Article 15 of the Civil Code is No Longer a Bar to the Recognition of Foreign Judgments in France

On May 23rd, 2006, The French supreme court for civil, commercial and criminal matters (*Cour de cassation*) held in the *Prieur* decision that article 15 of the Civil Code is no bar any more to the recognition or enforcement of foreign judgments in France and overruled an 80 year old interpretation of this provision.

Article 15 of the Civil Code provides that French citizens may be sued before French courts. This provision obviously gives jurisdiction to French Courts over French defendants. But the provision was also construed by the *Cour de cassation* as a defence against the recognition of foreign judgments delivered against French defendants. From the French perspective, the jurisdiction of French Courts over French defendants was thus exclusive. This priviledge could be waived by the French defendant, for instance by agreeing to a jurisdiction clause, or by defending on the merits before the foreign court without challenging its jurisdiction. But when it had not been waived, it was a fortress that could not be defeated. It applied in all almost fields (contract, torts, family law, etc…), except in immovable or enforcement matters. But its scope was shrinking as European conventions and many bilateral treaties excluded its application.

In *Prieur*, the *Cour de cassation* held that article 15 could not be used any more to determine whether the foreign court lacked jurisdiction from the French perspective and thus made its judgment unenforceable in France. In that case, a French citizen born and living in Switzerland had married in Switzerland a woman who was also born and lived there. In 1996, a Swiss court annulled the marriage, and the wife then sought a declaration of enforceability of the judgment in France. The husband challenged the jurisdiction of the Swiss court in the French enforcement proceedings on the sole ground of his citizenship. The court held that it was irrelevant, and that the foreign court having a significant link with the dispute, it had jurisdiction from the French perspective. The Swiss judgment was found enforceable in France.

It is no mystery in French circles that this change is due to a modification of the

composition of the court. Several influential French writers have already written that they fully support the change (Bernard Audit in *Recueil Dalloz* 2006, p. 1846, Helene Gaudemet-Tallon in *Revue Critique de Droit International Privé* 2006, p. 871. Professor Courbe, however, wrote a critical commentary in *Les Petites Affiches*, 22 Sept. 2006, p. 10). It is good news for plaintiffs suing French nationals in jurisdictions which have not concluded treaties with France such as, for instance, the United States. The debate in France is now whether the remaining conditions for the recognition of foreign judgments are sufficient to prevent the recognition of judgments that should not be recognised. The answer is probably yes, but one can wonder which condition could be an efficient bar to judgments made by foreign corrupt judiciaries. None of those remaining in France, it is submitted.

Substantive Law, Technology and Intellectual Property in the Conflict of Laws

Kimberlee G. Weatherall (*University of Queensland – T.C. Beirne School of Law*) has posted "**Can Substantive Law Harmonisation and Technology Provide Genuine Alternatives to Conflicts Rules in Intellectual Property?**" on SSRN (also to be found in *Media & Arts Law Review, Vol. 11, No. 4, p. 393, 2006*). The abstract reads:

> *This article investigates whether there could be practical alternatives to relying on private international law to solve legal boundary issues in cross-border communications contexts, especially those involving IP rights. It points out that certain developments would seem to be tending in this direction — first, with significant moves to remove the legal boundaries (or make them undetectable) through harmonisation of IP law; second, with advancements in technology that seek to 'reimpose' geographic borders. Developments in both fields proceed apace, and it is worthwhile to explore what difference, if any, they will make.*

> *The conclusion is that, although both contribute at some level, perhaps unsurprisingly, neither provides a complete response.*

You can download the article, for free as usual, from here.

Choice of Law, Jurisdiction and Foreign Judgment Enforcement in IP Disputes

Richard Garnett (*University of Melbourne – Faculty of Law*) has posted "**An Overview of Choice of Law, Jurisdiction And Foreign Judgment Enforcement in IP Disputes**" on SSRN (also in *Media & Arts Law Review, Vol. 11, No. 4, p. 341, 2006*). Here's the abstract:

> *Historically, the bodies of legal doctrine known as private international law and intellectual property have inhabited largely separate spheres. Recent technological developments have, however, made possible the communication and infringement of IP rights on a global scale. This article examines the current relationship between private international law and intellectual property as well as a recent reform proposal by the American Law Institute.*

Available from here.

Arbitration and the Brussels

Convention

Legal Department du Ministère de la Justice de la République d'Irak c./ Stés Fincantieri, Finmeccanica et Armamenti E Aerospazio is the first French case to address the issue of whether the 1968 Brussels Convention applies to the enforcement of a foreign judgement declaring an arbitration clause void. The judgement was rendered by the Paris Court of Appeal on June 15th, 2006, and I understand that an appeal is now pending before the French Supreme court for civil, commercial and criminal matters (*Cour de cassation*). The dispute had arisen between the State of Iraq and three Italian companies. Of course, as any proper French judgement, not much is said on the facts. It is only stated that Iraq concluded a contract with each of the companies, and that each contract contained an ICC arbitration clause. At the beginning of the 1990s, arbitration proceedings were initiated pursuant to the clauses, while the Italian companies initiated proceedings in Italy to have the arbitration clauses declared void. In 1994, the Genoa Court of Appeal did declare the clause void as being contrary to the embargo established by the U.N. 661 Resolution of 1990, but did not go on to rule on the merits. For the following decade, the arbitration went on. In 2004, the Italian companies sought a declaration of enforceability of the 1994 Genoa judgement in France. The Paris Court of appeal noticed in its judgement that, interestingly enough, that was precisely at the time when the arbitral tribunal was getting close to make its award. The case before the Paris Court of appeal was whether the Italian judgement could be declared enforceable in France. The Court held that it could not. The first reason was that the Brussels Convention did not apply, because the case fell within the exclusion of article 1, d) of the Convention. One could maybe have expected the Court to rule that the Italian judgement was clearly dealing with an issue of arbitration, as it had only held that the arbitration clauses were void, and had not ruled on the merits. Instead, the Court held that the rationale behind the exclusion was to allow the contracting states to comply freely with their international undertakings under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and that one of such undertaking was the obligation for courts of Contracting states to decline jurisdiction in presence of an arbitration clause, pursuant to article II of the New York Convention. The Court then went on to examine whether the 1930 Franco-Italian Convention applied, and found that it did not either. Finally, and most interestingly, the Court held that the Genoa Court did

not have jurisdiction from the French perspective. The reason why it lacked jurisdiction was that it had accepted to examine whether the arbitration clause was valid and applicable when, under French law, courts do not have such power unless the clause can be found prima facie void or inapplicable.

In order to fully appreciate the meaning of this judgement, it is important to appreciate how French law of arbitration differs from the law of arbitration of most jurisdictions. Under French law, arbitrators have a priority to rule on their own jurisdiction. The competence-competence principle entails not only that arbitrators may rule on their own jurisdiction, but also that they have a priority to do so over national (French) courts, and that such courts ought to decline jurisdiction to do so unless they find that the clause is prima facie void or inapplicable ("*manifestement nulle ou inapplicable*"). The French judgement projects this peculiar perception of the strength of the jurisdiction of arbitrators internationally. The Italian Court is found as lacking jurisdiction because it declared the arbitration clause void without finding that it was prima facie so, although Italian law may well have provided that (Italian) Courts do have the power to examine whether arbitration clauses are valid and applicable before declining jurisdiction.

Conference 2007 – Programme and Booking

We are delighted to announce that the **Programme** for the ***Journal of Private International Law Conference 2007***, to be held at the University of Birmingham on 26 – 27 June, is now available. Please see the Conference Homepage for more details. Here are all the relevant links:

- The Conference Homepage on the University of Birmingham website
- The Programme (you can also view it on this site – see the Conference 2007 page)
- Information on the Conference Fees, and Booking (you can register online

or via the downloadable word document)
- Information on the state-of-the-art venue
- Contact details, if you have any questions or queries

There are a limited number of places available at the conference, so we do advise you to book as early as possible.

We very much hope to see you at the conference in June.

"Rome II" and the Choice of Law for Defamation Claims

There is a substantial note (some 41 pages) in the new issue of the *Brooklyn Journal of International Law* by Aaron Warshaw (Brooklyn Law School) entitled, "**Uncertainty from Abroad: Rome II and the Choice of Law for Defamation Claims**". The article can be downloaded **for free** from the Journal homepage. Here's some of the introduction:

> *Like many other areas of law, commentators have repeatedly noted that the Internet has wreaked havoc on the jurisdictional and choice-of-law aspects of international defamation claims. Much of this difficulty stems from substantive differences in national approaches to defamation law and the ease with which plaintiffs can bring their claims in foreign jurisdictions. Central to these differences is the fact that, compared to the United States, many countries "place much greater importance on the protection of personal reputation, dignity, and honor than they do on protecting the freedom of speech." While U.S. defamation law reflects the constitutional guarantees of freedom of speech and press under New York Times v. Sullivan and its progeny, Sullivan's impact abroad has been mixed. Instead, every country possesses a different legal standard for resolving defamation claims based on their particular histories, values, and political systems. For instance, while the United States and the United Kingdom share the same tradition of common-law defamation, both countries have developed divergent approaches to balancing*

free speech and reputation interests. This conflict-of-laws problem is exacerbated by the fact that foreign courts appear keen to adjudicate claims against U.S. publishers without regard for the free-press protections under U.S. law. As a result, publishers are now subject to new and unforeseen liabilities and are likely to begin constructing "virtual borders" around their Internet presence to avoid exposure to restrictive foreign defamation laws.

In assessing the current situation, one British government commentator noted that any substantive solution to the difficulty of international defamation law would come in the realm of international treaty accompanied by greater harmonization of substantive national laws. One such pending treaty that will perhaps encompass the problematic arena of international defamation law is "The law applicable to non-contractual obligations," known commonly as "Rome II." This agreement among the European Union's Member States will determine the choice of law for cross-border defamation claims as well as a variety of other crossborder claims based in non-contractual relationships. Rome II will determine which law is applicable to all defamation claims brought within a Member State's forum, although jurisdiction will continue to be available in any nation where a publication is read. As such, Rome II presents an opportunity for an international body of lawmakers to adopt a clearer and fairer standard of how to settle defamation claims against foreign publishers in the Internet age.

Yet, despite the possibility of creating a clearer choice-of-law standard, Rome II's defamation provision proved to be extremely difficult to resolve. In 2006, after over three years of work, the European Union found itself no closer to creating a rule that all members could agree upon. The European Commission eventually excised the defamation provision from Rome II, effectively forestalling a new framework for the choice of law for defamation claims within the European Union's Member States. Despite this setback, much can still be learned from Rome II, both in terms of its potential application as well as the issues raised and debated during the drafting process—issues that are emblematic of the broader complexities of defamation law in the Internet age. This Note will argue that the European Commission's parliamentary maneuver is by no means the end of the story, but rather it is one chapter in a slow, difficult struggle to achieve a workable solution that satisfies publishers, national courts, and defamation plaintiffs. Part II of this Note examines the existing choice-of-law and jurisdictional rules for resolving defamation claims in

Europe, the United States, and in other nations. Part III traces Rome II's legislative history, focusing on the opposing place-of-harm and place-of-publication approaches to defamation claims. Part IV examines Rome II through the lens of the modern American approach to conflicts of law. This Note concludes that while the drafters of Rome II attempted to create a rule to protect publishers, their inability to successfully adopt such a provision reflects the intractability of balancing publishing and reputational interests. This Note will argue that American conflicts law provides key insights into both the policy behind protecting press interests and also how to create a more workable choice-of-law framework.

Highly recommended. Download it from here.

The Debate on "Rome II" in the European Parliament

Following on from our news item on the European Parliament's adoption, in plenary session, of the proposed Regulation on the law applicable to non-contractual obligations ("**Rome II**"), the **debate that preceded the vote** has been published online. The opening by Diana Wallis MEP, the Rapporteur, is worth reproducing in full, for Ms Wallis appeals as much to the MEPs' collective conscience as she does to their sense of what is legally correct, and viable:

Madam President, Commissioner, ROME II has been a long journey for us all and, whilst we might have hoped that this was the end, it seems likely that we are just at another staging post.

Let me start by saying that we appreciate that the common position took on board some of our ideas from the first reading. Commissioner, I also want to emphasise the importance that we attach to this regulation, providing, as it will, the ground plan, or roadmap, which will provide clarity and certainty for the basis of civil law claims across Europe. We need this, and we, here in

Parliament, want to get it done, but it has to be done in the right way. This has to fit the aspirations and needs of those we represent. This is not just some theoretical academic exercise; we are making political choices about balancing the rights and expectations of parties before civil courts.

I am sorry that we have not reached an agreement at this stage. I still believe that it could have been possible, with more engagement and assistance. Perhaps it is because both the other institutions are not used to Parliament having codecision in this particular area – I am sorry, but you will have to get used to it!

I also want to thank all my colleagues in the political groups in the Committee on Legal Affairs, who have stuck together with me on this long journey and supported a common view, which, subject to sufficient presence in this Chamber today, will be clearly shown in our vote.

Now let me detail the points that still separate us. We have always made it clear that we prefer a general rule, with as few exceptions as possible. If we must have exceptions, they must be clearly defined. Thus, we have accepted the position on product liability. However, problems still remain in respect of unfair competition and the environment.

With unfair competition, we also face a simultaneous proposal from Commissioner Kroes. The two proposals must work together; currently they do not. We have tried to present a more acceptable formulation, which, sadly, I think is unlikely to succeed here at today's vote, and I would therefore urge colleagues to support the deletion, to allow us to return to this at conciliation and do the work properly.

It is the same with the environment. I know and deeply respect the fact that many would like a separate rule, but it should not be a rule just for the sake of a headline. It should be a rule that is clear in terms of what facts it applies to. Given that we already have several possible formulations, the safest course, again, I would urge, is the general rule. This would also allow us to delete the separate rule today and return to the definition at conciliation.

Now I come to the two big issues for this Parliament. The first is defamation. Please understand that we know only too well how difficult an issue this is. However, we managed to get a huge majority at first reading across this House,

and you will likely see a similar pattern repeated here today. That the Commission decided to exclude this issue before we could consider it again was disappointing, to say the least. That it did so on the basis of a clear two-year review clause, which has now been abandoned, is unacceptable. We know the issues surrounding this area of media and communication will only increase and continue to haunt us. Maybe we cannot deal with it now, but we will soon be looking at Brussels I again, and it is imperative that jurisdiction and applicable law remain in step. So, would we deprive ourselves of the opportunity to look at this again? Exclusion may truly be the only answer, but this Parliament wants to try a little bit more to see if we cannot resolve this.

I turn to the issue that my colleagues have been most tenacious in their support for (and I am very grateful for that): damages in road-traffic accidents. Commissioner, we have the support of insurers, the support of legal practitioners, the support of victims, the support of those we represent, but somehow we cannot transmit these concerns to the Commission or to the Council.

Even last week, I was confronted by a very senior justice ministry official who thought that what we were trying to do was the equivalent of applying German law to determine liability in respect of a road-traffic accident which had happened in the UK, where, of course, we drive on the 'wrong' side of the road. Do you really think we are that stupid? I wish people would have the courtesy to read and understand what we are suggesting: merely the accepted principle of restitutio in integrum – to put victims back in the position they were in before the incident. There should be nothing so fearful in this. Indeed, the illogical approach would be for a judge in the victim's country to be able to deal with the case by virtue of the Motor Insurance Directives and Brussels I, and then have to apply a foreign, outside law in respect of damages. This, indeed, would be illogical – and that is the situation we are currently in. Please look at what we are saying and appreciate that, given the even the greater mobility of our citizens on Europe's roads, this matter needs attention, sooner rather than later, and a four-year general review clause just will not do.

My last hope is that our debates will have brought the subject of private international law out of the dusty cupboards in justice ministries and expert committees into the glare of public, political, transparent debate. Therefore, all we ask is that you bear with us a little longer so that, together, the institutions

of Europe can get this right.

Franco Frattini, Vice President of the European Commission, led the response to Ms Wallis in the ensuing debate. Other respondees include Barbara Kudrycka (PPE-DE), the Rapporteur for the Committee on Civil Liberties (LIBE) at an earlier stage of Rome II. You can read the full debate here (set out in the original language of each speaker).

(Many thanks to Giorgio Buono, University of Rome "La Sapienza", for the link. I'm also very pleased to announce that Giorgio has taken on the role of Editor for Italy of CONFLICT OF LAWS .NET, which brings our coverage of private international law around the world up to thirteen jurisdictions. Long may the growth continue.)

German Federal Supreme Court: Adversary Proceedings in the State of Origin necessary for Recognition under Brussels I Regulation

In its decision of 21 December 2006 (IX ZB 150/05) the German Federal Supreme Court held that provisional measures can only be recognised and enforced under the Brussels I Regulation if the judicial decision was the subject of an inquiry in adversary proceedings in the State of origin and thus declared the ECJ's case law (Denilauler) on the Brussels Convention to be applicable also with regard to the Brussels Regulation.

In the present case, the Federal Supreme Court had to deal with a Swedish order of attachment which had been declared enforceable in Germany even though the

debtor had neither been heard nor been served with the document instituting the proceedings. The decision on the application for a declaration of enforceability has been appealed by the debtor according to Art. 43 Brussels I Regulation. However, the German appellate court, the Higher Regional Court Schleswig, dismissed the appeal by arguing that also provisional measures had to be recognised under the Brussels I Regulation and that the *Denilauler* judgment of the ECJ on Artt. 25, 27, 46 No. 2 Brussels Convention was not applicable with regard to Artt. 32 et seq. Brussels I Regulation. The appellate court argued, the fact that the European legislator did maintain the broad wording of the former Art. 25 Brussels Convention in Art. 32 Brussels I Regulation showed that the legislator did not aim to adhere to the ECJ's decision in *Denilauler* – otherwise provisional measures would have been excluded from Artt. 32 et seq. Brussels I Regulation.

This reasoning has been rejected by the Federal Supreme Court. The Court pointed out that provisional measures do – in general – fall within the scope of Art. 32 Brussels I Regulation. However, this was only the case if the judicial decision was subject of an adversary proceeding in the State of origin – which had been held by the ECJ in *Denilauler*. This could – under the Brussels Convention – be derived from Art. 27 no. 2, Art. 46 no. 2 and results now from Art. 34 no. 2 Brussels I Regulation (which corresponds to the former Art. 27 no. 2 Brussels Convention) as well as Art. 54 (in conjunction with Annex V) Brussels I Regulation.

Since the relevant provisions of the Brussels I Regulation correspond to the ones of the Convention, the ECJ's findings in *Denilauler* could be transferred to Artt. 32, 34 no. 2 Brussels I Regulation. Thus, provisional measures cannot be recognised and enforced under the Brussels I Regulation if the debtor has not been granted the right to be heard.

Patent Litigation in the EU – German Case Note on “GAT” and “Roche”

A recently published and very interesting case note by *Jens Adolphsen* (Gießen) deals critically with the two recent and much discussed ECJ decisions on patent litigation – "GAT" and "Roche" – by arguing both decisions illustrated that effective infringement proceedings in intellectual property matters are not possible on the basis of the Brussels I Regulation.

Adolphsen starts his annotation by an analysis of the ECJ's reasoning in "GAT". Here the ECJ has held that,

> *[a]rticle 16 (4) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters […] is to be interpreted as meaning that the rule of exclusive jurisdiction laid down therein concerns all proceedings relating to the registration or validity of a patent, irrespective of whether the issue is raised by way of an action or a plea in objection.*

This leads to the result that the continuation of infringement actions with an indirect examination of the validity of the patent is inadmissible since this "would undermine the binding nature of the rule of jurisdiction laid down in Article 16 (4) of the Convention". (ECJ, para. 26).

This approach is criticised by *Adolphsen* – who favours a restrictive interpretation of Art. 16 (4) Brussels Convention – for obstructing an effective protection by patent.

Secondly, *Adolphsen* attends to the "Roche" decision where the ECJ has held that,

> *[a]rticle 6 (1) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters [..] must be interpreted as meaning that it does not apply in European patent infringement proceedings involving a number of companies established in various Contracting States in respect of acts committed in one or more of those States*

> *even where those companies, which belong to the same group, may have acted in an identical or similar manner in accordance with a common policy elaborated by one of them.*

Adolphsen agrees with the ECJ regarding the first question referred for a preliminary ruling. Here, the ECJ has held that,

> *[…] in the case of European patent infringement proceedings involving a number of companies established in various Contracting States in respect of acts committed in one or more of those States, the existence of the same situation of fact cannot be inferred, since the defendants are different and the infringements they are accused of, committed in different Contracting States, are not the same.*

Adolphsen points out that the negation of a connection in this context makes allowance for the fact that national patents of a European patent are subject only to the national law of the State they have been granted for.

However, *Adophsen* criticises the point of view adopted by the ECJ with regard to the second question. Here the ECJ declined a connection even if companies are involved which belong to the same group and have acted in an identical or similar manner in accordance with a common policy elaborated by one of them.

The ECJ laid – according to the author – too much weight on the existence of the same situation of fact and law and adopted therefore an approach far too formalistic.

This criticism leads *Adolphsen* to questioning fundamentally whether it was appropriate to transfer the meaning of "closely connected" – which has now been incorporated into Art. 6 (1) and Art. 28 (3) Brussels I Regulation – from Art. 22 (3) to Art. 6 (1) Brussels Convention since both provisions are based on different considerations and goals.

The full annotation can be found in IPRax 2006, 15 et seq.

U.S. Supreme Court Hears One Case, Grants Two More, On Private International Law Issues

On Tuesday, January 9, the Supreme Court heard argument in Sinochem v. Malaysia Int'l Shipping, regarding the doctrine of forum non conveniens in U.S. Courts. The case was previewed on this site here, and the argument transcript can be found here. It provides an interesting dialogue among members of the Court regarding the efficacy and operation of the doctrine in U.S. federal courts.

On Friday, January 19, the Court granted certiorari in 05-85, Powerex Corp. v. Reliant Energy Services. The question presented in that case is whether a foreign company owned by a Canadian province and doing commercial business in the U.S. is to be treated as an organ of a foreign government, and thus entitled to have legal claims against it heard in federal rather than state court. The Court added to this review the question of the Ninth Circuit Court's jurisdiction to review a remand order by the District Court. Courtesy of the SCOTUSblog, the briefs can be found here: Petition, Brief in Opposition, Reply. Amici briefs from the government of Canada and British Columbia are expected to be filed, and it wouldn't be surprising if other sovereigns line-up as well.

On that same day, the Court also granted review in 06-134, India Permanent Mission to the United Nations v. New York City over the question whether foreign embassy properties used as diplomats' residence are immune to property taxes assessed by the local New York City government. Especially interesting is question 2 presented in the petition: "Is it appropriate for U.S. Courts to interpret U.S. statutes by relying on international treaties that have not been signed by the U.S. government and do not accurately reflect international practice because they have been signed only by a limited number of nations." The Court granted review over both questions. Again courtesy of the SCOTUSblog, the briefs can be found here: Petition, Brief in Opposition, Reply . This is also a case where one would expect numerous amici from other nations.