No Surprise But Now Substantiated: Foreign Litigants Lose More in US Courts

As recently covered by the Financial Times, and forthcoming in the Journal of Law and Economics, a new study details an unsurprising yet still unsettling fact when it is substantiated: foreign litigants lose more in U.S. Courts. Here is the abstract:

> *Using a comprehensive sample of 2,361 public U.S. corporate defendants and 715 public foreign corporate defendants in U.S. federal courts in the period 1995-2000, we find that the market reaction at the announcement of a U.S. federal lawsuit is less negative for U.S. corporate defendants. We find that this market reaction is rational; U.S. firms are less likely to lose than foreign firms controlling for year, industry, type of litigation, size and profitability. This may still reflect a sample selection bias. We control for this bias, and the results remain. We thus cannot rule out that U.S. firms have a home court advantage in U.S. federal courts.*

Opinio Juris notes that perhaps the most interesting claim is that judges may be more biased than juries are. As this sort of evidence mounts, I assume it will incrementally bolster the legitimacy of supranational and arbitral fora for dispute resolution.

The full study can be found here.

In Memoriam: Professor Kurt

Lipstein

Professor **Kurt Lipstein**, one of the greatest comparative lawyers of the twentieth century, passed away at 11:15pm on Saturday 2nd December 2006. His wife Gwyneth predeceased him in 1998 and he is survived by two daughters, Eve and Diana. Happily he was active to the very end of his life, and attended his last public function in the Law Faculty (20th November) on the occasion of the 70th anniversary of obtaining his PhD. In September 2006, Cambridge University compiled an account of his extraordinary career:

> *Kurt Lipstein was born in Frankfurt am Main, Germany on 19th March 1909. His father was from Königsberg in East Prussia (now Russia) and his mother from Frankfurt. He had an English great-grandfather, and his grandmother had grown up in England. This explained the relative ease with which Kurt eventually settled into England. After his schooling at the Goethe Gymnasium in Frankfurt, Kurt studied law at the University of Grenoble (1927) and Friedrich Wilhelm University in Berlin (1927-31). Here, he rubbed shoulders (metaphorically if not actually) with professors such as Wolff and Rabels, and younger colleagues including von Caemmerer, and Mezger. His classical education in Greek and Latin allowed him later to have clear insights into the inner workings of Roman Law – these days something of a lost art.*
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> *Once graduated, his practical legal training began in 1931 as Referendar in Königstein and then at the district of Court of Appeal of Frankfurt, but with the election of the National Socialists to power, his career effectively collapsed. In April 1933 employment in the civil service was barred to Jewish professionals, and in 1934 Kurt emigrated to England to escape persecution. He obtained a place at Trinity College to study for his PhD, which was on the subject of suretyship within Roman Law: the beneficium cedendarum actionum. This was successfully defended in 1936 before Martin Wolff's brother-in-law, H. F. Jolowicz, who was then Professor of Roman Law at the University of London.*
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> *At that point, financial matters reared their head. He was unsuccessful in applying for a scholarship at Trinity, was unwilling to become a burden on the English branch of his extended family. His savior, and his mentor was Harold Gutteridge, the Professor of Comparative Law, who, in 1937, began to pay Kurt from his own pocket to give "supervisions" in Roman Law, Public International*

Law and Constitutional Law.

Soon after the Second World War broke out (1940) Kurt was interned as an enemy alien and sent to camps at Bury St Edmunds and then Liverpool. Here he met an eclectic mix of academics and professionals, many of whom later went on to either high office or academic status (or both). He mentions some of these in the interviews that are archived elsewhere on this site (as a transcript published by the IJLI, and the original audio version). Luckily the university secured his release later in the year, and he returned to Cambridge where he was given membership of Clare College, with which he has been associated ever since. He became a fellow in 1956. In 2002, fellow legal academics at the college (Moore & Turpin, 2002) conducted an interview with Kurt to reminisce on his associations therewith.

The Faculty Board employed Kurt as Faculty Secretary for a small stipend, and in 1944 he married Gwyneth Herford. After the war, in 1946, he was appointed to one of a batch of new lectureships (which included David Daube, Trevor Thomas and R. Y. Jennings), and he remained in this post until 1962, when he was appointed Reader in Conflict of Laws. In 1973 Kurt became Professor of Comparative Law, following in the footsteps of his erstwhile friend and patron Harold Gutteridge, of whom he reminisces affectionately in our interviews. In 1977 the University awarded him his LLD.

Kurt Lipstein formally retired in 1977, but to this day (Michaelmas Term 2006, in his 98th year) he has continued to give supervisions with great enthusiasm and charisma to students at Clare College, and has remained academically active and scholastically productive. He also lectures at the annual Summer School in English Legal Methods offered by the Faculty of Law. His success with the students is grounded in his legal knowledge, but there is no doubt that his charm and sense of humour have much to do with his popularity.

Kurt Lipstein has an unparalleled association with the Squire Law Library, having occupied offices and worked as a scholar in each of its manifestations: Downing Street (1934-37), The Old Schools (1937-1995), and now the glass and concrete titanic West Road site (1995-). This is a unique achievement, and exploring his memories of its personalities and how the library developed over those 72 years, forms the core of the interviews we conducted with Kurt in 2004. Remember, the Squire Law Library is only four years older than Kurt and

it is fascinating to hear how relatively small and parochial the collections appear to have been in those early years.

Kurt has a long publications record, but many of his writings are in Festschriften and similar works that are not readily available in our digitised age: 14 from his total of 118 publications, and readers might find some of his publications difficult to lay their hands on. In the bibliography, we have listed all those for which we can account.

Although his earliest works dealt with Roman Law, Kurt's reputation and later career rest largely on his studies on the conflict of laws within international law (both public and private), and his views (with Gutteridge) have strongly influenced the coverage of the subject in Dicey & Morris's Conflict of Laws (Forsyth 2004). An important development in broadening his horizons on the reception of western law into jurisdictions with different cultures, was his appointment as Directeur des Recherches of the International Association of Legal Science for the period 1954-59. The results of this are apparent in the five publications Kurt produced on the legal regimes in Turkey and India.

During our interviews, it was clear that Kurt was particularly sensible (the word proud would be an unworthy epithet for such a self-effacing man) of the honour accorded him on his invitation to give The Hague lectures in 1972 (and which he published separately in 1976). When he was asked for the highlights of his career at the end of the interviews, he replied; the achievement of an academic career, the title of Queen's Counsel, and his membership of the Institute of International Law.

His academic career has been long and fruitful, and its legacy is bound to be felt for the foreseeable future. As for the others, Kurt was called to the Bar (Middle Temple) in 1950, and in 1993 he was elected to the Institut de Droit International. The Institut then gave him the task of preparing a Resolution on a theme of "Taking foreign private international [law] into consideration". This was a taxing remit: under the heading "Renvoi" it had twice previously come before the Institut for resolution (1896-1900 & 1957-1965), with inconclusive results. Kurt Lipstein tackled it with his usual foresight, and when he reported (in 1998), as he modesty put it, his new "Resolution was accepted with few modifications" (Lipstein 2004 p. 769). The question of his success, where others had failed, was raised during our interviews (question 73), and his reply is a

model of understatement.

His final highlight was achieved when he was made an Honorary Queen's Counsel in 1998. Kurt was an Honorary Fellow of Wolfson College, and still lives in the secluded house in Newnham he built in 1947-8 and shared with Clive Parry, and their respective families.

Finally, it is clear from the last paragraph of his own reminiscences of his time at Cambridge, that Kurt Lipstein feels he owes a debt of gratitude to the institution that gave him the chance to make a new life when the land of his birth was no longer welcoming (Lipstein 2004). This has manifest itself in a lifetime devoted to upholding its values and faithfully following a path of true scholarship.

A bibiography of all of Professor Lipstein's published works can be found here, and you can also look through an archive of photos charting Professor Lipstein's life. A series of interviews with the man himself can be downloaded from here, and you can leave your thoughts and condolences on the comments board on the Cambridge website. Our thoughts are with his family, as I'm sure are all those who have felt the influence of Professor Lipstein's unparalleled scholarship in the field over the last seventy years.

Determinants for Dataflow

Georg Philip Krog (Norwegian Research Center for Computers and Law) has posted a short article on SSRN entitled, "Determinants for Dataflow: Norm and Action – Causation in Law, and Causation from Law to Action". Here's the abstract:

The paper explores succinctly two questions in abbreviated form: First, how may law, elucidated by the rules of international adjudicatory authority, be a determinant for cross-border circulation of intangible data and communicational behaviour in global computer networks? Second, why are

rules on international adjudicatory authority the starting point for such a determination?

The full article is available here.

New Text on Private International Law in Australia

Reid Mortensen (*TC Beirne School of Law, University of Queensland*) has published a new text on **Private International Law in Australia**. Here's the publisher's summary:

> *Private International Law in Australia is a substantial new text, providing comprehensive coverage by an internationally respected expert author in this area of law. The standard range of topics is covered in suitable detail for LLB students. The book includes important recent developments in private international law. Examination of the decision in Renault v Zhang (2002) and other recent developments will make this the most current, accurate text covering the private international law of tort, a major part of the field for practitioners and students. Summary of contents:*
>
> - *Introduction to Private International Law*
> - *Jurisdiction and Judgments*
> - *Choice of Law*
> - *International Family Law*
> - *Choice of Obligations Law*
> - *Choice of Property Law*

ISBN: 9780409322446. Price: $95.00 (Australian dollars). Available from LexisNexis Australia.

New Edition of International Civil Litigation Text

Peter Rutledge of the Columbus School of Law, Catholic University of America, and Gary Born of WilmerHale recently announced the release of the fourth edition of their text, **International Civil Litigation in United States Courts**. In previous editions, the book has been lauded by critics as the leading US commentary and casebook on international civil litigation in US courts:

- *"The bible for litigation lawyers*
- *"An excellent work….A felicitous combination of theory and practice."*
- *"The best available approach…."*
- *"The most comprehensive work in the field"*
- *"A remarkable work…No practitioner should be without it…."*

More information can be found here.

Deadline for Submission of Abstracts – Journal of Private International Law Conference 2007

Call for Papers DEADLINE NOTICE

for the Journal of Private International Law Conference 2007

to be held at the **University of Birmingham on 26th -27th June 2007**

The deadline for submission of an abstract of a proposed conference paper is **20th December 2006**, at which time all submitted abstracts will be considered by the editors. Vacancies for speaking at the conference can not be guaranteed after the deadline.

Please see here for details on submitting an abstract.

Graveson Memorial Lecture at King's College, London

A big event will be taking place tomorrow at King's College London:

The Graveson Memorial Lecture 2006 in memory of Professor R H Graveson CBE QC

Some Judgments on Judgments : A View from America

by Professor Linda J Silberman Martin Lipton Professor of Law, New York University, School of Law

The Chair will be taken by The Rt Hon Lord Justice Auld

17.30 Wednesday 13 December 2006, King's College London, Weston Room, Maughan Library, Chancery Lane, London WC2

- Admission free without a ticket
- All interested welcome to attend

The Threat of Forum Shopping

Peter Frost and Anne Harrison (*Herbert Smith*) have written a short piece in the new edition of The Lawyer (Lawyer 2006, 20(48), 21) entitled "**Company Uniform**", which:

> *Considers the need for multinational companies to ensure that the they are protected from the threat of being sued by employees based outside the UK and employees based in the UK suing them in non-UK jurisdictions. Discusses the jurisdictions of the UK, US, Germany, and France. Notes reasons for forum shopping.*

The full article can be found online.

Norwegian Supreme Court of Appeals on the Lugano Convention Art 16(1)(a)

The Norwegian Supreme Court of Appeals has recently handed down a judgment on the Lugano Convention Art 16(1)(a). The decision (Norsk Höyesterett (kjennelse)) is dated 2006-09-07, was published in HR-2006-01547-U – case no. 2006/1310 and is retrievable from here.

Facts and contentions
The facts and contentions of the case were the following. In 2003, C and his cohabitant A bought a house in Spain. A died 15 January 2004. Serving the decedent estate on 21 June 2005 with a subpoena in the forum (Oslo tingrett) at the place of the decedent estate´s domicile in accordance with the Norwegian Civil Procedural Law of 13 August 1915 nr 6 (Lov om rettergangsmaaten for tvistemaal) § 30, C claimed the joint ownership dissolved in accordance with the Law of Joint Ownership of 18 June 1965 nr. 6 (Lov om sameige) § 15. C extended

his claim on 29 September 2005 and contended to buy the decedent estate out of the joint ownership in accordance with an agreement between C and A of 14 August 1997. The decedent estate contended, first, there was no agreement on buy out, and, second, the forum (Oslo tingrett) at the place of the decedent estate lacked adjudicatory authority. Therefore, the decedent estate asserted the court must reject to hear the case and subsequently dismiss the case from becoming a member of the Norwegian adjudicatory law system.

Legal basis

The relevant provision for determining the adjudicatory authority of Norwegian Courts was the Lugano Convention Art 16(1)(a). That provision reads:

> *"The following courts shall have exclusive jurisdiction, regardless of domicile: (1) (a) in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, the courts of the Contracting State in which the property is situated;"*

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

Court instances and conclusions

The decisions of the court of first and second instance as well as the Supreme Court of Appeals were as follows. The court of first instance ("Oslo tingrett"), in its decision on 14 October 2005, attributed adjudicatory authority to hear the case. The decedent estate appealed to the court of second instance ("Borgarting lagmannsrett"), which on 23 January 2006 decided, first, the decedent estate was obliged to pay C´s court costs only for the proceedings before the court of second instance, and, second, to attribute adjudicatory authority to Norwegian courts.

Hence, the court of second instance sent the case back to the court of first instance to be heard. The decedent estate appealed to the Supreme Court of Appeals, which on 29 March 2006, rejected the judgement of the court of second instance and returned the case to that court for adjudication. The court of second instance decided on 30 June 2006, first, the decedent estate was not obliged to pay C´s court costs, and, second, to attribute adjudicatory authority to Norwegian courts and send the case back to the court of first instance to hear the case. The decedent estate appealed that decision to the Supreme Court of Appeals contending Norwegian courts lacked adjudicatory authority. The Supreme Court of Appeals was, in accordance with the Norwegian Procedural Law (tvistemålsloven) § 404, competent to hear questions pertaining to procedure and interpretation, and the appeal to the Supreme Court of appeals concerned the interpretation of the court of second instance on the Lugano Convention Art 16(1)(a). Hence, the Supreme Court of Appeals was competent to test the correctness of the interpretation of the court of second instance on the Lugano Convention Art 16(1)(a). The Supreme Court of Appeals agreed with the lower instances on adjudicatory authority being attributed to Norwegian courts, and subsequently rejected the appeal from decedent estate. Hence, the case was sent back to the court of first instance.

Ratio decidendi of the Supreme Court of Appeals

In the following, the rationale of the Norwegian Supreme Court will be described.

- First, the Supreme Court of Appeals concluded, with support from the judgement of the Norwegian Supreme Court in Rt-2000-654, the Lugano Convention in material scope was applicable to the dissolution of the joint ownership in accordance with article 1 since the dissolution of joint ownership would entail a sale of the property in question, which did not fall under the scope of article 1 nr. (1), where rights arising out of wills and succession are excluded from the material scope of the Lugano Convention.
- Second, the Supreme Court of Appeals introduced the wording of the Lugano Convention Art 16, which, first, the court stressed, concerns exclusive jurisdiction for certain courts, and, second, the courts of the Contracting State in which the property is situated have such exclusive jurisdiction in accordance with that article paragraph (1)(a) in proceedings which have as their object rights in rem in immovable

property or tenancies of immovable property.

- Third, the Supreme Court of Appeals stated that the notion "rights in rem" is to be interpreted autonomously, and independent from national conceptions of that notion in each Contracting State. On the concept of autonomous interpretation, the Supreme Court of Appeals referred to its judgement in Rt-2006-391, paragraph 20 and 21, and also to the judgement of 18 May 2006, case C-343/04, Land Oberösterreich vs EZ as by the European Court of Justice.

- Fourth, the Supreme Court of Appeals accentuated the importance of Art 16 as being an exception to the main rule in Art 2, the article must not be interpreted wider than the limits of its aim and purpose. In that respect, the Supreme Court of Appeals referred to the judgement of 5 April 2001, case C-518/99 Gaillard vs Chekili and the judgement of 18 May 2006, case C-343/04, Land Oberösterreich vs EZ as by the European Court of Justice on the corresponding article in the Brussels Convention. Thereupon, the Supreme Court of Appeals inserted paragraph 28 of the Danish version of the latter judgement, which in English reads:

"as regards the objective pursued by Article 16(1)(a) of the Brussels Convention, it is clear both from the Jenard Report on the Brussels Convention (OJ 1979 C 59, p. 1) and the consistent case-law of the Court that the essential reason for the exclusive jurisdiction of the courts of the Contracting State where the property is situated is that the court of the place where property is situated is best placed to deal with matters relating to rights in rem in, and tenancies of, immovable property (see, in particular, Case 73/77 Sanders [1977] ECR 2383, paragraphs 11 and 12)."

- Fifth, the Supreme Court of Appeals inserted the Danish version of paragraph 29 and 30 of the judgement of 18 May 2006, case C-343/04, Land Oberösterreich vs EZ as by the European Court of Justice. Those paragraphs read in English:

"29 As regards, in particular, disputes concerning rights in rem in immovable property, they must generally be decided by applying the rules of the State where the property is situated, and the disputes which arise frequently require checks, inquiries and expert assessments which have to be carried out on the

spot, so that the assignment of exclusive jurisdiction to the court of the place where the property is situated, which for reasons of proximity is best placed to ascertain the facts satisfactorily, satisfies the need for the proper administration of justice (see, in particular, Sanders, paragraph 13, and Reichert and Kockler, paragraph 10).”

“30 It is in the light of the interpretative principles thus recalled that the Court held that Article 16(1)(a) of the Brussels Convention must be interpreted as meaning that the exclusive jurisdiction of the courts of the Contracting State in which the property is situated does not encompass all actions concerning rights in rem in immovable property, but only those which both come within the scope of the Brussels Convention and are actions which seek to determine the extent, content, ownership or possession of immovable property or the existence of other rights in rem therein and to provide the holders of those rights with protection for the powers which attach to their interest (Reichert and Kockler, paragraph 11).”

- Sixth, the Supreme Court of Appeals quoted paragraph 17 of the judgement of 5 April 2001, case C-518/99 Gaillard vs Chekili as by the European Court of Justice where it is stated that:

“the difference between a right in rem and a right in personam is that the former, existing in an item of property, has effect erga omnes, whereas the latter can only be claimed against the debtor (see the judgment in Lieber, paragraph 14).”

- Further, The Supreme Court of Appeals clarified that the Chekili-case concerned an action for rescission of a contract of sale of immovable property and claim for damages for rescission, which clearly did not concern rights in rem in accordance with the Brussels Convention Article 16(1)(a).
- Furthermore, the Supreme Court of Appeals referred to the judgement of 17 May 1994, case C-294/92 Webb vs Webb as by the European Court of Justice, which concerned proceedings to obtain a declaration that a son holding the flat for the exclusive benefit of the father and that in that

capacity he is under a duty to execute the documents necessary to convey ownership of the flat to the father. The Supreme Court of Appeals inserted the Danish version of paragraph 15 of that judgement, which in English reads:

"The father does not claim that he already enjoys rights directly relating to the property which are enforceable against the whole world, but seeks only to assert rights as against the son. Consequently, his action is not an action in rem within the meaning of Article 16(1) of the Convention but an action in personam."

- Seventh, against the preceding considerations, the Supreme Court of Appeals concluded that the claim for dissolution of the joint ownership did not fall under the scope of the Lugano Convention Art 16(1)(a) as conceived as a right in rem under that article. The Supreme Court of Appeals defined the question before the court as a question of whether or not the conditions for dissolution of the agreement on joint ownership were fulfilled, which in turn may be regulated by a contract or by law. Hence, that claim must be directed against those taking over the part of the joint ownership previously held by the deceased. Therefore, the Supreme Court of Appeals held that the claim could not be directed against anyone since the claim for dissolution of the joint ownership did not follow from the rights of ownership of the property, which if it did, could be directed against anyone. Reiterating the relatively narrow scope of the exclusive jurisdiction of courts in accordance with the Brussels Convention Art 16(1)(a), the Supreme Court of Appeals reaffirmed that article, and also the parallel article in the Lugano Convention, being an exception to the main rule laid down in Art 2, must not be interpreted wider than the limits of its aim and purpose, as follows by case-law of the European Court of Justice and by legal theory.
- Hence, the Supreme Court of Appeals agreed with the lower instances that the Lugano Convention Art 16 was inapplicable (and therefore not attributing adjudicatory authority to Spanish courts), and attributed adjudicatory authority to Norwegian courts at the place of the domicile of the defendant. Subsequently, the Supreme Court of Appeals rejected the appeal from decedent estate and sent the case back the court of first

instance.

The court decision (Norsk Höyesterett (kjennelse)) is dated 2006-09-07, was published in HR-2006-01547-U – case no. 2006/1310 and is retrievable from here.

The American Journal of Comparative Law, 2006 American National Report

The 2006 American National Report, published yearly by the The American Society of Comparative Law, is now in print. The Society has as its laudable goal to "promote the comparative study of law and the understanding of . . . private international law," and the recent Report is no exception. In pertinent part, the Table of Contents is as follows:

American Law in the 21st Century: U.S. National Reports to the XVIIth International Congress of Comparative Law
Edited by John C. Reitz and David S. Clark

Preface by John C. Reitz & David S. Clark

American Participation in the Development of the International Academy of Comparative Law and Its First Two Hague Congresses by David S. Clark

SECTION II: Civil Law, Procedure, and Private International Law

- *New Developments in Succession Law* by Ronald J. Scalise, Jr.
- *Parenthood in a Time of Transition: Tensions between Legal, Biological, and Social Conceptions of Parenthood* by David D. Meyer
- *The Boundaries of Property Rights: La Notion de Biens* by Alain A. Levasseur
- *Estoppel and Textualism* by Gregory E. Maggs
- *Pure Economic Loss in American Tort Law: An Unstable Consensus* by

David Gruning

- *Contracts Subject to Non-State Norms* by Symeon C. Symeonides
- *New Experiences of International Arbitration in the United States* by Christopher R. Drahozal
- *Recognition of Same-Sex Legal Relationships in the United States* by Peter Hay
- *The Civil, Criminal and Disciplinary Liability of Judges* by John O. Haley
- *Access to Justice, Costs, and Legal Aid* by James P. George
- *Agriculture and the Polluter Pays Principle* by Ved P. Nanda

Information on how to order a copy, or to obtain information about the Society's other publications, seminars and activities, is available on its website.