Guest Editorial: Muir-Watt on Reshaping Private International Law in a Changing World

April's Guest Editorial is by Professor Horatia Muir-Watt: **Reshaping Private International Law in a Changing World**.

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Reshaping Private International Law in a Changing World

The past few decades have witnessed profound changes in the world order – changes affecting the nature of sovereignty or the significance of territory – which require measuring the methodological impact of political and technological transformations on traditional ways of thinking about allocation of prescriptive

and adjudicatory authority as between states. Myriads of issues arise in this respect within the new global environment, such as the extraterritorial reach of regulatory law, the decline of the private/public divide in the international field, the renewed foundations of adjudicatory jurisdiction (particularly in cyberspace), the implications of individual and collective access to justice in the international sphere, the impact of fundamental rights on choice of law, the ability of parties to cross regulatory frontiers and the subsequent transformation of the relationship between law and market. Indeed, one of the most important issues raised by globalization from a private international law perspective is the extent to which private economic actors are now achieving "lift-off" ((As Robert Wai has so aptly put it, in "Transnational lift-off and Juridical Touchdown: The Regulatory Function of Private International Law in a Global Age", 40 *Colum. J. Transnat*. L 209 (2002).)) from the sway of territorial legal systems. To some extent, traditional rules on jurisdiction, choice of law and recognition/enforcement of judgments and arbitral awards have favored the undermining of law's (geographical) empire, which is already threatened by the increasing transparency of national barriers to cross-border trade and investment. Party mobility through choice of law and forum induces a worldwide supply and demand for legal products. When such a market is unregulated, the consequences of such legislative competition may be disastrous.

An excellent illustration of the way in which rules on choice of law and forum, combined with a liberal regime relating to enforcement of foreign judgments, allow private confiscation of the governing law can be found in the circumstances which gave rise to the notorious Lloyd's litigation. ((Among many: *Bonny v. Society of Lloyd's* (3 F.3d 156, 7th Circuit, 1993) ; *The Society of Lloyd's v. Ashenden* (233 F.3d 473, 7th Circuit 2000).)) Here, securities offerings accompanied by inadequate disclosure on the American market managed to slip through the net of the federal Securities Acts. This example shows how "barrier-crossing" – escaping the sway of mandatory provisions by opting out of a legal system, and *de facto* redefining jurisdictional boundaries to suit oneself ((W. Bratton & J. McCahery, "The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second Best World", 86 *Georgetown L J* 201 (1997).)) – through the mobility conferred by unfettered choice of forum alters the status of *lois de police* or internationally mandatory laws, which become merely "semi-mandatory" ((L. Radicati di Brozolo, "Mondialisation, jurisdiction, arbitrage: vers des règles d'application semi-nécessaires?", *Rev crit DIP* 2003.1.))

before the chosen foreign forum. Other well-known examples can be found in the field of tort, where the use of *forum non conveniens* to prevent access by the victims of accidents linked to delocalized industrial activities, to justice in the country of the (parent) corporate defendant, seals the downward spiral in which developing counties are trapped when economically dependant upon versatile foreign capital; lowering the cost of security, environmental protection, or social legislation will attract investment, but will maintain any liability incurred within the limits designed by the low standards of the *lex loci delicti* as applied by local courts. ((As the *Nike* case shows, the powerful market leverage of consumer arbitrage in the defendant's home country may contribute to remedy the problem through consumer refusal to buy products manufactured by means of child labour, etc: see *Nike Inc. v. Kasky* 539 US 654 (2003).)) Here, rules of jurisdiction and choice of law contribute to the "global tragedy of the commons", where in the absence of a central regulator or universally accepted standards of conduct, nothing prevents a state from abetting the exportation by its private sector of industrial costs (pollution, economies on social protection, etc) in the direction of the global community.

Insofar that it is felt desirable to ensure the "touch-down" of economic actors in this context, private international methodology may require considerable reshaping, so as to harness it to the new need for strong yet adjusted regulation of the consequences of private mobility and the inter-jurisdictional competition which it inevitably generates. Approaches developed in a world where the prescriptive authority of State was coextensive with territory are clearly no longer adapted to this function; this is particularly true of the methods inspired by the private interest paradigm on which continental Europe doctrine thrived throughout the second half of the twentieth century and is loath even today to abandon. ((On this point, I express courteous disagreement with Pierre Mayer, who has devoted a chapter of his excellent Hague lectures to challenging the relevance of the changes discussed here: "Le phénomène de la coordination des rdres juridiques étatiques en droit privé", RCADI t327 (2007).)) The message of this editorial is to the effect that private international law should adjust to the stakes involved in real world conflicts of laws, which do not, or do no longer, implicate purely private interests playing out on a closed field, ((This is the "unilateralists' complaint": see P. Gothot, "Le renouveau de la tendance unilatéraliste", *Rev crit DIP* 1971.1; D. Boden, *L'ordre public : limite et condition de la tolérance (essai sur le pluralisme juridique)*.)) but involve strong state

policies or substantive values perceived as fundamental by the global community; in turn, it is mistaken and indeed harmful to continue to represent the rules designed to respond to these conflicts as being "neutral", since this leads to underestimate the needs generated by the novel ways in which national laws inter-relate in a global setting and prevents private international law from being fully invested with an appropriate regulatory function. ((There is nothing particularly surprising in the emergence of new needs in this field, insofar as they mirror those which increasingly affect the role and content of private law as a whole: see Cafaggi & Muir Watt, "The making of European Private Law: Regulatory Strategies and Governance", Sellier, forthcoming 2008.)) Just three examples (among many more) will serve to draw attention to the tectonic upheavals currently occurring and to the pressing need to devote further thought to the reshaping of traditional methods and approaches.

1. *Choice of law and economic due process.*

Within the European Union, the appearance of a market for law is not of course a mere and perverse side-effect of other policies geared to enhancing party autonomy. Carefully designed regulatory competition in the field of goods and services ((Jukka Snell*, Goods and Services in EC Law, A Study of the relationships between the Freedoms,* OUP 2002.)) has been shown to – deliberately – overturn the very concept of "monopolistic states", even in the field of public law and services. ((Ch. Kerber, Interjurisdctional Competition within the European Union", 23 *Fordham Int'l L J*. 217 (2000).)) Indeed, inter-jurisdictional mobility of firms, products and services is once again the means by which law is made to appear as offering on a competitive market, designed in turn to stimulate legislative reactivity and creativity. As illustrated in the global context, one of the market failures to be feared in the context of unregulated competition is the exporting of costs or externalities linked to legislative choices of which the consequences may affect other communities. However, in an integrated legal system, these risks are restricted by the existence of a central regulator, armed with tools such as approximation of substantive rules, or, where diversity is deemed to be desirable, constitutional instruments designed to discipline the various States in their mutual dealings. ((In the US, these are the Commerce Clause, Due Process, Full Faith and Credit)) Here, as recent conflicts of laws

implicating both economic freedoms and workers' rights have shown, the Court of justice is invested with an important balancing function which clearly overflows into the political sphere. ((*Viking* aff. C-438/05, *Laval* aff. C-341/05))

This is where uniform choice of law rules come in, as tools of governance designed to fulfill the requirements of economic due process on a Community level. Economic due process, which is now thought to explain the requirements of the Commerce Clause in the US federal Constitution, ((In the field of cyber torts, see J. Goldsmith & A Sykes, "The Internet and the Dormant Commerce Clause", 110 Yale L J 785 (2001).)) ensures that a given community does not impose costs on out of state interests which were not represented in its decision-making process. Thus, for instance, the cost of a law providing for lax standards of environmental protection should not be exported towards a neighbouring state with different priorities: in cases of cross-border pollution, environmental damage caused in the the latter state by firms legally using low standards of protection on the other side of the frontier must be internalized by application of the more protective rule. Posting workers employed under lax labor standards to a host state with higher social protection in order to benefit from the competitive advantage of low cost labor requires application of local law for the duration of the posting in order to avoid unhealthy distorsions of competiton between firms. To a large extent, recent choice of law provisions have integrated this change. ((See article 7 of the new Rome II Regulation for environmental torts and, in the field of employment relationships, the conflict of law provisions of the 1996 Posted Workers Directive.)) Typically, the recitals introducing Rome II attribute virtues to the determination of the applicable law which are far removed from the traditional private interest paradigm. There is still room for further improvement, however. Scrutinizing Rome II through the lenses governmental interest analysis, Symeon Symeonides has shown that in many cases, it would be desirable, as in the field of environmental pollution, to take account of true conduct-regulating conflicts, and to give effect if necessary to the prohibitive rules of the state of the place of conduct if its interest in regulating a given conduct is greater than the that of the state where the harm occurs, when it provides for a laxer standard of care. (("Tort Conflicts and Rome II: A View from Across", *Festschrift Ehrich Jayme*, Sellier, Munich, 2004, p. 935.)) For the moment, this result is only possible through article 16. ((Article 17 does not seem intended to be interpreted bilaterally, and the escape clause of article 4-3 does not appear to allow an issue by issue approach.))

2. *The "new unilateralism"*

The requirements of human rights in cross-border cases are also bringing about profound methodological changes whenever the continuity of an enduring personal or family relationship requires the host state to refrain from refusing recognition under its own private international law rules. Thus, the progressive appearance of a "unilateral method of recognition of foreign situations", implemented both by the European Court of Justice, the European Court of Human Rights, and subsequently by national courts ((See CA Paris, 25th October 2007, not yet published, but a commentary posted by G. Cuniberti is available on this website.)) , ousts traditional bilateral choice of law rules and favors the cross-border validity of what look very like vested rights in fields such as adoption, other parent/child relationships, marriage, same-sex partnerships, etc. Grounds for such change have been discovered in fundamental rights and European citizenship, heralding an adjustment of the philosophical foundations of the conflict of laws to the ideology of recognition and identity which also forms the basis of contemporary European substantive law. ((See for instance, S. Rodota, *Dal soggetto alla persona*, Editoriale Scientifica, Rome, 2007))

Although the objective of recognizing existing personal or family relationships in cross-border situations is entirely legitimate, its implementation certainly requires further thought. Indeed, the common thread which seems to run through the case-law is the principle of non-discrimination. This principle appears both as a fundamental value in itself and, in a Community context, as an essential component of European citizenship. The implication of the new recourse to non-discrimination as a foundation for choice of law is that the traditional use of nationality or domicile as connecting factor generates unjustified discrepancies in the field of personal status. This may in itself suggest that non-discrimination as conflict of laws methodology is totally misguided. Among the most notorious illustrations of judicial use of this principle is the European Court of Justice's judgment in the *Garcia Avello* case. ((ECJ *Garcia Avello*, C-148/02, 2003.)) It was held to be discriminatory for a Belgian court to apply choice of law rules on personal status which lead to the name of a Belgo-Spanish child residing in Belgium being governed by Belgian law, as if he was in the same situation as a child whose parents are both Belgian. The principle of non-discrimination, inherent in the concept of European citizenship, mandates that he benefit from the rules of Spanish law on this point. The Spanish perspective on the

determination of the name of a Spanish child must be recognized in Belgium on the basis of non-discrimination. This reasoning is flawed. The Garcia-Weber child had been born and was still resident in Belgium, which might have provided additional credit to the claim of Belgian law to regulate his family name. By deciding the contrary, and thereby allowing the child to benefit from whichever set of rules he chose to invoke, the Court of justice seems to imply that the sole fact of possessing dual citizenship suffices to differentiate a child from those who possess only the nationality of the country of his or her domicile. Of course, a child with strong personal connections to two different communities may well encounter difficulties in as far as the coherence of his or her personal status is concerned, if each adopts a different stance (whether on name, validity of marriage, adoption, etc). Avoiding limping personal status in this sort of situation is one of the principal policies behind many choice of law rules. But here, the Court's reasoning is distorted because it purported to resolve a difficulty linked to the impact of cross-border mobility on individual status, whereas in fact, there was no such mobility under the facts of the case other than the dual citizenship of the child. It was not unreasonable in the present case that Belgium, which was the country of both citizenship and domicile, sought to regulate the child's name in the same way as that of other purely Belgian children living in Belgium. It would therefore have been far more satisfactory to look towards other principles which, mindful of identity and the protection of persons, have significant implications as far as choice of law is concerned, such as the fundamental right to protection of one's personal and family life under article 8 of the ECHR. Of course, one the proper basis for full faith and credit due to foreign situations is determined, the task for the future will be to define its precise requirements in this respect in practice.

3. *Conflicts of public law*

Is it still true, that, as is so often asserted, the conflict of laws is limited to the field of private law? It has been apparent for some time that the some of the most significant evolutions, for private international law purposes, induced by the new quasi-federal environment in Europe, concern public, administrative or regulatory law. Such law is given extraterritorial effect, through mutual recognition; independant regulatory authorities appear, with a duty to cooperate transnationally; elaborate schemes allocate regulatory authority among the

Member States. In particular, in the field of securities regulation, the 2001 Lamfalussy Report provided considerable impetus for transnational cooperation between regulatory agencies. Thus, borrowing on the Admission Directive, ((Consolidated Directive 2001/34 EC coodinating the condtions for admission of securities to official stock exchange listing.)) which has served as a model for securities regulation as a whole, the Community has established a complete system of decentralised supervision and enforcement of the harmonised regime, supported by cooperation between administrative authorities. ((See Niamh Moloney, *EC Securities regulation Oxford EC Law Library*, 2002, p.100.)) The interesting point is that the administrative duty to cooperate, which justifies negotiation and dialogue when it comes to deciding upon the shared exercise of regulatory authority, may also lead to administrative bodies having to apply foreign regulatory law, which means in turn that conflict of laws principles will need to extend, with certain adjustments, to the field of public law. For an academic discipline which was epistemologically harnassed to the public/private divide – or rather, the public law taboo – this is all something of a landslide. However, it is also remarkable that even before the courts, where traditional approaches tends to linger, there are signs that transnational litigation in regulatory fields is throwing up evidence of shared state interests – so much so that one author has suggested that such litigation, albeit subject to domestic economic law, may bring substantive regulatory benefits to the international community. ((Hannah Buxbaum, Transnational Regulatory litigation, 48 Va J Int'l L 251 (2006).))

Here again, however, there is room for debate as to the appropriate approach to public or regulatory conflicts. An academic proposal on the regulation of global capital markets through interjurisdictional competition, ((S. Choi & A. Guzman, « Portable reciprocity : Rethinking the International reach of Securities Regulation », 71 S. Cal. L. Rev. 903 (1998).)) building on the mutual recognition theme, rejects administrative cooperation as insufficient, time-consuming and overly costly in terms of monitoring compliance. Free choice by issuers and investors as to how, or according to which national rules, they should be regulated (a choice which would then be "mutually" recognised by all states participating in the market according to a system of "portable reciprocity") would supposedly enhance competition across the board and ensure a wide range of legal products catering for risk-takers and risk averse alike. Although this proposal will no doubt meet some scepticism on this side of the Atlantic, where there is less faith in the

regulatory virtues of party freedom, it is extremely interesting, first, because it emphasises once again the radical change in the relationship (or at least in the perception of this relationship) between law and market in a global environment, where party mobility (whether through free choice or exit from the sway of mandatory rules) is already a reality. Second, because it includes in this reversal the activity of regulatory agencies, which to some extent would be functioning on a delocalised basis. If one links these ideas to equally intriguing recent proposals to delocalise the adjudicatory activity of the courts in order to enhance global efficiency with the cooperative consent of states, ((It has even been suggested that accessing the courts of a chosen jurisdiction can be seen as an "after-sale service" bundled with the choice of the applicable law in the field of contracts or corporate charters, so that such access should also be available extraterritorially in the form of delocalized courts, in the context of a competitive global market for legal services: see H. Hansmann "Extraterritorial Courts for Corporate Law", *Yale Law School Faculty Scholarship Papers*, 2005, Paper 3.)) the vision of the global world it projects is quite startling. Clearly, private international law needs be ready to meet the challenge of its new regulatory rôle.

Fourth Issue of 2007's Revue Critique de Droit International Privé

The last issue of *Revue Critique de Droit International Privé* for 2007 was just released. It contains two articles dealing with conflict issues.

The first is authored by Fabien Marchadier who lectures at the Law Faculty of Limoges University. It discusses the Contribution of the European Court of Human Rights to the Efficacy of the Hague Conventions on Judicial and Administrative Cooperation (*La contribution de la CEDH à l'efficacité des conventions de La Haye de coopération judiciaire et administrative*). The English

abstract reads:

> *The first encounters between the Hague Conventions and European human rights law have revealed in particular that there is an issue of compatibility of transnational cooperation with the ECHR. While the Hague Conventions aim to implement various rights and freedoms of which the Court of Strasbourg is the guardian, they are exposed at the same time to requirement of conformity, thereby providing the Court with the opportunity of ensuring the respect by national public authorities both of their reciprocal obligations to cooperate and of individual fundamental rights. Thus, the Court participates in the efficiency and effectiveness of the Hague Conventions by exercising an international control, otherwise lacking, over the compulsory nature of the cooperation and its effective implementation.*

The second article is authored by Maria Lopez de Tejada (Paris II University) and Louis D'Avout (Lyon III University). It is a study of Regulation 1896/2006 creating a European order for payment procedure (*Les non-dits de la procédure européenne d'injonction de payer*). Here is the English abstract:

> *After evoking successively the genesis of the Regulation which introduces into the Common judicial area an injunction to pay, the needs which this procedure is intended to cover and the means it has chosen to attain procedural uniformity, the study of this novelty, on the one hand, highlights the inadequate content of the new instrument, which rests on rules which are both incomplete and insufficiently attentive to the protection of the addressee of the injunction as far as notification and jurisdiction ar concerned, and on the other hand, detects a number of deficiencies affecting the use of this procedure, linked to the defective definition of its scope or a short-sighted view of its practical follow-up.*

New Articles for Early 2008

It has been a little while since my last trawl through the law journals, and a few articles and casenotes have been published in the intervening period that private international law enthusiasts may wish to add to their reading list:

J.M. Carruthers, "**De Facto Cohabitation: the International Private Law Dimension**" (2008) 12 *Edinburgh Law Review* 51 – 76.

P. Beaumont & Z. Tang, "**Classification of Delictual Damages – Harding v Wealands and the Rome II Regulation**" (2008) 12 *Edinburgh Law Review* 131 – 136.

G. Ruhl, "**Extending Ingmar to Jurisdiction and Arbitration Clauses: The End of Party Autonomy in Contracts with Commercial Agents?**" (2007) 6 *European Review of Private Law* 891 – 903. An abstract:

> *In the judgment discussed below, the Appeals Court of Munich (OLG München) deals with the question whether jurisdiction and arbitration clauses have to be set aside in the light of the Ingmar decision of the European Court of Justice where they cause a derogation from Articles 17 and 18 of the Commercial Agents Directive. The Court concludes that this question should be answered in the affirmative if it is 'likely' that the designated court or arbitral tribunal will neither apply Articles 17 and 18 nor compensate the commercial agent on different grounds. Thus, the Court advocates that Articles 17 and 18 be given extensive protection. This is, however, problematic because such extensive protection imposes serious restrictions on party autonomy, whereas these restrictions are not required by Community law in general or by the principle of effectiveness in particular. Therefore, it is very much open to doubt whether this decision is in the best interests of the Internal Market.*

F. Bolton & R. Radia, "**Restrictive covenants: foreign jurisdiction clauses**" (2008) 87 *Employment Law Journal* 12 – 14. The abstract:

> *Reviews the Queen's Bench Division judgment in Duarte v Black and Decker Corp and the Court of Appeal decision in Samengo-Turner v J&H Marsh & McLennan (Services) Ltd on whether restrictive covenants were enforceable*

under foreign jurisdiction clauses contained in the long-term incentive plan agreements of UK domiciled employees of multinational companies. Examines the conflict of laws and whether English law applied under the Convention on the Law Applicable to Contractual Obligations 1980 Art.16 and under Regulation 44/2001 Arts.18 and 20.

W. Tetley, "**Canadian Maritime Law**" *L.M.C.L.Q.* 2007, 3(Aug) Supp (*International Maritime and Commercial Law Yearbook* 2007), 13-42. The blurb:

Reviews Canadian case law and legislative developments in shipping law in 2005 and 2006, including cases on: (1) carriage of goods by sea; (2) fishing regulations; (3) lease of port facilities; (4) sale of ships; (5) personal injury; (6) recognition and enforcement of foreign judgments; (7) shipping companies' insolvency; (8) collision; and (9) marine insurance.

S. James, "**Decision Time Approaches – Political agreement on Rome I: will the UK opt back in?**" (2008) 23 *Butterworths Journal of International Banking & Financial Law* 8. The abstract:

Assesses the extent to which European Commission proposed amendments to the Draft Regulation on the law applicable to contractual obligations (Rome I) meet the concerns of the UK financial services industry relating to the original proposal. Notes changes relating to discretion and governing law, assignment and consumer contracts.

A. Onetto, "**Enforcement of foreign judgments: a comparative analysis of common law and civil law**" (2008) 23 *Butterworths Journal of International Banking & Financial Law* 36 – 38. The abstract:

Provides an overview of the enforcement of foreign judgments in common law and civil law jurisdictions by reference to a scenario involving the enforcement of an English judgment in the US and Argentina. Reviews the principles and procedures applicable to the recognition and enforcement of foreign judgments in the US and Argentina respectively, including enforcement expenses and legal fees. Includes a table comparing the procedures for the recognition and enforcement of foreign judgments in California, Washington DC and New York.

J. Carp, "**I'm an Englishman working in New York**" (2008) 152 *Solicitors Journal* 16 – 17. The abstract:

> *Reviews case law on issues arising where a national of one country works in another country. Sets out a step by step approach to ascertaining: the law governing the employment contract; the applicability of mandatory labour laws, including cases on unfair dismissal, discrimination, working time, and the transfer of undertakings; which country has jurisdiction; and public policy. Offers practical suggestions for drafting multinational contracts.*

J. Murphy – O'Connor, "**Anarchic and unfair? Common law enforcement of foreign judgments in Ireland**" 2007 2 *Bankers' Law* 41 – 44. Abstract:

> *Discusses the Irish High Court judgment in Re Flightlease (Ireland) Ltd (In Voluntary Liquidation) on whether, in the event that the Swiss courts ordered the return of certain monies paid by a Swiss airline, in liquidation, to an Irish company, also in liquidation, such order would be enforceable in Ireland. Considers whether: (1) the order would be excluded from enforcement under the common law on the basis that it arose from a proceeding in bankruptcy or insolvency; and (2) the order would be recognised on the basis of a "real and substantial connection" test, rather than traditional conflict of laws rules.*

V. Van Den Eeckhout, "**Promoting human rights within the Union: the role of European private international law**" 2008 14 *European Law Journal* 105 – 127. The abstract:

> *This article aims to contribute both to the 'Refgov' project, which is focused on the ambition to find ways of promoting human rights within the EU, but also, more in general and apart from the project, to an improved understanding of the crucial place conflict of law rules occupy in the building of a common Europe—a highly political question behind apparently technical issues. In the study the author deals with the parameters, points of interest, etc in relation to private international law which should be heeded if European Member States 'look at' each other's laws, and—in the context of the 'Refgov' project—if the idea is to exchange 'best practices' or harmonise substantive law, or to harmonise private international law, etc further through a type of open method of coordination. The contribution also shows that private international law*

issues are decisive in respect of every evaluation of the impact of European integration on human rights, both if this integration process takes place through 'negative' harmonisation (for example by falling back on the principle of mutual recognition) and through 'positive' harmonisation.

R. Swallow & R. Hornshaw, "**Jurisdiction clauses in loan agreements: practical considerations for lenders**" (2007) 1 *Bankers' Law* 18 – 22. Abstract:

Assesses the implications for borrowers and lenders of the Commercial Court judgment in JP Morgan Europe Ltd v Primacom AG on whether proceedings brought in Germany challenging the validity a debt facility agreement were to be treated as the first seised under Regulation 44/2001 Art.27 (Brussels I Regulation), despite the fact that the agreement contained an exclusive jurisdiction clause in favour of the English courts. Advises lenders on the drafting of loan agreements to help mitigate the risk of a jurisdiction clause being frustrated. Considers the steps that might be taken by the lender once a dispute has arisen.

A. Dutton, "**Islamic finance and English law**" (2007) 1 *Bankers' Law* 22 – 25. Abstract:

Reviews cases relating to Islamic finance, including: (1) the Commercial Court decision in Islamic Investment Co of the Gulf (Bahamas) Ltd v Symphony Gems NV on whether the defendant was liable to make payments under a Sharia compliant contract governed by English law that would contravene Sharia law; (2) the Court of Appeal ruling in Shamil Bank of Bahrain EC v Beximco Pharmaceuticals Ltd (No.1) interpreting a choice of law clause expressed as English law "subject to the principles" of Sharia law; and (3) the Commercial Court judgment in Riyad Bank v Ahli United Bank (UK) Plc on whether the defendant owed a duty of care to a Sharia compliant fund where it had contracted directly with its parent bank.

J. Burke & A. Ostrovskiy, "**The intermediated securities system: Brussels I breakdown**" (2007) 5 *European Legal Forum* 197 – 205. Abstract:

Presents a hypothetical case study of a dispute arising from a cross-border securities transaction involving parties from the UK, Sweden and Finland to

examine the application of the private international law regime under Regulation 44/2001 Art.5(1) (Brussels I Regulation), the Convention on the Law Applicable to Contractual Obligations 1980 Art.4 (Rome Convention) and the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary. Considers the extent to which commercial developments in the securities industry have outstripped the current conflicts of law rules.

M. Requejo, "**Transnational human rights claims against a state in the European Area of Freedom, Justice and Security: a view on ECJ judgment, 15 February 2007 – C292/05 – Lechouritou, and some recent Regulations**" (2007) 5 *European Legal Forum* 206 – 210. Abstract:

Comments on the European Court of Justice ruling in Lechouritou v Germany (C-292/05) on whether a private action for compensation brought against Germany with respect to human rights abuses committed by its armed forces during its occupation of Greece in the Second World War fell within the scope of the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1968 Art.1, thus preventing the defendant from claiming immunity for acts committed during armed conflict. Examines the EC and US jurisprudential context for such private damages claims.

L. Osana, "Brussels I Regulation Article 5(3): German Law Against Restrictions on Competition" (2007) 5 *European Legal Forum* 211 – 212. Abstract:

Summarises the Hamburg Court of Appeal decision in Oberlandesgericht (Hamburg) (1 Kart-U 5/06) on whether the German courts had jurisdiction under Regulation 44/2001 Art.5(3) (Brussels I Regulation) to order a German tour operator not to incite Spanish hotels to refuse to supply contingents to a competitor German tour operator, behaviour that had been found to be anti-competitive.

C. Tate, "**American Forum Non Conveniens in Light of the Hague Convention on Choice of Court Agreements**" (2007) 69 *University of Pittsburgh Law Review* 165 – 187.

E. Costa, "**European Union: litigation – applicable law**" (2008) 19

International Company and Commercial Law Review 7 – 10. Abstract:

> *Traces the history of how both the Convention on the Law Applicable to Contractual Obligations 1980 (Rome I) and Regulation 864/2007 (Rome II) became law. Explains how Rome II regulates disputes involving non-contractual obligations and determines the applicable law. Notes areas where Rome II does not apply, and looks at the specific example of how Rome II would regulate a dispute involving product liability, including the habitual residence test.*

E.T. Lear, "**National Interests, Foreign Injuries, and Federal Forum Non Conveniens**" (2007) 41 *University of California Davis Law Review* 559 – 604 [**Full Text Here**]. Abstract:

> *This Article argues that the federal forum non conveniens doctrine subverts critical national interests in international torts cases. For over a quarter century, federal judges have assumed that foreign injury cases, particularly those filed by foreign plaintiffs, are best litigated abroad. This assumption is incorrect. Foreign injuries caused by multinational corporations who tap the American market implicate significant national interests in compensation and/or deterrence. Federal judges approach the forum non conveniens decision as if it were a species of choice of law, as opposed to a choice of forum question. Analyzing the cases from an adjudicatory perspective reveals that in the case of an American resident plaintiff injured abroad, an adequate alternative forum seldom exists; each time a federal court dismisses such a claim, the American interest in compensation is irrevocably impaired. With respect to deterrence, an analysis focusing properly on adjudicatory factors demonstrates that excluding foreign injury claims, even those brought by foreign plaintiffs, seriously undermines our national interest in deterring corporate malfeasance.*

I am sure that I have missed various articles or case comments published in the last couple of months. If you spot any that are not on this list (or, even better, if you have written one and it is not on this list), please let me know.

Comity at the Court: Three Recent Orders Seeking the View of the Solicitor General

If the Justices are considering whether to grant a petition for certiorari, and they think the case raises issues on which the views of the federal government might be relevant—but the government is not a party—they will order a CVSG brief. "CVSG" means "Call for the Views of the Solicitor General." This "invitation" is naturally treated as a command by the Solicitor General, and signals that the Court is at least considering granting the Petition. In its most recent private conference, the Court ordered CVSG briefs in two new cases concerning the role of international judicial comity in private litigation. Together with another CVSG ordered in November on Executive assertions of foreign policy interests affected by private litigation, and a fourth likely grant being considered in private conference next month, the 2008 Term may already be taking an interesting shape for this site's readership. Here's a preview of the cases.

In *PT Pertamina v. Karaha Bodas Company, LLC*, No. 07-619, the Second Circuit granted an anti-suit injunction against litigation in the Cayman Islands after it had finally decided the merits of a claim. The Petition to the Court presents an array of circuit conflicts and questions for review, all centered around the basic question of when a district court can issue an anti-suit injunction and in what circumstances. (The long-standing divergence over this important question was previously discussed here on this site.) The Petition specifically asks "whether an injunction barring foreign litigation presents a grave intrusion upon principles of international comity that is justified only when necessary to protect the jurisdiction of the U.S. federal court or to further an important public policy." The decision of the Second Circuit in *Pertamina* is in direct conflict with the decision of the Eighth Circuit in *Goss International Corp. v. Tokyo Kikai Seisakusho, Ltd*., No. 07-618, which is also pending before the Court and the subject of a contemporaneous CVSG. The Eighth Circuit refused to enjoin Japanese litigation. The conflict between the Second and Eighth Circuits stems around the doctrine of

"ancillary jurisdiction," specifically whether a federal court loses the power to bar foreign litigation once it decides the merits of a claim and the resulting judgment is satisfied. But the Petition in Goss also raises the comity issue, questioning whether the court "erred in giving dispositive weight to concerns about international comity at the expense of the court's traditional duty to enforce U.S. law on U.S. soil and protect final judgments from relitigation."

Judicial comity is not the only current point of interest; more traditional notions of comity among nations is at issue in *Exxon Mobil Corp. v. Doe I*, No. 07-81, in which the Court ordered a CVSG brief last November. *Doe* involves a case under the federal Alien Tort Statute, regarding various human rights abuses by members of the Indonesian military hired to perform security services for Exxon Mobil. Both the U.S. State Department, and the Indonesian Ambassador to the United States, have urged the court that continuation of the suit would detrimentally affect foreign policy interests. The district court declined to dismiss the suit under the political question doctrine, and the D.C. Circuit dismissed the interlocutory appeal for lack of jurisdiction. The Petition In Doe asks whether the collateral order doctrine permits the immediate appeal of a denial of a motion to dismiss, when continuation of the suit threatens "potentially serious adverse impact on significant foreign policy interests." In post-Petition wrangling, counsel for the Exxon companies sought a stay of the discovery process in the District Court, ostensibly because that process was interfering with U.S.-Indonesian relations. The Chief Justice refused to block the scheduled discovery, stating that the denial took into account a limit on the "current phase of discovery," but left open the possibility that Exxon could ask again for relief at a later time.

Finally, still pending is the Petition in *American Isuzu Motors Inc. v. Ntsebeza*, No. 07-919, previewed here on this site last November. It involves tort claims against 50 multinational corporations by a class of persons alive in South Africa between 1948 and 1993 who were affected by the apartheid regime. Again, the U.S. State Department opposes the lawsuit because of its effect on foreign relations, and the Petition to the Court asks, inter alia, whether the case should be dismissed "[in] deference to the political branches, political question or international comity." Interestingly, as noted in the prior post, the Petition also asks whether international treaties—specifically the Rome Statute of the International Criminal Court—can provide the legal standard to define a cause for "aiding and abetting" a violation of international law under the Alien Tort Statute.

The Solicitor General has already filed a brief supporting review.

The best source for further discussion on these cases, and links to more documents and the decisions below, is the SCOTUSBlog. It seems that an interest in comity at the Court is clearly on the rise (not to be confused with "comedy" at the Court, which seems to be on the rise as well. On this latter point, see the interesting study by Professor Wexler from Boston University.)

French Muslims Getting Divorced Back Home

In 2007, the French supreme court for private matters (*Cour de cassation*) ruled five times on the recognition in France of Islamic divorces obtained in Algeria (judgments of 10 July 2007, 19 September 2007, 17 October 2007, 31 October 2007) or in Morocco (judgment of 22 May 2007). Even by the standard of a civil law supreme court which delivers thousands of judgments each year, this is a high number.

The facts of the cases are almost invariably the same. The couple was of Algerian (or Moroccan) origin. They were sometimes born there, or even had got married there. They then emigrated to France, where they have been living ever since. They sometimes acquired French citizenship.

It seems that it is normally the wife who wants the divorce. She therefore decides to sue, in France. But the husband then travels to Algeria or Morocco and gets an islamic divorce (*Talaq*) there. He subsequently attempts to rely on the res judicata effect of the Moroccan judgment to stop the French proceedings. This is where the French court has to decide whether the foreign judgment can be recognised in France and thus have a res judicata effect.

The reasons why the wife chooses France, and the husband their country of origin, are quite simple. The wife seeks an allowance for her and the children. A

French court would give her much more than an Algerian court. And in any case, under Islamic law, at least as a matter of principle (there are some variations among sunni schools), women may not ask for divorce. This is a right which belongs to men only.

The practice could appear as shocking for a variety of reasons. First, it seems that husbands seek divorce in Algeria or Morocco to avoid French courts and the French law of divorce. Second, it appears that, typically, women will not even be called in the foreign proceedings, which is contrary to the basic understanding of due process. At the same time, this is not completely illogical, since they have no say in the proceedings anyway (although it seems that they sometimes have a say in respect of the financial consequences of the divorce). Third, Islamic law of divorce is essentially unequal.

For long, the *Cour de cassation* was unwilling to rule that islamic divorces ought to be denied recognition because they are the product of a law which does not consider men and women equal. The court would still deny recognition to most Islamic divorces, but on the ground that the wife had not been called to the foreign proceedings. Alternatively, the court would sometimes rule that the husband had committed a *fraude à la loi*, i.e. had initiated proceedings in Algeria for the sole purpose of avoiding French proceedings. However, such intent was often difficult to prove. After all, he was Algerian, and initiating proceedings where he was from was not unreasonable. However, this method led the court to recognize some of these divorces. For instance, in 2001, it accepted to recognize an Algerian divorce decision where the wife had participated to the foreign proceedings and had been awarded a (tiny) allowance.

In 2004, the *Cour de cassation* changed its doctrine and ruled that Islamic divorces are contrary to French public policy on the more general and abstract ground that divorce in Algerian or Moroccan law is in the hands of the sole husband, which infringes the principle of equality between spouses in the dissolution of marriage. The Islamic law of divorce has been rejected abstractly ever since. Formally, the court has ruled that the principle of equality between spouses flows from the European Convention of Human Rights (Article 5, Protocol VII).

The five 2007 judgments all deny recognition to the Algerian or Moroccan divorces on that ground. The law now seems settled. It is thus quite surprising

that the court still has to rule so often on the issue. France has certainly a large Algerian and Moroccan population (and generally has the biggest Muslim population in Europe), which explains why so many disputes arise. One wonders, however, why the costs of litigation up to the supreme court do not discourage husbands. My guess is that, for some reason, they do not bear them.

November 2007 Round-Up: Focus on Anti-Suit Injunctions, The Hague Convention on the Civil Aspects of International Child Abduction, and Foreign Relations Implications of Private Lawsuits

Significant issues of private international received notable attention in the federal courts over this past month.

We'll begin with an issue that has long-tortured consensus in federal courts: anti-suit injunctions. Over three years ago, Judge Selya outlined a split of circuit authority over the "legal standards to be employed in determining whether the power to enjoin an international proceeding should be exercised." *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 3161 F.3d 11 (1st Cir. 2004). The application of these standards – whichever are employed – dictates when the power "should be exercised." These decisions, however, say nothing of the threshold inquiry of when they "can be exercised." The Second and (now) Eleventh Circuits believe that the discretionary balancing test articulated by *Quaak* is triggered *only* if the domestic action is "dispositive" of the foreign action; the Ninth and First Circuits take a bit more lenient approach, and engage in a comity-analysis so long as the actions are "substantially similar."

In *Canon Latin America, Inc. v. Lantech S.A.*, No. 07-13571 (11th Cir., November 21, 2007), a party sought to enjoin a Costa Rican action that, in essence, sought damages under Costa Rican law for the unlawful termination of a exclusive distributorship agreement. The opposing party brought an action in the Southern District of Florida to declare the non-exclusivity portions of the distributorship valid. The Court of Appeals vacated an anti-suit injunction because, "strictly" speaking, the domestic action would not "dispos[e] of . . . statutory rights that are unique to Costa Rica." In a footnote, the panel noted the disagreement among the circuits; to wit, the Ninth and First Circuit have, in strikingly similar circumstances, found the threshold inquiry satisfied and proceeded to determine whether an injunction "should" issue. *Id*. at n. 8. The decision of the Eleventh Circuit is located here.

In a second development, the Sixth Circuit has re-weighed-in on a significant disagreement governing The Hague Convention on the Civil Aspects of International Child Abduction. The pivotal question in *Robert v. Tesson*, No. 06-3889 (6th Cir., November 14, 2007) concerns how to determine a child's "habitual residence" under the Convention. The Ninth and Eleventh Circuits generally give dispositive weight to the "subjective intention of the parents" in answering this question. The Sixth Circuit, in line with the Third and Seventh Circuits, pins habitual residence on the place where there is a "degree of settled purpose from the child's perspective." The decision in *Robert*, which includes a studious examination of the Convention, its text and intent, can be found here.

Finally, the Supreme Court has granted certiorari in a significant case concerning the foreign policy implications of a private lawsuit, and will most likely receive a compelling petition to hear another. In *Republic of Phillipines v. Pimentel*, the Court agreed to consider a dispute over money stolen by the late Philippines dictator Ferdinand Marcos. The money is now in a U.S. bank account, and the court will consider whether it can be distributed to individuals asserting claims for human rights abuses against Marcos in the absence of the Republic from the case (who is asserting sovereign immunity). The ruling by the Ninth Circuit Court to allow the distribution would allegedly prejudice cases pending in the Philippines on the same issue. Appearing as amicus curiae, the Solicitor General asserts on behalf of the Republic that the willingness of lower U.S. courts to get involved "raises significant concerns," that "threatens to undermine" the ability of the United States to assert sovereign immunity in foreign courts in similar

circumstances or to enforce its judgments abroad. The Ninth Circuit's decision is available here, and the Solicitor General's brief is available here.

A similar case is on the verge of Supreme Court review was previously noted on this site. *Khulumani v. Barclay Nat'l Bank*, No. 05-2141 (2d Cir.) concerns claims against various multinational corporations stemming from decades of apartheid in South Africa. Remarkably, in its recent decision in *Sosa v. Alvarez-Machain*, the Court held in a footnote that this very case presents a "strong argument" for deferring to the Executive Branch, which has steadfast opposed the suit on the grounds of foreign policy. A majority of the Second Circuit panel that allowed the claims to proceed held that outright dismissal was "premature" in light of a Supreme Court footnote. Along with the mandate of its "foreshadowing footnote," Lyle Denniston at SCOTUSBlog points out that review by the Court would also

> *give the Justices an opportunity to clarify . . . its June 2004 ruling in the Sosa case. That decision clearly left the courthouse door ajar to claims of human rights abuses, if they were confined to "a relatively modest set of actions alleging violations of the law of nations...a small number of international norms." [While] Justice David H. Souter, called for "judicial caution" and for "great caution in adapting the law of nations to private rights," . . . Justice Antonin Scalia suggested that the claim of discretionary power in the U.S. courts to create rights to sue to enforce international law was deeply flawed.*

See this post for more details and links to the decision and briefs.

Private International Law in Africa: Past, Present and Future

Richard Oppong (*Lancaster Law School*) has written an article on "**Private International Law in Africa: Past, Present and Future**" in the latest issue of the *American Journal of Comparative Law* ((2007) 55 AJCL 677-719.) Here's the abstract:

The development of private international law has stagnated in Africa for some time now. This is reflected in the neglected and undeveloped state of the subject, and the near absence of Africa in international processes, academic forums, writings, and institutions that have significance for the subject. This article explores the present and future state of the subject in Africa by situating it in a historical context. It challenges the often unarticulated assumption of writers on private international law in Africa that the subject and issues it addresses came to Africa only after the advent of colonization. It suggests that although the specific rules may be difficult to ascertain, conflict of laws problems existed in pre-colonial Africa and were, consistent with current theories on pre-modern societies, addressed by a mixture of practices and mechanisms that tended towards conflicts avoidance and lex forism. It notes that during the colonial period the subject developed without any clear theoretical underpinnings, was deployed to fulfil narrow political and commercial goals, and was largely insulated from international developments. The article argues that a new dawn is rising in which the subject will occupy a prominent place with regard to many issues in Africa. It examines how an emerging academic interest in the subject, current economic integration initiatives, harmonization of laws, drive to promote trade and investment, constitutionalism and human rights, and other developments will impact private international law in Africa.

October 2007 Round-Up: International Tort Claims, "Forum Non" Dismissals and Punitive

Damages

This installment of significant developments will focus on salient issues that have been the subject of frequent, past posts on this website.

First, the United States Court of Appeals for the Second Circuit decided a compendium of Alien Tort Claim cases that raise an interesting question at the intersection of domestic and international law: that is, when determining whether a corporate defendant has "aided and abetted" a violation of international law, what law defines the test for "aiding and abetting." *Khulumani v. Barclay National Bank* and *Ntsebeza v. DaimlerChrysler* (available here) concern the tort claims of a class of persons alive in South Africa between 1948 and 1993 who were affected by the apartheid regime. The defendants are 50 multinational corporations, and the claimed damages total over $400 billion. The basic theory of the case is that defendants' indirectly caused plaintiffs' injuries by perpetuating the apartheid system (e.g. by providing loans to a "desperate South African government"), and that they indirectly profited from those acts which violated recognized human rights standards, but not necessarily the law of the place where those acts took place. The District Court dismissed the case as a non-justiciable political question, but also because "aiding and abetting" human rights violations – the gravamen of the indirect causation and indirect harm claims – provided no basis for ATCA liability. A split panel of the Second circuit reversed. Amongst the other decisions intertwined in the 146 page opinion, the court determined that the appropriate test for aiding and abetting liability under the ATCA is set out in the Rome Statute of the International Criminal Court – that is, one is guilty if one renders aid "for the purpose of facilitating the commissions of a . . . crime." This is a far more stringent test than the one argued by Plaintiffs, founded on the Restatement (Second) of Torts § 876(b), which pins liability if one "gives substantial assistance or encouragement" to another's actions which he "knows" to "constitute a breach of duty." While the case was kept alive and remanded for further consideration, commentators have begun to wonder whether Plaintiffs have won a pyrrhic victory: "[i]f the Rome Statute test for aiding and abetting is broadly adopted, few ATCA cases against corporations may clear summary judgment and go on trial."

In a second notable case, the United States Court of Appeals for the Eleventh Circuit considered does a forum non conveniens dismissal of foreign plaintiffs in favor of Italian courts put the remaining American plaintiffs "effectively out of

court" so as to justify appellate review of the dismissal? The panel held that it does. In *King v. Cessna Aircraft Co.*, the personal estates of 70 deceased individuals sued defendant for a tragic air accident in Milan, Italy. Sixty-nine of those plaintiffs were European, with one being American. The district court dismissed the claims of the European plaintiffs on forum non conveniens grounds, and stayed the action of the American plaintiff pending resolution by the Italian courts (because, it is view, the American plaintiff was entitled to "a presumption in favor of its chosen forum"). All plaintiffs appealed. Because one may not generally appeal a decision to stay proceedings, appellate jurisdiction turned on whether the American plaintiff was "effectively out of court" by the imposition of the stay. The Court held that that plaintiff:

> *"has for all practical effects been put out of court indefinitely while litigation whose nature, extent, and duration are unknown, is pending in Italy. The district court has held its hand while Italian courts assume or continue what amounts to jurisdiction over the merits of the lawsuit. Their decision of Italian law issues will be followed by the district court. The stay order does have the legal effect of preventing [the American plaintiff] from proceeding with his claims in federal court for an indefinite period of time, potentially for years. Because he has been effectively put out of court, we have jurisdiction to review the order that did put him out. We do not mean that there are no differences between federalism and international comity for purposes of evaluating the merits of a stay order, as distinguished from deciding whether appellate jurisdiction exists to review the stay order . . . : "The relationship between the federal courts and the states (grounded in federalism and the Constitution) is different from the relationship between federal courts and foreign nations (grounded in the historical notion of comity)." . . . Those important differences do not, however, affect the extent to which a plaintiff is placed "effectively out of court," which is the measure that defines our appellate jurisdiction over stay orders."*

On the merits, the court vacated the stay as improvident because "there is no indication when, if ever, the Italian litigation will resolve the claims raised in this case, and whether [the American plaintiff] will have a meaningful opportunity to participate in those proceedings." The court did not consider the merits of the European plaintiff's appeal of the forum non conveniens decision, preferring instead to remand the entire case for reconsideration in the event that the

vacation of the stay, and the continuation of the lone American case here in the U.S., affects that decision.

Finally, in the latest salvo into the propriety and extent of punitive damage awards, the Supreme Court just granted certiorari in *Exxon Shipping Co., et al., v. Baker, et al*. (07-219). This case concerns a $2.5 billion punitive damages award against Exxon Mobil Corp. and its shipping subsidiary for the massive oil spill in Alaska's Prince William Sound in 1989. In agreeing to hear Exxon's appeal, the Court will decide whether the company should be subject to punitive damages solely upon judge-made maritime law, which is in apparent contradiction of decades of legal history and subject to considerable discordance in the federal courts. The case also raises the question of whether, if maritime law does govern, this specific award is too high because it is said to be "larger than the total of all punitive damages awards affirmed by all federal appellate courts in our history." The appeal also included the question of whether a verdict of that size was unconstitutional; separating this case from recent ones (see here), the Court did not agree to hear that last question. Nevertheless, this decision will have significant ramifications for international maritime concerns. Early reactions can be found here, here, and here. SCOTUSblog has a brief discussion and links to the briefs as well here.

Comity and the Recognition of Foreign Judgments in Long Beach v Global Witness

A very interesting judgment was handed down in the High Court on 15th August 2007 in the case of ***Long Beach & Nguesso v Global Witness*** [2007] EWHC 180 (QB). Professor Jeremy Phillips at the IPKat blog has posted an excellent summary of the case. I have reproduced sections of his post here, and supplemented them with a little more detail on the private international law issues.

Nguesso, son of the President of the Congo, was also President and Director General of the marketing arm of Cotrade, the Congolese state-owned oil company. He owned Long Beach, a company registered in Anguilla. This application was brought by Nguesso and Long Beach against Global Witness, a non-profit-making English company which campaigns against corruption and which was nominated for a Nobel Prize for its work back in 2003.

Kensington, a vulture fund that buys debts cheaply in the hope of getting something back, brought proceedings in Hong Kong in order to trace and seize assets belonging to the Congo. That court ordered a company in Hong Kong to disclose information and documents to Kensington. Those documents, which disclosed information about the financial activities of Nguesso and Long Beach, were referred to at a hearing of the Hong Kong court that was open to the public. Kensington then passed copies of the documents to Global Witness, which posted them on its website.

On the application of Nguesso and Long Beach, the Hong Kong court – sitting in private and without Global Witness being a party to the proceedings – ordered Global Witness not to publish the documents or even to disclose the facts of the making of the application.

Nguesso and Long Beach then sued Global Witness in England and Wales, relying on

1. their rights to confidentiality and privacy under English law;
2. Nguesso's right of privacy under Article 8 of the European Convention on Human Rights, alleging misuse of the documents by both Global Witness and Kensington.

According to the applicants,

1. an English court was required, as a matter of comity between courts in friendly jurisdictions, not to question the correctness of the judgment of the Hong Kong court;
2. the documents remained private and confidential, even though they were referred to in court open to the public in Hong Kong;
3. Nguesso's rights under Article 8 were clearly engaged and the publication of the documents infringed those rights.

On the issue of the **recognition and enforcement of the Hong Kong judgment**, Burnton J. stated (at para. 23),

> *As appears from the terms of their application, the Claimants issued this application seeking relief under section 25 of the Civil Jurisdiction and Judgments Act 1982. At the beginning of the hearing, I pointed out that, under our rules for the recognition and enforcement of foreign judgments, it did not seem that GW was subject to the jurisdiction of the Hong Kong court [since it did not carry on business in Hong Kong], and therefore it would not be bound by any final order made by that court. It seemed to me that that consideration is most material to the grant of relief under section 25. Having been given time to consider the point, the Claimants decided not to pursue their claim under section 25.*
>
> *It follows that for the purposes of this application the Claimants must rely on their substantive rights, i.e. their rights to confidentiality and privacy, on the Second Claimant's rights under Article 8, and on what they contend was a misuse of documents by Kensington and GW.*

The Claimants then turned to the principle of **comity**, arguing tht it required the English court to not question the correctness of the Hong Kong decision, and should not undermine or question its subsequent injunction against publication of the documents. Burnton J. held (at para. 26),

> *Comity requires this court to treat the judgments and orders of the courts of Hong Kong with due respect and even deference. However, in effect, the Claimants seek to treat those judgments and orders as binding on GW. GW was not a party to the Hong Kong proceedings when the judgment of 30 June 2007 was given, and they cannot be bound by it. Furthermore, since it does not carry on business in Hong Kong, it is not subject to that jurisdiction under our rules for the recognition of foreign judgments, and these courts do not regard it as having an obligation to comply with the judgments of that jurisdiction. The fact that the order of 6 July was made against them ex parte, in circumstances in which they had been informed of the Claimants' application on the previous day, and presumably, given the time difference, less than 24 hours before the hearing before Mr Justice A Cheung, reinforces this point. True it is that GW could apply in Hong Kong to set aside the order of 6 July, but that would*

require a non-profit-making organisation to expend considerable resources on legal representation there and may involve its submitting to that jurisdiction. In any event, the rights of free expression on which they rely are rights under our law, not under Hong Kong law.

Burnton J. went on to hold that,

- The significant public interest in the subject matter of the disclosed documents was such that Global Witness's right of communication under Article 10 of the European Convention on Human Rights would be violated if an English court considered itself bound by the restrictions on reference to the procedures of the Hong Kong court;
- the specified documents were, when disclosed to Kensington, confidential by their very nature and content. That they were referred to in open court was clear, though the extent of that reference was not. This being so, court should proceed on the basis that there was sufficient reference to them as would have removed their confidential status if they had been disclosed on discovery and referred to in open court in England;
- neither Long Beach ot NGuesso had shown that they were likely to establish at trial that the documents were protected by confidentiality;
- while Nguesso's right of privacy under Article 8 was undoubtedly engaged, there was a clear and overwhelming case for refusing relief on the ground that there was an important public interest in the publication of the specified documents and the information derived from them;
- once there was good reason to doubt the propriety of the financial affairs of a public official, there was a public interest in those affairs being open to public scrutiny.

(Visit the IPKat blog for news and views in IP law.)

Second Issue of 2007's Journal du Droit International

The second issue of the French *Journal du Droit International* for 2007 was released a few days ago. As a journal covering the whole spectrum of international law, it contains articles on topics related to public international law, European Union law and European human rights. For a complete table of content in French, see here.

The Journal also contains a few articles dealing with conflicts issues, all written in French.

The first was written by Gian Paolo Romano and wonders how one can reconciliate the choice of the UNIDROIT Principles by contracting parties with mandatory rules (*Le choix des principes UNIDROIT par les cocontractants à l'épreuve des dispositions impératives*). The English abstract reads:

> *The intensity of the internationally mandatory character of a legal rule varies depending on the strength of the ties existing between the State and the contract. A rule which is mandatory with respect to a given contract may be no longer mandatory with respect to another contract. To the extent that it aims to protect the contracting parties, such rule then gives up its internationally mandatory character thereby becoming either "internationally dispositive", if the State from which it emanates is the one whose law would be applicable in the absence of choice, or, if not, "internationally available" to the parties, who may freely let themselves be governed by it. If the rule is, with respect to a particuler contract, internationally dispositive or available to the parties within the proposed definition, it can hardly be maintained that the State has an interest in applying it to such a contract notwithstanding the choice of the UNIDROIT Principles by the parties. While questioning the practical importance of the dichotomy "substantive – conflict autonomy", the present study allows itself to venture into the realm, still little explored, of the internationally dispositive scope of application of a mandatory rule.*

The second article is authored by Philippe Singer and Jean-Charles Engel, who are members of the staff of the European Court of Justice (for Mr Singer) or the

Court of First Instance (for Mr Engel). Its title is the Importance of Comparative Research for Community Justice (*L'importance de la recherche comparative pour la justice communautaire*). The English abstract reads:

> *More than a passage required in certain cases by the Treaties or the expression of a concern to avoid a denial of justice, recourse to comparative law constitutes for the Community judge a real step in deciding a case. If this importance attached to comparative research in Community justice is well-known, its concrete realization and its formalization are perhaps a little less so. The "research notes" requested by the "research and documentation" Service testify, however, to the institutionalization of this method in the heart of the Community Court.*

The third article was written by Francois Melin, who lectures at Amiens Faculty of Law. It deals with the applicable law to set off in European insolvency proceedings (*La loi applicable à la compensation dans les procédures communautaires d'insolvabilité*). The English abstract reads:

> *The role of set off in case of insolvency is particularly important. The EC Regulation on insolvency proceedings alludes therefore to it in two provisions. Article 4.2.d indicates that the law of the State of the opening of the proceedings shall determine the conditions under which set off may be involved. Article 6 states that the opening of insolvency proceedings shall not affect the right of creditors to demand the set off of their claims against the claims of the debtor, where such set off is permitted by the law applicable to the insolvent debtor's claim. The difficulty consists in establishing the relationship between these two provisions.*

Articles of the *Journal* cannot be downloaded.