insolvency proceedings as well as on States' jurisdictional immunities.

In community law, the ECJ and French courts ruled on the notion of the « centre of a debtor's main interests » in the sense of Article 3.1 of the EC Regulation 1346/2000 on insolvency proceedings as well as on problems of transmission of acts between Member States (EC Regulation 1348/2000). The ECJ also ruled on the res judicata of a decision having infringed community law. English courts ruled on an anti suit injunction in regard of the violation of an arbitration agreement and on jurisdictional immunities. French and Irish courts ruled, on the ground of Article 5.1 of the Brussels Convention, on the issue of courts' jurisdiction in the field of brokerage contracts and sale of goods. The French Cour de cassation, the ECJ and the English High Court ruled, on the ground of Article 5.3 of the Brussels Convention, on territorial jurisdiction in the field of intellectual property rights, damages caused by car accidents, and misleading declarations. The ECJ was also interrogated as to the application of Article 16.1 of the Convention to damages to real estates, while the Cour de cassation was asked to rule upon the application of Article 16.4 of the Convention to registered intellectual property rights. The Cour de cassation also had to rule, on the ground of Article 6.1 of EC Regulation, on the link of connexity between main claims and claims in guarantee. The English High court was referred an issue of lis pendens with regard to the date of accession of a State to EC Regulation 44/2001. The Cour de cassation also ruled, on the ground of Article 27.1 of the Brussels Convention, on lis pendens in an action for infringement of intellectual property rights. In the field of recognition and enforcement, French, English and Italian courts ruled, on the ground of Article 27 of the Brussels Convention, on possible breaches of rules of public policy, on the regularity of a notification to the defendants, and on the purported contradiction between national and foreign decisions. The ECJ ruled, on the ground of Articles 34 and 36 of the Convention, on the consequences of an irregularity of the notification of the foreign decision with regard to its

exequatur. The French Cour de cassation and the Paris Court of Appeal ruled on the enforceability of foreign judgments in the sense of Article 47.1 of the Convention.

As regard to private international law in the US, the District Court of New York recalled the criteria for American courts to have jurisdiction over class action in securities fraud claims, while the US Court of Appeals of the First Circuit ruled on the extra-territoriality of the Whistleblower provision of the Sarbanes Oxley Act.

Those with access to the IBLJ can download the article, or you can buy the article for 47 Euros from the IBLJ website.

The Regime for the Circulation of Judgments under the EC Insolvency Regulation

Ettore Consalvi (*University of Rome*) has published an article in the latest issue of *International Insolvency Review* on "**The regime for circulation of judgements under the EC regulation on insolvency proceedings**" (Vol. 15, Issue 3, 2006, p. 147-162). Here's the abstract:

The regime for recognition and enforcement of judgements under the EC Regulation 1346/00 on insolvency proceedings raises several issues due to gaps in its provisions (Chapter II). This article analyses these rules and suggests solutions to its principal shortcomings particularly focusing on the prohibition against reviewing decisions as to their merits and conflicts between judgements opening main insolvency proceedings in different member states. This analysis draws on the European Court of Justice's interpretation of the 1968 Brussels Convention in preliminary rulings, which is a valuable tool for dealing with problems concerning recognition and enforcement of judgements as the

Regulation is based on a similar framework.

The full article is available on the *International Insolvency Review* website.

Articles on the Conflict of Laws in International Arbitration

There are two articles in the new issue of *Abitration International* that deal with private international law issues arising out of international commercial arbitration. They are:

Thomas Buergenthal, "The proliferation of disputes, dispute settlement procedures and respect for the rule of law" *Arbitration Int*. 2006, 22(4), 495-499. Abstract:

> *Considers the reasons for the proliferation of disputes, particularly international disputes, and of dispute resolution mechanisms. Discusses whether respect for the rule of law has kept pace with these trends, especially with regard to conflict of laws issues and the selection of arbitrators and judges.*

Klaus Peter Berger, "Evidentiary privileges: best practice standards versus/and arbitral discretion" *Arbitration Int.* 2006, 22(4), 501-520. Abstract:

> *Examines the diverse approaches to evidentiary privileges in international commercial arbitration that are taken in various jurisdictions, and considers conflict of laws issues in this area. Assesses whether there is a need for harmonised best practice standards or whether the resolution of privilege rule conflicts can be left to arbitral discretion.*

Those with a subscription to *Arbitration International* can access the full articles online.

U.S. Decisions: December 2006 Round-Up: Part II

Again with thanks to the International Civil Litigation Blog for many of the citations below, Part II of the December 2006 round-up will discuss a few significant case developments in the fields of International Discovery and Foreign Sovereign Immunity. More expanded discussion of these cases, and a few others pertaining to these topics, can be found at that site and other sites linked below.

INTERNATIONAL DISCOVERY

Linde v. Arab Bank, PLC, 2006 WL 3422227 (E.D.N.Y. Nov. 25, 2006).

In this case, a number of Israeli and American individuals and estates pressed actions against Arab Bank for aiding and abetting murder, conspiracy to commit murder, provision of material support to terrorists, committing and financing terrorism and other related claims. Arab Bank claimed that bank secrecy laws in Jordan, Lebanon, and the Palestinian Monetary Authority (recognized by the United States) prevent the disclosure of certain records. At issue here is whether foreign bank secrecy laws can shield Arab Bank's records from discovery. Violations of these laws involve criminal penalties of fines and incarceration, and plaintiffs apparently conceded that some of the information they sought in discovery would require violating the secrecy laws.

Nonetheless, the Court concluded that the U.S. interests in combating terrorism trumped a foreign state's interest in bank secrecy, holding that:

> *"there is no question that important interests of the United States would be undermined by noncompliance with the discovery orders issued by the court. As the court has already recognized, those interests are articulated in statutes on which some of the claims in this litigation rest: "Congress has expressly made criminal the providing of financial and other services to terrorist organizations and expressly created a civil tort remedy for American victims of international terrorism." Linde v. Arab Bank, PLC, 384 F.Supp.2d 571, 584 (E.D.N.Y.2005).*

> *The discovery sought here is transactional and other evidence of precisely those financial and other services at which the statutes here are aimed. Without that discovery, the interests expressed in those statutes will be difficult if not impossible to vindicate in this action."*

According to the court, although maintaining bank secrecy is an important interest of the foreign jurisdictions where the discovery sought here resides, that interest must yield to the interests of combating terrorism and compensating its victims. As members of the Middle East and North Africa Financial Action Task Force, both Jordan and Lebanon have expressly adopted a policy not to rely on bank secrecy laws as a basis for protecting information relating to money laundering and terrorist financing. Although the Palestinian Monetary Authority has apparently not expressly adopted any policies recognizing the subordination of bank secrecy to the interest of fighting terrorism, it is not a state, and its interests therefore need not be accorded the same level of deference accorded to "states" in considering comity. In any event, as the Palestinian Monetary Authority operates in an area governed at least in part by other authorities that have themselves engaged in terrorist activity, it would be absurd for this court to exalt the bank secrecy interests of those under the jurisdiction of the Palestinian Monetary Authority over the anti-terrorism interests of the United States and other recognized states in the region.The court ultimately concluded that Arab Bank should, with this opinion in hand, seek permission from appropriate governments to disclose information. The court deferred further action pending the outcome of this process. News source and blog discussions of this case can be found here and here.

SEC v. Sandifur, 2006 U.S. Dist. LEXIS 89428 (W.D. Wash. 2006)

This case involves an action against Defendants for securities fraud. A witness who is a United States citizen working in Luxembourg has declined Defendant's request to voluntarily appear in the United States for a deposition. The Walsh Act however, provides a U.S. Court with subpoena power over a national or resident of the United States who is in a foreign country if "it is not possible to obtain [a witness's] testimony in admissible form without his personal appearance." *28 U.S.C. § 1783(a)*. The issue presented here is whether the party seeking that subpoena power should be required to resort to the procedures outlined in the Hague Evidence Convention as a "possible" means of obtaining the testimony

without a Walsh Act subpoena. The court noted that:

> *"Under the Walsh Act, subpoenas may be issued when it is "impractical" to obtain the information. . . . Impracticality occurs, for example, where resort to alternative methods is unlikely to produce the relevant evidence in time to meet impending discovery deadlines. The court held that "[u]se of the Hague Convention procedures in this case would be impractical. . . . [T]he discovery deadline of February 17, 2007 is only a few months away. Though the Parties disagree on precisely how long the Hague Convention procedures generally take to process letters of request, . . . it can take up to a year, and that at the end of the process the government of Luxembourg may exercise its right Under Article 23 of the Hague Convention not to grant such a request. [T]he issue here is not that the Hague Convention procedures are merely inconvenient because they would require more resources or expertise to implement, but rather that they are impractical in the context the looming discovery deadline and overall trial schedule. [T]he Walsh Act does not require a harsh rule of 20/20 hindsight to see whether it ever would have been possible to obtain the information via other means but rather whether, looking forward, it "is not possible to obtain [the] testimony in admissible form without [the witness's] personal appearance." 28 U.S.C. § 1783(a) (emphasis added). While a party's unreasonable delay may factor into the "interests of justice" analysis, the Act thus does not require denial of a subpoena where the alternative means would once have been theoretically feasible."*

Accordingly, the court held that "Defendants demonstrated that it is not possible to obtain [the requested] testimony in admissible form without his personal appearance and have thus satisfied both requirements to obtain a Walsh Act subpoena." The subpoena was accordingly granted.

Finally, the court discussed where the deposition should occur. The court considered London, but decided that this alternative would infringe upon the sovereignty of the UK. Forcing the foreign party to fly to New York seemed an excessive burden to the party and the court. Therefore, the court held that the deposition should proceed in Luxembourg. As for the infringement on Luxembourg's sovereignty:Any potential infringement on Luxembourg's sovereignty is outweighed by the imposition that the alternatives would impose on the nonparty witness. The Supreme Court has held that "American courts are not

required to adhere blindly to the directives" of countries who oppose unauthorized, American-style discovery even when they have gone so far as to enact "blocking statutes." Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 544 n. 29 (1987); see also Valois of America Inc. v. Ridson Corp., 183 F.R.D. 344; Rich v. KIS California, Inc, 121 F.R.D 254, 258 (M.D.N.C. 1998). While this Court recognizes that the "interest of foreign nations in the sanctity and respect of their laws is both important and deserving of significant respect," see In re Vitamins Antitrust Litig., 120 F. Supp. 2d 45, 54 (D.D.C. 2000), in this case any potential sovereignty concerns are outweighed by the countervailing considerations regarding the significant burden that would otherwise be imposed on a nonparty witness. This decision, particularly that the Hague Evidence Convention is an "impractical" process, seems to further weaken the strength of that Convention in U.S. Courts.

In re Application of Roz Trading Ltd., 2006 WL 3741078 (N.D. Ga. Dec. 19, 2006)

Roz Trading, the Coca-Cola Export Company ("CCEC"), and the government of Uzbekistan entered a contract for a joint venture. Roz Trading alleges that Uzbekistan and CCEC seized its interest in the venture and accordingly brought its claim before the International Arbitral Centre of the Austrian Federal Economic Chamber in Vienna (the "Centre") in accordance with the contractual arbitration clause. Roz Trading sought the assistance of the court to obtain discovery from the Coca-Cola Company to be used in the arbitration.

Roz Trading relied upon 28 U.S.C. §1782(a) in requesting judicial assistance for document discovery. The court addressed whether section 1782(a) includes arbitrations before the Centre, a private arbitral forum. The Coca-Cola Company argued that the Centre is not a "tribunal" for purposes of §1782(a) because it is a private institution whose proceedings are voluntary and arbitral. Taking guidance from *Intel v. AMD*, 542 U.S. 241 (2004), wherein the Supreme Court determined that the Directorate-General of Competition for the Commission of the European Communities was a "tribunal," the court here held that private arbitral panels are also "tribunals" for 1782(a) purposes. In *Intel*, the Supreme Court drew special attention to the 1964 amendment to 1782(a) which "deleted the words 'in any judicial proceeding pending in any court in a foreign country,' and replaced them

with the phrase 'in a proceeding in a foreign or international tribunal,'" and characterized §1728(a) tribunals as "first-instance decisionmaker[s], capable of rendering a decision on the merits, and as part of the process that could ultimately lead to final resolution of the dispute." Here, the Centre performs just such a function. Accordingly, "[t]he Court held that the Centre is a 'foreign or international tribunal' within the meaning of § 1782(a)." In so holding, the court expressly disagreed with both the Second and the Fifth Circuits which, prior to *Intel v. AMD*, held that only governmental bodies qualify as tribunals under 1782(a). *See Nat'l Broad. Co., Inc. v. Bear Stearns & Co., Inc.*, 165 F.3d 184 (2d. Cir.1999) and *Republic of Kazahkstan v. Beidermann*, 168 F.3d 880 (5th Cir.1999).

As a question of first impression in the Eleventh Circuit, the court issued an opinion fully supportive of international arbitration and robust judicial assistance for such forums. This opinion also fulfills the prediction of some commentators that *Intel v. AMD* would cause some courts to revisit whether private arbitration constitutes a tribunal under §1782.

FOREIGN SOVEREIGN IMMUNITY

Powerex Corp. v. Reliant Energy Services, No. 05-85 (U.S. 2006)

In a possible watershed case regarding the Foreign Sovereign Immunity Act, the Supreme Court has now twice re-listed the cert. petition in *Powerex Corp. v. Reliant Energy Services*, 05-85, thereby pushing back its grant or denial of Certiorari until after its holiday break. The Questions Presented by the Petition are:

> *1. Whether an entity that is wholly and beneficially owned by a foreign state's instrumentality, and whose sole purpose is to perform international treaty and trade agreement obligations for the benefit of the foreign state's citizens, may nonetheless be denied status as an "organ of a foreign state" under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1603(b)(2), based on an analysis of sovereignty that ignores the circumstances surrounding the entity's creation, conduct, and operations on behalf of its government.*
>
> *2. Whether an entity is an "organ of a foreign state" under the FSIA when its shares are completely owned by a governmental corporation that, by statute, performs all of its acts as the agent of the foreign sovereign.*

The cases grew out of the energy crisis in California in 2000 and 2001. Powerex contends that it is an arm of the province of British Columbia in Canada, but the NInth Circuit Court rejected that argument. The full Petition is available courtesy of SCOTUS Bloghere. The SG has recommended that the Court grant on the first question. The decision of the Ninth circuit opinion is available here.

Agudas Chasidei Chabad of U.S. v. Russian Federation, 2006 WL 3476236 (D.D.C. Dec. 4, 2006)

This is fascinating case blending history and international law. It involves the proper possession of the historic collection of books and materials of the Agudas Chasidei Chabad ("Chabad"), an organization of Jewish religious communities located worldwide with origins in the Russian Empire. The organization's complaint against the Russian Federation and several Russian state agencies alleges that the defendants illegally took and retained a library and archive of Jewish religious books and manuscripts after World War II, which Chabad claims to rightfully own. On a motion to dismiss, the court heard: (1) Whether the Foreign Sovereign Immunities Act precludes jurisdiction over the case in US federal court; (2) Whether the act of state doctrine, which instructs US courts to presume the validity of actions taken by foreign governments within their territories, should preclude the court from ruling on the plaintiffs' claims; (3) Whether forum non conveniens should compel dismissal of the plaintiffs' action.

The Foreign Sovereign Immunities Act embodies the longstanding tradition of foreign sovereign immunity, but the Act includes a series of exceptions, one of which, the expropriation exception, the court found applicable to this case. For the exception to apply, the court needed to find that (1) property rights are at issue; (2) the property was taken in violation of international law; and (3) the property is owned or operated "by an agency or instrumentality of the foreign state and that agency or instrumentality' engages in commercial activity in the United States." The court granted the motion to dismiss regarding the library of works. Discussing the second prong, it concluded that the alleged taking of the property took place in the early 1920s, when the Fifth and Sixth Rebbes of the Chabad were citizens of the Soviet Union. In order for a taking to violate international law, the court reasoned, it must involve a state taking the property of citizens of a foreign state, and that condition was not satisfied in this case. Regarding the archives, however, the court found that the complaint alleged a

violation of international law. Specifically, the archival materials were seized by the Nazis during WWII and, at the end of the war, they were appropriated by the Soviet Red Army in Poland in 1945. By the time the property taking occurred, the sixth Rebbe had become a Latvian citizen and the Chabad had been formally constituted as a New York Corporation, satisfying the requirement that the taking be conducted by a state actor against citizens of a foreign state. The court also found the first and third prongs easily met with regard to the archives.

The court then found the Act of State doctrine inapplicable to this case because the taking in question did not occur within Soviet territory. While "[t]he act of state doctrine directs courts in the United States to presume the validity of 'acts of foreign sovereigns taken within their own jurisdictions,'" neither the initial seizure of the library by the Nazis nor the subsequent appropriation of the library by the Soviet Union took place in Soviet territory. Consequently, the court held the act of state doctrine to be inapplicable to this case.

Finally, the court rejected the invitation to dismiss on forum non conveniens grounds, finding that the defendants had failed to satisfy their burden to demonstrate the existence of a viable alternative forum. Additionally, the court found that the costs of hearing the case in the United States, including the expenses of document translation and the difficulty of accessing evidence currently located within the Russian Federation, did not justify moving the case to an alternative forum. Finally, the court noted strong public interest factors in resolving the dispute in the plaintiff's chosen forum, including the DC Circuit's location in the nation's diplomatic and political epicenter, the longstanding interest that the United States government has taken in the dispute, and the lack of regard that the Russian government has shown in allowing the archives to fall into disrepair. These factors, taken together, led the court to find that the defendants had failed to overcome the strong presumption in favor of the plaintiffs' chosen forum.

Some news discussions of this case can be found here. Opinio juris has this commentary.

ECJ judgment on Art 34(2) of the Brussels I Regulation

On 14 December 2006, the European Court of Justice handed down a preliminary ruling on the interpretation of Article 34(2) 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.

Art 34(2) of the Brussels I Regulation, it will be remembered, provides that a judgment is not to be recognised 'where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was **possible** for him to do so'. In **ASML (C-283/05)**, after litigation in the German courts, the reference was made in the course of proceedings between ASML Netherlands BV ('ASML'), a company established in Veldhoven (Netherlands), and Semiconductor Industry Services GmbH ('SEMIS'), a company established in Feistritz-Drau (Austria), concerning the enforcement in Austria of a judgment given in default of appearance by the Rechtbank 's-Hertogenbosch (Netherlands) ordering SEMIS to pay ASML the sum of EUR 219 918.60 together with interest and the costs of the proceedings. The question essentially referred to the ECJ by the Oberster Gerichtshof was (para. 15):

> *...whether Article 34(2) of Regulation No 44/2001 must be interpreted as meaning that the condition that it must be '**possible**', within the meaning of that provision, to commence proceedings to challenge the default judgment in respect of which enforcement is sought, **requires that the judgment should have been duly served on the defendant, or whether it is sufficient that the latter should have become aware of its existence at the stage of the enforcement proceedings in the State in which enforcement is sought**.*

The ECJ answered the question in favour of the hypothetical defendant (para. 49):

> *In the light of all the foregoing considerations, the answer to the questions referred must be that Article 34(2) of Regulation No 44/2001 is to be*

interpreted as meaning that it is 'possible' for a defendant to bring proceedings to challenge a default judgment against him only ***if he was in fact acquainted with its contents, because it was served on him in sufficient time to enable him to arrange for his defence before the courts of the State in which the judgment was given****.*

The full judgment can be found **here**. Comments welcome.

Update: There is a short case-note in the forthcoming edition of EU Focus (2007, 201, 8-9) on the decision in ASML.

Natural Forum and the Elusive Significance of Jurisdiction Agreements

Tiong Min Yeo (National University of Singapore) has posted "**Natural Forum and the Elusive Significance of Jurisdiction Agreements**" on SSRN. Here's the abstract:

The Singapore court's power to stay its proceedings by reason of its "not being the appropriate forum the proceedings ought not to be continued" is underpinned by the common law principle enunciated in The Spiliada that generally a trial should be heard in its natural forum, i.e., the forum best suited to try the case for the interests of all the parties and the ends of justice. The approach in forum non conveniens is undisputed. A defendant who has been served with process within the jurisdiction seeking a stay of proceedings has to show that there is another available and competent forum which is clearly the more appropriate forum for the trial of the action. At this stage the court looks primarily to factors of convenience and expense and the connections of the parties and the issues in the case to determine the forum with which the action has the most real and substantial connection. If no clearly more appropriate

forum is shown to exist, stay would ordinarily be refused. If there is such a forum, then the local proceedings will be stayed unless the circumstances show that the stay would deprive the plaintiff of substantial justice; the mere deprivation of the legitimate advantages of the plaintiff in having the trial in the forum is not decisive.

You can download the article from **here**.

Warnings for a new Beginning: Singapore Choice of Law in Tort

To complete our round-up of newly available articles today, we have an article on "**Warnings for a New Beginning**" by William Tong (*University of Nottingham*), which explores the tort choice of law rules in Singapore, and how they compare with other common law jurisdictions such as the UK. Here's the abstract:

In striking contrast with some of the Commonwealth developments in the area of tort choice of law, where notably even the United Kingdom has abandoned the English common law position in relation to tort choice of law for a statutory regime embodied by Part III of the Private International (Miscellaneous Provisions) Act 1995, Singapore has largely maintained its adherence to the English common law position with the unequivocal acceptance by the Singapore Court of Appeal that the "applicable choice of law rule in Singapore with respect to torts committed overseas is that laid down in Phillips v. Eyre" and that the "exception to the rule as formulated in Boys v. Chaplin, Johnson v. Coventry Churchill and Red Sea Insurance" is part of Singapore law as well.

Available to download from **here**.

The Application of the Statute Law of Singapore within its Private Internatinal Law

A note written By Adrian Briggs (Univeristy of Oxford) has been made available for download on the SSRN network: "**A Note on the Application of the Statute Law of Singapore within Its Private International Law**" *Singapore Journal of Legal Studies, pp. 189-203, 2005*. The abstract reads:

> *The purpose of this Note is to raise a question on which the rules of private international law of the common law, including Singapore, are less satisfactory than they should be. It is written in the light of one part of a seminar conducted at the Singapore Academy of Law in April 2005, but the proximate cause of the investigation was an enquiry as to the application of certain aspects of Singapore's statutory employment law in cases in which the factual and legal context contains points of contact to countries outside Singapore, or to laws other than the law of Singapore. It is presented in the form of a Note because its aim is to raise the issue as one for thought and further analysis, rather than pretending to give answers which are, in the writer's opinion, fixed and final. In the current state of the law's development it is not possible to claim any more for any individual analysis.*

You can find the article, for free as usual, **here**.

Governing Cyberspace: a US Approach

A highly theoretical, and interesting, article on the rules governing e-commerce transactions (or "cyberspace", as the author puts it) has been posted on SSRN. David G. Post's article, "**Governing Cyberspace**", was originally in the *Wayne Law Review, Vol. 43, p. 155, 1996*. Here's the abstract:

> *What is the source of those law(s) that will govern our interactions in cyberspace? What body of rules will participants in cyberspace transactions consult to determine their substantive obligations and who is to make those rules? This paper sketches out two alternative models for the way in which order can emerge in this environment, models I refer to as Hamilton and Jefferson. Hamilton involves an increasing degree of centralization of control, achieved by means of increasing international coordination among existing sovereigns, through multi-lateral treaties and/or the creation of new international governing bodies along the lines of the World Trade Organization, the World Intellectual Property Organization, and the like. Jefferson invokes a radical decentralization of law-making, the development of processes that do not impose order on the electronic world but through which order can emerge, in which individual network access providers, rather than territorially-based states, become the essential units of governance. The normative choice is a significant one, and I argue that mobility users' ability to move unhindered into and out of individual networks with their distinct rule-sets is a powerful guarantee that the resulting distribution of rules is a just one; indeed, that our very conception of what constitutes justice may change as we observe the kind of law that emerges from uncoerced individual choice.*

You can download the article from **here**.