New Articles in Canadian Publications

Two recent publications contain several topical articles:

In the 2010 issue (volume 60) of the University of New Brunswick Law Journal are the following five articles: Catherine Walsh: "The Uses and Abuses of Party Autonomy in International Contracts"; Joshua Karton, "Party Autonomy and Choice of Law: Is International Arbitration Leading the Way or Marching to the Beat of its own Drummer?"; Stephen Pitel, "Reformulating a Real and Substantial Connection"; John McEvoy, "'After the Storm: The Impact of the Financial Crisis on Private International Law': Jurisdiction"; and Elizabeth Edinger, "The Problem of Parallel Actions: The Softer Alternative". This journal is available to subscribers, including through Westlaw.

In Jeff Berryman & Rick Bigwood, eds., *The Law of Remedies: New Directions in the Common Law* (Toronto: Irwin Law Inc., 2010) are four articles that relate to the conflict of laws: David Capper, "Mareva Orders in Globalized Litigation"; Scott Fairley, "Exporting Your Remedy: A Canadian Perspective on the Recognition and Enforcement of Monetary and Other Relief"; Garry Davis, "Damages in Transnational Tort Litigation: Legislative Restrictions and the Substance/Procedure Distinction in Australian Conflict of Laws"; and Russell Weaver & David Partlett, "The Globalization of Defamation". This collection of articles is available for purchase here.

Privacy and Personality Rights in the Rome II Regime – Not Again?

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Art. 1(2)(g) of the Rome II Regulation (Reg. (EC) No. 864/2007) excludes from its scope "non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation". In its statement on the Regulation's review clause (Article 30), the Commission undertook as follows:

> *The Commission, following the invitation by the European Parliament and the Council in the frame of Article 30 of the 'Rome II' Regulation, will submit, not later than December 2008, a study on the situation in the field of the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality. The Commission will take into consideration all aspects of the situation and take appropriate measures if necessary.*

The comparative study, prepared for the Commission by its contractors Mainstrat and supporting cast, was published in February 2009. We should not quibble about the two month delay – these review clause deadlines are not, after all, to be taken too seriously. No doubt, the Commission needed a little extra time to take into consideration "all aspects of the situation" and to identify any measures which it thought "necessary". Should its silence on the matter in the following 18 months be taken, therefore, as a tacit acknowledgement that nothing needs be done at this point in time? Or just that the Commission has more "important" fish to fry (such as 200-years of European legal tradition in the area of contract law – a discussion for another day)?

The European Parliament, for one, seems unhappy with the present state of affairs, and this should not come as a surprise. This aspect of the review clause was all that the Parliament had to show for the considerable efforts of its rapporteur, Diana Wallis MEP, and her colleagues on the JURI Committee during the discussions leading to the Rome II Regulation to broker a compromise provision acceptable to the Member States, the media sector and other interested groups. Those efforts proved futile, doing little more than opening what the former Vice-President of the European Commission, Franco Frattini, described with a classical nod as *la boîte de Pandore* (an expression that appears more earthily in the English translation of the Parliamentary debate as "a can of worms").

In her Working Document, Diana Wallis acknowledges that "[t]he history of failed attempts to include violations of privacy and personality rights within the scope of the Rome II Regulation shows how difficult it is to find a consensus in this area". To illustrate those difficulties, it may be noted that at a meeting of the Council's Rome II committee in January 2006, no less than 13 different options for a rule prescribing the law applicable to non-contractual obligations arising from violations of privacy and personality rights were apparently on the table. The topic, with its close link to the fundamental human rights concerning the respect for private life and freedom of expression, inevitably attracts strong and disparate reactions from the media, from civil liberties groups, from those representing celebrities and other targets of "media intrusion" and from politicians of all colours. Inevitably, any proposal to create uniform European rules in this area, however narrow their scope or limited their effect, will cause a stir, with those involved using the considerable means of influence at their disposal to secure a result (both in the rule adopted and the policy direction) which is perceived to accommodate and further their interests. If the EU does act, one or more groups will claim that a victory has been secured for their own wider objectives (whether they be "freedom of the press", or "protection from media intrusion", or some other totemic principle). Against this background, the most likely outcome (as the Rome II Regulation demonstrates) is a stalemate, with the players pushing their pieces around the board without attempting to make a decisive move.

Why should the outcome be any different on this occasion, especially given the limited time that has elapsed since Rome II was adopted? Wouldn't we all be better off focussing our efforts on more pressing business, or just getting on with our holiday packing?

Mrs Wallis' Working Paper, although admirable in the breadth of its coverage, provides little cause for optimism. If anything, the debate appears to have regressed in the three years since the Regulation was adopted. Instead of the debate being centred upon a clearly focussed proposal, such as that contained in Art. 7 of the European Parliament's Second Reading Proposal, we are left with a tentative preference for introducing a degree of flexibility (either judicial or party oriented) coupled with some form of foreseeability clause. Other options, such as reform of the related rules of jurisdiction, minimum standards of protection for privacy and personality rights and (gulp) "a unified code of non-contractual obligations, restricted to or including those arising out of violations of privacy and

personality rights" are floated, with varying degrees of enthusiasm, but without any clear picture emerging as to what the problem(s) is/are at a European level and how these options may contribute to an overall "solution". Although concrete proposals will emerge, such as those identified on these pages by Professor von Hein, the debate is lacking in focus. If the European Parliament's JURI Committee has now retreated from its former, strongly held position into the legislative outback, what hope is there for its current initiative? Wouldn't it be better to wait, at least, until the full review of the Rome II Regulation by the Commission, scheduled – at least according to the black letter of the Regulation – for next year?

As the foregoing comments may suggest, my own strong preference would be to wait, and to maintain the *status quo* for the time being, for the following reasons:

1. In terms of the law applicable to non-contractual obligations arising out of cross-border publications, there is nothing in the Working Paper to suggest that the problem is a pressing one, or that immediate legislative intervention by the European Union is "necessary". "Libel tourism" may be a cause for concern in some quarters on both sides of the Atlantic, but the focus of that debate is on rules of jurisdiction and on the English substantive law of defamation, and the difficulties do appear to have been somewhat overstated. There is also, in my view, a real risk, by hasty legislative intervention, of exacerbating existing problems or creating new ones, for example by a rule of applicable law that might subject a local publication (for example, the Manningtree and Harwich Standard) to the privacy laws of a foreign country where the subject of an article is habitually resident and where the article (in hard copy or online form) has not been read except by the subject and his lawyers.
2. We are in the middle of the review of the Brussels I Regulation, whose rules (in contrast to those of the Rome II Regulation) do apply to cross-border disputes involving privacy and personality rights. That process, which raises issues of major commercial importance (most obviously, the effectiveness of choice of court and arbitration provisions in commercial contracts) has already been drawn out, and we should not impose a further obstacle of requiring at the same time a mutually acceptable and viable solution to the question as to which law should apply in these cases. Either the Brussels I review should be allowed to proceed first,

with questions concerning the law applicable to be considered thereafter, or the present subject area should be stripped out of the Brussels I review leaving private international law (and substantive law) aspects of privacy and personality rights to be considered separately, but on a firmer footing than the present debate.

3. It must be recognised that the rules of applicable law in the Rome II Regulation are not (and should not be) rule or outcome selecting. The privacy or defamation laws of the subject's country of habitual residence, or the country where the publisher exercises editorial control, or of any other country to which a connecting factor may point may be more or less favourable to each of the parties. Further, all of the Member States are parties to the European Convention on Human Rights and obliged to respect both private life (Art. 8) and freedom of expression (Art. 10) within the margins of appreciation allowed to them. Those requirements must be observed by all Member State courts and tribunals, in accordance with their own constitutional traditions, whether they are applying their own laws or the laws of a Member or non-Member State identified by the relevant local rule of applicable law. In terms of the legislative structure of the Rome II Regulation, they are a matter of public policy (Art. 26) and not of identifying the country whose law applies. It follows that the impact of rules of applicable law on these Convention rights would appear to be more practical than legal. Might a night editor at a newspaper hesitate to run a story about a foreign footballer's private life if he cannot be sure that it will not expose him and the publisher to a claim based on a "foreign law"? Might an impecunious European aristocrat step back from bringing legal action to protect his family's privacy if it requires him to pay expensive foreign lawyers in order to determine his rights? Moreover, the temptation (as in these examples) to focus on the mass media and on "celebrities" must also be resisted – the position of the web blogger or the office worker, whose rights are equally valuable, must also be considered. Any attempt to formulate a rule of applicable that balances the interests of both parties, and facilitates the effective enforcement of Convention rights, must take account of these and other practical issues, but (despite the Mainstrat report) a sufficient evidential basis is presently lacking.
4. In view of the constitutional sensitivity of this area (acknowledged in a declaration at the time of the Treaty of Amsterdam*, although apparently not repeated upon adoption of the Lisbon Treaty), it is vital that the

debate should be properly focussed and resourced from the outset. A review of the present state of the law must open up not only the Art. 1(2)(g) exception, but also the terms and effect of the eCommerce Directive and the "country of origin" principle that it is claimed to embody, as well as the interface between private international law rules and the Convention rights. The size, importance and complexity of this undertaking should not be underestimated, and the temptation for the legislator to jump in with two feet should be strongly resisted. Laudably, Diana Wallis has not made this error, but her Working Paper demonstrates how much remains to be done to identify the problem and assess potential solutions. Significant additional resources, both within and outside the European legislative machine, will be required in order to create even the potential for a satisfactory outcome to the process. In the present climate, it may be questioned whether this is the best use of scarce resources. Sensible and sensitive, pan-European legislation regulating private international law or other aspects of civil liability for violations of privacy and personality rights may be thought "desirable", but is it really necessary and, if so, is it achievable and at what cost?

* *Declaration on Article 73m of the Treaty establishing the European Community*

> *Measures adopted pursuant to Article 73m of the Treaty establishing the European Community shall not prevent any Member State from applying its constitutional rules relating to freedom of the press and freedom of expression in other media.*

Res Judicata for Foreign Freezing Orders?

Can foreign freezing orders prevent the forum from granting leave to attach provisionally local assets? The Rouen Court of appeal ruled so in a judgment of 24

March 2009.

The case was about the sale of a ship from a company incorporated in Panama to a companny incorporated in the Marshall Islands. The parties had concluded a memorandum of agreement whereby the buyer, which had paid a deposit upon the signature of the memorandum, would pay the price within three days of the notification of the delivery of the ship. The seller notified. The buyer did not pay. The seller terminated the contract, but kept the deposit. The buyer initiated arbitration proceedings in London (substantive claims are not known).

Parallel arrest proceedings

While the arbitration proceedings were pending, the buyer sought to arrest provisionally (*saisie conservatoire*) the ship in Greece. A Greek court granted leave to do so ex parte, but when the defendant challenged the order in inter partes proceedings, a Greek court set aside the order on the ground that two critical requirements of Greek law were not met: there was neither a good arguable case nor a real risk that the award would go unsatisfied.

When the ship showed up in France a year later, the buyer sought to arrest it provisionally again. The commercial court of Rouen (Normandy) granted leave to do so ex parte. The defendant challenged unsuccessfully the French order in inter partes proceedings. It then appealed.

Recognition of Foreign Order

The Court of appeal of Rouen allowed the appeal, and set aside the arrest. It did so on the ground that the dispute had been settled by the Greek court, not on the ground of French substantive law. Indeed, the Court ruled that French law had different requirements, but that this was irrelevant since the court was bound to recognize the foreign order. It underlined that the foreign order had been rendered between the same parties, had the same object and the same cause.

One would have expected the court to rule that the foreign order was *res judicata* and thus prevented any other European court from deciding the dispute again. The court referred to article 33 of the Brussels I Regulation and held that it was bound to recognize the foreign order. It also held that the two disputes were the same by the Brussels I Regulation standards (parties, cause, object).

However, the court got it all wrong when it offered its final legal analysis. It held that the French order was irreconcilable with the Greek order. It concluded that, in such circonstances, article 34 of the Brussels I Regulation demanded that the foreign order be recognized and the French court not issue a contradictory order. This was a rather innovative reading of article 34. Article 34 provides that, when one of the two irreconcilable judgments was rendered by the forum, it should always be preferred. Article 34 does not help recognition: it offers grounds for denying it.

Nevertheless, the decision is interesting. If the court had applied the *res judicata* doctrine instead of addressing the issue through the conflict of judgments doctrine, it would have reached the exact result that it wanted to reach.

It might then have wanted to discuss the issue of the applicable law to res judicata: *res judicata of* provisional orders is typically limited , as they often can be modified in case of new circumstances. This is what article 700 of the Greek Code of civil procedure provides. But did Greek law govern the issue?

I am grateful to Sebastien Lootgieter for drawing my attention to this case.

ILA Conference 2010

De Iure Humanitas. Peace Justice and International Law.

The 74th Conference of the International Law Association, hosted by the Netherlands Society of International Law to celebrate its 100th anniversary, will take place in The Hague from 15 to 20 August 2010. The programme includes topics intesting for PIL lawyers, e.g. sessions on international commercial arbitration, international family law, international securities regulation, international trade law and international civil litigation.

For more information on the programme and registration, please click here.

Guest Editorial: Fentiman on “Private International Law and the Downturn”

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Abstract

An increase in litigation in the wake of the economic downturn was widely anticipated, and with it a rise in cross-border disputes with conflicts elements. Yet the expected flood of cases has not materialised, despite a rise in claims in commercial centres such as London. There are reasons why disputes increase in any slump. But the current downturn has special features. These suggest what kind of disputes may arise, including conflicts disputes, and they explain why the number of claims is less than expected. A surge in litigation may yet occur, as initial attempts at compromise fail. But, whatever the number of disputes, private international law may have a central role in regulating the downturn’s legal effects.

Private International Law and the Downturn

1. Facts and figures

Is private international law affected by the current downturn? An intuitive answer is that commercial disputes proliferate with economic contraction. Conflicts disputes increase correspondingly because so much commercial activity is transnational. This is apparently verified by recent developments in London, venue for so many commercial disputes. With the world's leading economies in recession, 2009 saw an increase of 20% on the previous year in claims initiated in the London Commercial Court. ((Financial Times, 8 April 2010.)) 1,225 claim forms were issued, close to the average in the early years of the last decade, and the highest number since 2002. ((When 1,213 claims were initiated: Admiralty and Commercial Court Report 2002-2003, [11].)) More striking still, cases submitted to the London Court of International Arbitration reached a record high in 2009, an annual increase of almost 30%. ((Financial Times, 8 April 2010.)) Many of these claims are likely to have foreign elements. Most commercial disputes in London involve foreign parties, or foreign laws, or foreign assets, or parallel foreign proceedings, or acts or omissions abroad – often in combination. ((The Commercial and Admiralty Court Report 2005-2006 records that approximately 80% of claims in that year involved at least one non-UK party.))

Such figures need cautious handling. Of course some recent cases originate in the downturn, some with conflicts implications. ((As, for example, *Jefferies International Ltd v Landsbanki Islands HF* [2009] EWHC 894 (Comm).)) But only proper investigation will reveal the true cause (or causes) of the rise in claims in London. Nor can it be a complete explanation to attribute the increase to the recession. The risk of default may have heightened, but the number of transactions from which litigation might arise increased in the preceding years of plenty, enhancing the risk of litigation, downturn or not. Nor does the increase in claims mean that conflicts issues are at stake. How many recent actions in the Commercial Court involve contested issues of private international law remains a matter of speculation until they go to trial, as many will not, given the tendency of

commercial disputes to settle. ((Commercial and Admiralty Court Report 2004-2005, 3.)) The nature of arbitrated disputes is even harder to discern, given the privacy of the process. ((Unless ancillary proceedings arise in court.))

Such caveats aside, the rise in pending disputes in London gives pause for thought, and begs intriguing questions. Has the downturn generated more disputes? Does this mean more conflicts disputes? What kind of conflicts disputes? How will they be resolved – in court, by arbitration, or by negotiation? And what of the biggest puzzle? Why has the slump not triggered still more claims? A proper response to these questions demands an empirical study, traversing the economics and sociology of litigation. The following brief remarks are no such thing, but attempt at least to capture some impressions, and suggest some possibilities.

2. Disputes and the economy

Litigation can be generated by economic growth as well as by retrenchment. Transactions multiply with economic expansion, increasing the potential for disputes. Some litigants may also be more aggressive in pursuing or defending proceedings if cushioned by prosperity from the risk of losing. But the risk of default is surely less when times are good, when credit is cheaper, and transaction costs stable. Experience confirms that economic crises spawn litigation. This is reflected in microcosm by the spike in claims in the London Commercial Court in the late 1990s. 1,808 claims were initiated in 1999, explained in large part by the implosion of the Lloyd's insurance market. ((Admiralty and Commercial Court Report 2005-2006, 5.))

Creditors become impatient in times of diminished liquidity. They are more likely to seek recovery through litigation rather than forgive a debt or reschedule. There is also an increased risk in a downturn that counterparties will default, or seek to escape performance, as transaction costs rise with the increased price of services and materials, and the scarcity of credit. But default is not always forced on obligors by pressures beyond their control. Some may calculate that deliberate repudiation of their obligations, with the risk of litigation, is preferable to adhering to a newly onerous bargain. With credit and liquidity reduced many litigants may have a heightened sensitivity to the cost of funding litigation, and to

the risk of losing in court. But economic adversity may also alter the balance of risk, making the cost of litigation seem more attractive than the cost of performance.

Excuses for non-performance, such as incapacity, mistake, fraud, duress or illegality, thus become important, with inevitable conflicts implications in cross-border transactions. Disputes about the identity of the applicable law are the consequence. But this will often be contractually agreed, forcing a defaulting party to argue that the contract is unenforceable by reference to another law. As cross-border litigation increases, so does reliance on overriding rules and public policy. A consequence may be more reliance on overriding prohibitions against onerous interest provisions or exemption clauses, coupled perhaps with pre-emptive litigation in courts where such prohibitions exist. ((A pre-downturn example of pre-emptive reliance on mandatory rules and public policy to invalidate provisions for the payment of interest is *JP Morgan Europe Ltd v Primacom AG* [2005] EWHC 508 (Comm).))

Just as economic adversity encourages default, so it precipitates collateral litigation against commercial partners, such as guarantors, insurers, and reinsurers, offering further potential for cross-border litigation. Such collateral disputes often concern whether the terms of a secondary contract incorporate those of a primary contract, not least terms affecting jurisdiction, arbitration and choice of law. ((Fentiman, International Commercial Litigation (Oxford: OUP, 2010), [4.71] – [4.86].))

It is also more likely in straightened times that parties to a bad bargain will allege mis-selling, or blame their advisers, perhaps suing for misrepresentation, or alleging negligence against a third party such as a broker or auditor. ((A pre-downturn example, subject to English law, but involving the alleged mis-selling of investments in complex financial instruments, is *JP Morgan Chase Bank v Springwell Navigation Corporation* [2008] EWHC 1186 (Comm).)) It becomes important to establish whether the creditworthiness of a counterparty, or the value of an asset, or the risk of a transaction, was misstated – and to address any related conflicts issues. Nor are lawyers immune from such collateral litigation ((See *Haugesund Kommune v Depfa ACS Bank* [2010] EWHC 227 (Comm) (advice as to capacity to contract).)) – not least those who gave insufficiently qualified opinions as to governing law and jurisdiction.

Allegations of fraud also increase with economic stringency – as indeed does fraud – as trading conditions worsen and liquidity deteriorates. ((Mitchell and Taylor, 'The Fraud Litigation Spiral' NLJ 6 February 2010, 175.)) Sellers misrepresent their products, straightened borrowers conceal their circumstances to obtain finance, traders lacking liquidity charge their assets (often receivables) to different lenders to obtain funds. In cross-border disputes this highlights the treatment of pre-contractual fault, and the vexed question of priority between competing assignments of the same debt. Because fraud is often associated with attempts to conceal assets, applications for transnational freezing and disclosure orders also become more frequent.

Governments also tend to respond to economic crises with protective legislation, increasing the legal regulation of businesses and markets, and restricting economically sensitive transactions. The effect is to highlight the importance of conflicts rules governing discharge and illegality, and in particular the treatment of supervening illegality in the place of performance. Old questions may also arise concerning the effect of moratorium legislation, and the expropriation of assets. ((As in *Jefferies International Ltd v Landsbanki Islands HF* [2009] EWHC 894 (Comm).))

So reasons to litigate abound in troubled times. But so does the readiness to sue. Some potential litigants may be deterred from doing so because the liquidity necessary to pursue litigation may be more limited, and the risk of failure more serious, in adverse economic conditions. But not those whose last chance to avoid closure or insolvency is a successful claim – colloquially, 'bet-all' claimants. And not liquidators, whose task is to maximize a company's assets by recovering its losses, or pursuing its debtors, or disputing disposals of its property. Liquidators are especially prone to challenge purported transfers of a company's accounts receivable – raising (again) vexed questions about the effectiveness of cross-border assignments. ((An older example is *Raiffeisen Zentralbank Osterreich AG v An Feng Steel Co Ltd.* [2001] EWCA Civ 68; [2001] QB 825.))

Such considerations explain why and how litigation follows in the wake of economic crisis. But this may not occasion more trials on the merits, still less more final judgments. Nor for that reason may choice of law disputes increase. Commercial disputes are almost always settled, often when the identity of the forum becomes clear. ((Commercial and Admiralty Court Guide 2004-2005, 3.)) True to form, any additional disputes in the London Commercial Court are likely

to be interlocutory, concerning jurisdiction and interim relief, the key components in cross-border litigation. The staying of actions, the restraint of foreign proceedings, and the disclosure and freezing of foreign assets, are likely to loom large. Given the likely complexity of any disputes, orders for case-management may assume special importance – with potential cross-border implications if proceedings in different countries are involved. Moreover, at least in the European Union, where the Brussels I Regulation emphasises the importance of pre-emptive forum shopping, many disputes are likely to involve first-strike actions, often no doubt for declaratory relief. ((Fentiman, 'Parallel Proceedings and Jurisdiction Agreements in Europe', in de Vareilles-Sommières, ed, Forum Shopping in the European Judicial Area (Oxford: Hart, 2007).))

3. A different landscape

The landscape of litigation in the present downturn has novel features unconnected with the economy, which may affect the incidence and nature of disputes. Two are special to Europe but have particular significance for conflicts lawyers.

First, there are now enhanced techniques for reducing the financial risk of litigation, making it more attractive – or less unattractive. The cost of litigation determines whether to initiate or defend proceedings, and (importantly) where to do so. But the financing of litigation has been transformed in recent years by the possibility of third party funding. (('Litigation finance follows credit crunch', Financial Times 27 January 2010; Litigation and Business: Transatlantic Trends (Lloyds, 2008), 9.)) Evidence of the practice in London is scant. But a growing number of third party investors are prepared to finance claims, conditional on a share of the proceeds if the claim succeeds. In theory at least this possibility is especially appealing in a downturn, both to claimants, whose ability to finance proceedings may otherwise be compromised, and by investors, for whom the value of more conventional asset classes may seem uncertain.

Secondly, the popularity of arbitration has increased. Claims before the London Court of International Arbitration rose significantly by 131% between 2005 and 2009, a trend matched by other arbitral institutions. ((Financial Times, 16 April 2010, 11, citing figures sourced from the Singapore International Arbitration Centre. In the period 2005-2009 the international disputes administered by the

other leading centres increased as follows: ICC, Paris 57%; American Arbitration Association 44%; the Singapore International Arbitration Centre 153%; the China International Economics and Trade Arbitration Commission 31%.)) At least some of those disputes would once almost certainly have been tried in court. One explanation is the perennial concern (not always justified) that commercial litigation is excessively lengthy, complex, and costly by comparison with arbitration. ((Concerns about the efficiency of lengthy cases before the London Commercial Court prompted a review of its procedures culminating in the Admiralty and Commercial Courts Guide 2009.)) Another is the increasing tendency to include arbitration clauses in species of contract which previously would have contained jurisdiction agreements. This is especially so in financial transactions. Financial institutions are less reluctant to arbitrate than convention once dictated. This partly reflects a desire to escape the inflexibility of the Brussels jurisdiction regime, preoccupied as it is with avoiding parallel proceedings even to the detriment of jurisdiction agreements. ((Sandy and O'Shea, 'Europe, Enforcement and the English'.)) The consequence has been an increase in hybrid clauses providing in the alternative for litigation or arbitration. ((See, for example, the clause at issue in *Law Debenture Trust Corporation Plc v Elektrim Finance BV* [2005] EWHC 1412 (Ch).)) Given the prevalence of disputes between financial institutions in the downturn, the sensitivity of the transactions involved, and concerns about media scrutiny, parties faced with that choice may well favour arbitration. The effect is not, however, to rule out litigation entirely. Arbitration often generates ancillary judicial proceedings, not least concerning the restraint of foreign proceedings commenced in defiance of an arbitration clause.

Thirdly, the downturn coincides with important changes in the European conflicts regime, with the coming into force of both the Rome I and Rome II Regulations. It is perhaps unfortunate that many of the conflicts issues which are likely to arise in the near future are governed by novel provisions, causing uncertainty, and itself generating more litigation. Foremost among these are Article 9 of Rome I (likely to become contentious as obligors plead illegality to escape performance), and Articles 4 and 12 of Rome II (regulating the likely crop of claims for mis-selling and negligent advice). It is especially regrettable that Article 14 of Rome I remains unreconstructed and ambiguous, given that the assignment of debts underlies so many contentious transactions.

Finally, any increase in litigation poses a challenge for the Brussels I Regulation, as interpreted in such recent cases as *Owusu*, ((Case C-281/02 *Owusu v Jackson* [2005] ECR I-553.)) *Gasser*, ((Case C-116/02 *Erich Gasser GmbH v MISAT Srl* [2003] ECR I-14693.)) *Turner* ((Case C-159/02 *Turner v Grovit* [2004] ECR I-3565.)) and *West Tankers*. ((C-185/07 *Allianz Spa v West Tankers Inc* [2009] 3 WLR 696.)) The inappropriateness of the Regulation for handling high-value, multi-jurisdictional disputes has often been noted, and needs no elaboration here. ((Fentiman, International Commercial Litigation (Oxford, OUP, 2010), [1.40] – [1.47].)) But a proliferation of such disputes can only impose further stress on a regime which destabilises jurisdiction and arbitration agreements, and militates against the allocation of cases to the most appropriate forum. The Brussels regime may indeed have its own role in encouraging litigation, by inciting the prudent to seise their preferred forum early so as to win the all-important battle of the courts. ((See, Fentiman, 'Parallel Proceedings and Jurisdiction Agreements in Europe', above.))

4. A different downturn

Not all slumps are the same, and the present crisis has distinctive features of particular interest to conflicts lawyers. Most obviously, this is the first downturn to affect truly global markets. The last two decades have seen an increase in cross-border transactions, encouraged by the globalization of finance, enhanced communications, and the growth of emerging markets for trade and investment. The present crisis also follows a period of unprecedented economic expansion. The downturn was preceded by an economic boom, fuelled by plentiful credit, in which the volume of global business increased – and with it the risk of cross-border litigation even in the best of times.

Again, the first effect of the crisis was an unprecedented credit drought, triggered by paralysis in the wholesale lending markets. The effect may be disputes in which the obligor's default was triggered by the denial or withdrawal of the credit necessary to fund a project, or a purchase, or an investment. There is evidence that many recent disputes in the London Court of International Arbitration concern default prompted by a lack of credit. ((Financial Times, 8 April 2010, quoting James Clanchy, LCIA deputy director-general.)) Another effect has been remarkable volatility in the financial markets, with the value of securities,

currencies and commodities not simply falling (as might be expected), but rising and falling unpredictably. ((‘Global Markets Turn Volatile’.)) Disputes about the assessment of loss may result. Market fluctuations also make it hard for potential litigants to predict whether their losses might evaporate with a market upswing, raising strategic problems for both obligors and obligees. Is it time to default; is it time to sue? ((This may further explain why less litigation has followed the downturn than expected.))

The dearth of credit has also prompted numerous business failures, leading to an increase in insolvency and associated disputes – often disputes with a foreign element, involving the collapse of multi-national businesses, and those with foreign creditors. At its simplest liquidators are likely to pursue unpaid debts and recover losses incurred by failed transactions. But they are equally likely to attack any disposals of the company’s assets. This might involve denying the effectiveness of any assignments of a business’s receivables or loan book, perhaps by challenging the proprietary effect of such disposals. Or it may involve recharacterising a transaction, by alleging perhaps that it creates a security interest, and so fails for want of form or registration. ((Fentiman, International Commercial Litigation (Oxford: OUP, 2010), [3.177] – [3.181].)) Both attacks beg choice of law questions. What law governs the effectiveness of the assignment of a debt, and the characterisation of a transaction?

The decade before the downturn also saw an increase in the use of complex financing techniques, and increased investment in novel investment vehicles and emerging markets. The legal structure of such techniques is largely untested, and the risk associated with such investments was often unclear. ((See eg the high-risk swap transactions involved in *Haugesund Kommune v DEPFA ACS Bank* [2009] EWHC 2227 (Comm).)) Cases probing the effectiveness of such transactions might be expected, as are claims for mis-selling, in which investors allege that the risks were either concealed or unexplained. ((A precursor is the dispute in *JP Morgan Chase Bank v Springwell Navigation Corporation* [2008] EWHC 1186 (Comm), in which the claim failed.))

Of special importance has been the use of derivatives, principally as a means to mitigate the risk of fluctuating markets, and the development of products linked to the securitization of debt. That one type of derivative, the credit default swap, functions (in effect) as insurance against default under a loan or bond, suggests that such transactions are increasingly likely to be litigated. But the potential for

disputes arising from securitization is especially instructive. Traditional 'vanilla' lending – finance in return for repayment and interest – depends on familiar contractual principles, against a tolerably stable conflicts background. So too does the straightforward issue of securities involving investment in the issuer's business. But the predominant financing technique of recent years has been securitization. This embraces a variety of structures with at their core the issue of securities in the form of bonds, backed by the bulk assignment of debt to the issuer, by legal vehicles whose only purpose is to hold the assigned assets and issue the securities. It has also spawned a parallel market in devices such as credit derivatives, effectively a means of betting on the value of securitized assets. Such structures provide finance to the owner of the underlying assets, profits for the issuer, and investment vehicles for those purchasing the securities and wagering on their value. But the legal implications have yet to be fully tested, certainly in a cross-border context. ((Numerous domestic disputes have arisen in the United States.))

Any litigation arising from such structures may seem familiar. Investors facing significant losses are likely to sue issuers for breach of warranty and misrepresentation, or claim from an issue's underwriters, or even pursue the debt's original owner (perhaps for fraud or negligence). So too the asset's original owner may face claims from an issuer. But securitization may be an especially fertile source of litigation for several reasons. ((For an account of the inter-party 'frictions' underlying securitization, each a potential source of litigation, see Ashcraft and Schuermann, *Understanding the Securitization of Subprime Mortgage Credit*, Federal Reserve Bank of New York Staff Reports, no 318 (March 2008).)) First, a typical securitization involves several contracts between different parties, creating a web of potential claims and counterclaims, involving the borrowers whose debts are securitized, the asset pool's original owner, the issuer of the securities, and the disappointed investors. Secondly, each of the relationships between the several key parties is asymmetric, in so far as one party is likely to have better information than the other concerning value and risk. ((As insightfully explained by Ashcraft and Schuermann, above.)) When one party's position sours such asymmetry leads inevitably to accusations of misrepresentation and non-disclosure. Thirdly, particular difficulty arises where the effectiveness of such arrangements is questioned, and in particular the assignment of the underlying assets to the issuer. These difficulties are magnified where those assignments involve parties from different jurisdictions, creating

intensely difficult (if all-too familiar) questions about the cross-border assignment of debts. ((It also lends particular urgency to the debate surrounding the future of the Article 14 of the Rome I Regulation.))

The present downturn also follows a period in which normal business prudence was to some extent ignored. Anecdotal evidence suggests that a combination of market pressure and easy profits meant that transactions were completed in haste, or with a degree of complacency about the legal implications. Of particular interest to conflicts lawyers, there is evidence of unthinking reliance on standardised documentation, of surprising inattention to the language of jurisdiction agreements, and a tendency to ignore qualified legal opinions as to the effectiveness of transactions.

5. To sue or not to sue?

Given the severity of the downturn, and the scale of the losses incurred, a substantial increase in commercial litigation was widely anticipated. ((‘Credit crisis could lead to surge in litigation’, Timesonline, 10 August 2007.)) True, the number of claims has risen in London. But the expected deluge of litigation has not – or has not yet – materialised. As the judge responsible for the London Commercial Court has said, ‘no one has encountered what I call a tidal wave of litigation’. ((Gross J, Judge in Charge of the Commercial Court, quoted in the Financial Times, 8 April 2010.)) Why is this so?

Legal obstacles may be one reason. A spate of claims related to the mis-selling of financial products has long been expected, cast as actions for fraudulent or negligent misrepresentation. But such claims are inherently problematic, and one judge recently described a sophisticated investor’s case as a ‘fantasy’ and ‘commercially unreal’. ((*JP Morgan Chase Bank v Springwell Navigation Corporation* [2008] EWHC 1186 (Comm). It has been suggested that the US fraud proceedings recently brought by the SEC against Goldman Sachs may become a template for litigation by private claimants: ‘Wall Street beware: the lawyers are coming’, ‘Regulator’s move risks opening lawsuit floodgates’, Financial Times 18 April 2010.)) Certainly, corporate investors may have difficulty in establishing the reliance necessary to found liability, ((See Bankers Trust International Plc v PT Dharmala Sakti Sejahtera (No 2) [1996] CLC 518.)) just as fraud or negligence

may be hard to make out against financial institutions with robust practices. ((See *Luminent Mortgage Capital Inc v Merrill Lynch & Co* (20 August 2009), USDC ED Pennsylvania (Philadelphia).)) In the context of an endemic market collapse claimants may also face difficult questions of causation and remoteness in proving loss. ((A feature of recent US litigation, illustrated by *Luminent Mortgage Capital Inc v Merrill Lynch & Co*, above.)) Moreover, and of particular importance, the parties' dealings are likely to be subject to contractual disclaimers and exemption clauses designed to forestall litigation. ((JP Morgan Chase Bank v Springwell Navigation Corporation [2008] EWHC 1186 (Comm); see further, Peekay Intermark Ltd v ANZ Banking Group Ltd [2006] EWCA Civ 386; [2006] 2 Lloyd's Rep 511.))

Nor are contractual claims for breach as likely as might be supposed. Commercial contracts are not meant to be litigated, but to regulate matters of performance and discharge autonomously. Potential claimants may be stopped short by robust exemption or force majeure clauses. Or their rights may be put beyond doubt by events of default clauses and warranties, or reinforced by indemnities, making any defence unsustainable. Such drafting obstacles may not always prevent litigation, given the creativity of lawyers, and what may be at stake. But they make it harder, more costly, and more risky, so deterring claimants and persuading defendants to capitulate.

There are also special incentives to resolve disputes arising from the downturn commercially, by negotiation. Where this cannot be achieved there may be incentives to resolve the dispute without the full panoply of litigation, by arbitration (perhaps post-dispute arbitration) or other alternative means. One reason is that one or both parties may be financial institutions reluctant to see their differences aired in public in court. The sensitivity of the commercial information involved, and the likelihood of media attention, may incline such litigants to resolve their differences by negotiation. Especially in the financial markets, the inter-connectedness of business provides two further reasons for preferring the amicable settlement of disputes. The need to preserve commercial relations for the sake of future business may incline the parties towards compromise, without the hostility engendered by litigation. The inter-relatedness of the markets also suggests that the roles of the same two parties may be reversed in different disputes, the potential claimant in one being the potential defendant in another. Where cases involve claims and counter-claims between

financial institutions there is a natural tendency to seek an accounting solution by means of a negotiated set-off.

A negotiated solution is especially attractive because of the degree to which litigation in the present climate may itself impair the parties' commercial effectiveness. A feature of the downturn is the pervasiveness of its effects. The scale of the crisis, and the number of transactions affected, makes its impact systemic, or at least ubiquitous. This has particular consequences. A party faced with default by numerous counterparties is more likely to resolve its problems by negotiation. It is one thing to pursue a single claim, quite another to embark on multiple actions involving different parties, which may come to dominate a company's business. The widespread nature of the crisis also means that the claimant in one dispute may be the defendant in another. Many potential claimants may themselves have defaulted in other transactions. To pursue and defend both actions would be to fight on two fronts. The cost and complexity of such litigation, consuming a company's business, is deeply unattractive. Companies may be willing to litigate one or even several matters where this represents a sound investment, and the benefit outweighs the cost, but not to amend their business plan by devoting their resources largely to pursuing and defending claims.

This is not to ignore the recent increase in proceedings in London. But the rise in claims is compatible with suggesting that most will be resolved by negotiation. Whatever the incentives to achieve a commercial solution a claimant may initiate proceedings to preserve its position. To commence proceedings was once regarded as a hostile act, as a last resort as likely to impair compromise as encourage it. But, at least in Europe, Articles 27 and 28 of the Brussels Regulation compel the parties to initiate proceedings early – indeed, prematurely – by giving priority in parallel proceedings to the court first seised. Many of the claims recently initiated in the London Commercial Court (as in other Member States) may have just this pre-emptive purpose. Whether the presence of such holding claims will impair the chances of reaching a commercial solution in particular cases remains to be seen. But to sue is not at odds with a desire for compromise.

To say that fewer disputes have gone to law than many expected requires, however, three important qualifications. First, pre-dispute legal business is booming. It is apparent that many commercial parties have sought legal advice to

establish their rights and liabilities in the wake of the downturn. Secondly, many companies, both sellers and investors, have set aside funds to cover the costs of potential litigation. In that sense, the legal impact of the downturn is already significant. Thirdly, what will happen next is unclear. There will be cases in which any hope of a commercial solution will evaporate as positions harden. There will be others in which such a solution is impossible because the legal position is uncertain. There may even be some where the parties' differences turn on questions of private international law. Such cases may yet become contested actions before courts or arbitrators. As this suggests, it is too early to tell what the true consequences of the downturn will be, for cross-border litigation, and for the conflict of laws. But there is growing awareness amongst practitioners that a new phase is about to begin, as it becomes clearer which disputes can be resolved amicably and which cannot – a phase of adjudication not compromise. In that sense, the story of the downturn's impact on cross-border disputes cannot yet be written.

6. Private international law and the downturn

It is important to ask whether cross-border disputes will increase with the downturn. Any rise in litigation or arbitration matters to the parties, and to the arbitrators, courts and lawyers whose business is adjudication. It has a public policy dimension, concerning the use of judicial resources. It also has economic effects. The cost of litigation and the ability of parties to recover their commercial losses are financial consequences of the downturn as much as those more commonly reported. The legal impact of any rise in cross-border cases may also be significant, not least for private international law. Litigation creates law. The more issues there are before the courts, the more the law evolves at the hands of the judges. It is perverse to wish for more cases. But when they arise old questions are answered, and new ones posed.

In the end, however, the importance of the downturn for private international law does not depend entirely on the volume of cross-border disputes. It does not turn alone on the work load of courts and arbitrators, or any increase in contentious conflicts questions, or even on whether the parties disagree at all. Which court has jurisdiction, which law governs, whether a judgment is enforceable, whether

an injunction is available, are matters which may frame the parties' negotiations, or underpin the advice of lawyers to their clients. The rules of private international law have a special importance in cross-border relations in establishing both the procedural position of the parties and their rights and obligations – matters of importance whether or not they are contested, and whether or not they go to court or arbitration. One way or another, private international law has a role in managing the effects of the downturn. One way or another, that role may be central.

I am grateful to Sarah Garvey of Allen & Overy, who kindly shared her views on these issues, but is absolved from responsibility for the opinions here expressed. *The following remarks are concerned only with private litigation, not with proceedings initiated by regulators.*

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (3/2010)

Recently, the May/June issue of the German law journal "Praxis des Internationalen Privat- und Verfahrensrechts" (**IPRax)** was published.

This issue contains *inter alia* some of the papers presented at the Brussels I Conference in Heidelberg last December. The other papers were published in the previous issue.

Here is the contents:

- ***Paul Oberhammer***: "The Abolition of Exequatur"

> *The Commission's Report on the reform of the Brussels Regulation points out that "the abolition of the exequatur procedure in all matters covered by the Regulation" is the "main objective of the revision of the Regulation". In this context, the Green Paper raises the following two questions: "Are you of the*

opinion that in the internal market all judgments in civil and commercial matters should circulate freely, without any intermediate proceedings (abolition of exequatur)? And in that case, are you of the opinion that some safeguards should be maintained in order to allow for such an abolition of exequatur? And in that case, which ones?"4 In the following discussion, I will try to answer these questions. As the problem is multifaceted, I can do so only in a very sketchy fashion.

- ***Andrew Dickinson***: "Provisional Measures in the "Brussels I" Review – Disturbing the Status Quo?"

Art. 31 of the Brussels I Regulation provides: "Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter." This provision closely mirrors Art. 24 of the Brussels and Lugano Conventions. Sitting (and, perhaps, partly hidden from view) between the provisions concerning, on the one hand, substantive jurisdiction and, on the other, the recognition and enforcement of judgments, the treatment of provisional measures attracted very little attention in the early history of those Conventions, being fleetingly considered in each of the official reports. That Art. 31 emerged intact from the process leading to the conversion of the Brussels Convention into a Community Regulation at the turn of the century is, however, surprising for the following reasons. First, as the Recitals to the Regulation emphasise, the predominant concern of the Community legislator was to adopt "highly predictable" rules of jurisdiction "founded on the principle that jurisdiction is generally based on the defendant's domicile". Art. 31 achieves neither objective. The delegation to national rules of jurisdiction (including rules of the kinds prohibited by Art. 3) creates a non-uniform landscape in which it is not possible for litigants to determine on the basis of the Regulation alone whether a particular court is competent to grant provisional measures. Secondly, the Commission itself in its 1997 Proposal for a Council Act establishing a revised Convention on jurisdiction and judgments had suggested replacing Art. 24 with a narrower provision, limiting the exorbitant power to grant provisional including protective measures (as defined) to cases of urgency in which the measure in question would be enforced within the territory of the State granting it. Thirdly, as the

Commission noted in the explanatory memorandum accompanying its initial proposal for the Regulation in 1999, the Court of Justice (ECJ) had in the previous year been faced with two important references concerning Art. 24 of the Brussels Convention (Van Uden v. Firma Deco Line and Mietz v. Intership Yachting). In those decisions, the ECJ had recognised Art. 24 as an anomalous provision whose propensity to disturb the scheme established by the Brussels Convention needed to be curtailed. In response, the Court revisited Art. 24's place in the jurisdictional scheme established by the Convention and reshaped it in ways that the Court found to be implicit in its wording and objectives but which are not readily apparent from a study of the text alone. A codification of some aspects, at least, of these rulings therefore appeared desirable. The need for caution in applying Art. 31 of the Regulation and its counterpart in Art. 31 of the Lugano II Convention (the successor instrument to the Lugano Convention) is highlighted by the commentary in the Heidelberg Report on the functioning of the Brussels I Regulation, in the Commission's recent Report and Green Paper on the review of the Regulation and in the Explanatory Report on the Lugano II Convention by Professor Fausto Pocar. Although, for rather unsatisfactory reasons, the text of Art. 31 has been left intact in the Lugano II Convention, its revision is long overdue and this should be one of the objectives of the Brussels I review. By way of background, this article considers, briefly, the ECJ's decisions in Denilauler, Van Uden and Mietz (Section II.) and the proposals advanced by the authors of the Heidelberg Report and the Commission (Sections III. and IV.) before turning to address the issues raised by Art. 31 in its present form and possible solutions (Section V.).

- ***Stephan Rammeloo***: "Chartervertrag cum annexis – Art. 4 Abs. 2, 4 und 5 EVÜ" – the English abstract reads as follows:

October 6, 2009, the ECJ gave interpretative rulings in case C-133/08 on Article 4 of the EC Convention on the Law Applicable to Contractual Obligations (Rome, 1980). The questions in preliminary proceedings centered round the applicable law to a charter-party contract cum annexis in the absence of choice by the parties ("objective proper law test"), the seperability of the contract, and the connecting criteria of Article 4, subsection 4 in relation to subsections 1, 2 and 5. The main proceedings and the essential observations of the ECJ judgment are followed by a critical analysis as well as some considerations on its potential effects on the interpretation of Article 4 (objective proper law test)

and Article 5 (contract on the carriage of goods) of EC Regulation 593/2008 which on 27 December 2009 replaced the 1980 Convention.

- ***Florian Eichel***: "Inhaltskontrolle von AGB-Schiedsklauseln im internationalen Handelsverkehr" – the English abstract reads as follows:

This essay discusses a recent decision of a German Oberlandesgericht (Court of Appeal) which denied enforcement of a US arbitral award on the ground of Art. V (1)(a) New York Convention (NYC). The court deemed a B2B-arbitration clause invalid for substantive unconscionability (s. 307 German Civil Code – BGB). The clause was contained in a Dutch-German franchise form and determined New York as place of arbitration. The essay argues that substantive unconscionability may not simply be based on the remoteness of the place of arbitration from the weaker party's domicile. Rather, in considering the validity of the clause a court should follow a twofold examination: First, it has to consider the formal unconscionability by means of s. 305c (1) BGB. According to this provision, a clause is invalid if it is of a surprising character, i.e. in no way connected to the negotiations or the execution of the contract. The reference to s. 305c (1) BGB is permissible even under the regime of the NYC as the latter only provides formal requirements for the arbitration agreement itself, but not for the procedural agreement in question designating the place of arbitration and the lex arbitri. If the party fails to prove the surprising character, one can in a second step deem the clause unconscionable pursuant to s. 307 BGB. However, this verdict requires a thorough examination as to whether the arbitral procedure in a whole, and not just the place of arbitration, deprived the defendant of his day in court.

- ***Reinhold Geimer*** on the judgment of the ECJ of 11 June 2009 (C-564/07) as well as the decisions of the German Federal Court of Justice of 5 March 2009 (IX ZB 192/07) and of 20 January 2009 (VIII ZB 47/08): "Einige Facetten des internationalen Zustellungsrechts und anderes mehr im Rückspiegel der neueren Rechtsprechung"
- ***Nina Trunk:*** "Anwendbarkeit der Wanderarbeitnehmerverordnung auf die Haftungsbefreiung bei Arbeitsunfällen" – the English abstract reads as follows:

In its ruling VI ZR 105/07 of 15th July 2008 the German Federal Court of Justice had to decide on a case, where an employee of a dutch employer has been injured in a car accident caused by his driving German colleague on a weekend visit to Germany. The crucial question is, if in this case the German regulations, which determine that the civil liability of the employer and/or its employees is excluded in cases of work accidents, applies or if Dutch law, which does not know a corresponding exclusion of liability, is applicable. This recension deals with the mandatory Character of the provisions of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community and their applicability. In accordance with the decision of the German Federal Court of Justice it comes to the conclusion that concerning the question of exclusion of liability, Dutch law applies and explains why this result is compatible with the freedom of services provided in Art. 49 EU Treaty.

- ***Peter Behrens***: "Anwendung des deutschen Eigenkapitalersatzrechts auf Scheinauslandsgesellschaften" – the English abstract reads as follows:

This is the first decision of a German insolvency court applying the new German legal rules on shareholder loans in case of insolvency of a pseudo-foreign company (i.e. an English private company limited by shares doing business exclusively in Germany). The court based its jurisdiction correctly on Article 3(1)(1) of the European Insolvency Regulation (EIR), because the debtor company's centre of main interests was clearly situated in Germany. The reasoning on the private international law issues was less convincing however. The court simply applied German law and held the insolvent company's shareholder liable towards the insolvent company for repayment of a sum which the shareholder had received from the company as redemption of a loan granted by the shareholder to the company. The redemption had occurred in 2007 at a time when the company was already insolvent. Until October 2008, the shareholder-creditor's liability towards the company resulted from relevant provisions in the GmbHG (Limited Liability Companies Act). Since November 2008, these provisions are, however, transferred to the Insolvency Act and they now establish the voidability of the redemption of a shareholder-creditor's loan which occurred within one year before the petition for insolvency proceedings was filed. This change of the law may have had an impact upon the highly disputed characterisation of a shareholder-creditor's liability towards an

insolvent company. Before November 2008, it could have been characterised as a matter of company law which should be subject to the "proper law" of the company (in this case: English law). Since November 2008, there may be better reasons for a characterisation as a matter of insolvency law. The court preferred the latter characterization for both, the old and the new law, without justifying its position by adequate reasoning and, what is more, without taking any notice of European Union law. According to Article 4(2)(m) EIR, voidability of a transaction is clearly a question of insolvency law, but Article 13 EIR limits the application of Article 4(2)(m) EIR under certain circumstances which may or may not have been present in this case. The court's decision therefore suffers from insufficient reasoning.

- ***Hans Hoyer*** on the judgment of the Higher Regional Court Munich of 5 December 2008 (33 Wx 266/08): "Nachlassverwaltung durch Betreuer im deutsch-österreichischen Rechtsverkehr""
- ***Philipp Sticherling***: "Türkisches Erbrecht und deutscher Erbschein" – the English abstract reads as follows:

The author discusses a decision of the Braunschweig district court (Landgericht) in a proceeding concerning the grant of an inheritance certificate. The bequeather has been an Turkish citizen with movable estate in Germany. The District Court has decided that German courts also have jurisdiction for the grant of the inheritance certificate. According to the decision of the District Court, the estate agreement in the consular agreement of 28 May 1929 between the German Empire and Turkey does not command the exclusive jurisdiction of Turkish courts for proceedings concerning the grant of inheritance certificates. The decision has been taken under the provisions of the Act on Voluntary Jurisdiction (Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit – FGG) that was in effect until 31 August 2009. With the Act on the Reform of the Act on Voluntary Jurisdiction, as from 1 September 2009 the Act on Proceedings in Family Matters and in Matters of Voluntary Jurisdiction (Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit – FamFG) has replaced the Act on Voluntary Jurisdiction. The question of international jurisdiction remains relevant under the new legislation. The author shows the differences between the new procedural rules under the reformed act and the old Act on Voluntary Jurisdiction.

- ***Zeynep Derya Tarman***: "Das neue Staatsangehörigkeitsgesetz in der Türkei" – the English abstract reads as follows:

The article will firstly give an overview of the new Turkish Nationality Act from 29.5.2009, with an emphasis on the reasons for the need of this new Act. Secondly, it will analyze the provisions of the new Turkish Nationality Act pertaining to the acquisition and loss of nationality, and thirdly it will give an insight to the multiple nationality under the new code.

- ***Hakan Albas/Serdar Nart*** on the acquisition of real estate by non-residents in Turkey: "Neues zum Erwerb von Grundstücken durch Ausländer in der Türkei"
- ***Christel Mindach***: "Weiterentwicklung des Zivilrechts und Internationalen Privatrechts in Russland" – the English abstract reads as follows:

The "Web portal of Private International Law of Russia" published a range of documents for further development of civil legislation including private international law of Russian Federation. The initiative goes back to two Decrees of the Russian President No. 1108 and No. 1105, dated July 18th, 2008. These Presidential Decrees obliged the "Council for Codification and Improvement of Civil Legislation" jointly with the "Research Centre for Private Law" both attached the President, to prepare a draft for development of civil legislation up to June 1, 2009. This article gives first information especially about this part of draft, dealing with amendment of some provisions of private international law.

- ***Sergej Kopylov/Marcus A. Hofmann***: "Das Verfahren vor dem Wirtschaftsgericht (Arbitragegericht) der Russischen Föderation" – the English abstract reads as follows:

This paper deals with a presentation of the proceedings before the national economic court (arbitration court) of the Russian Federation (RF) in the first instance. Frequently, a Russian and a foreign business partner contract under Russian law and agree on a venue in Russia. Especially in times of financial crisis, the contractors are trying – whether because of liquidity or economic reasons – to turn away from the long-term contracts that have often been entered into before the crisis, which is usually only possible by judicial decision.

As a result, the European companies that are active in the Russian Federation are commonly sued by their Russian partners. The emphasis of this paper is based on a view from the perspective of the German defendants, describing the process and details of the procedure and explaining a useful approach in cases where a defendant finds himself before the arbitrage court.

- ***Peter Kindler*** on the monograph by Günther H. Roth, Vorgaben der Niederlassungsfreiheit für das Kapitalgesellschaftsrecht. Exigences de la liberté d'établissement pour le droit des sociétés de capitaux, 2010 (including a French translation): "'Cadbury-Schweppes': Eine Nachlese zum internationalen Gesellschaftsrecht"
- ***Heinz-Peter Mansel*** on the 80th birthday of Richard M. Buxbaum: "Richard M. Buxbaum zum 80. Geburtstag"
- ***Erik Jayme/Carl Friedrich Nordmeier*** on the 2009 meeting of the German-Lusitanian lawyers' association in Brasília: "Grenzüberschreitende Dimensionen des Privatrechts – Tagung der Deutsch-Lusitanischen Juristenvereinigung in Brasília"
- ***Zou Guoyong:*** obituary in honour of Han Depei

ERA Conference International Commercial Transactions

This ERA Conference on International Commercial Transactions takes place on 10-11 June 2010. The objective is to analyse the legal aspects of international commercial transactions with a special focus on cross-border sale of goods.

Key topics include:

– UN Sales Convention (CISG). The CISG represents a landmark in the process of international unification of law. For example, if a company from Germany enters into a sales contract with a business that comes from the US, France or any other of the more than 70 Contracting States, the CISG will apply (unless the

parties expressly agree otherwise). It is estimated that 75% of all international sales transactions worldwide are potentially governed by the CISG. There will be particular emphasis on: drafting international commercial contracts; cross-border sales; application and ambit of the CISG; remedies for breach of contract.

– UNIDROIT Principles of International Commercial Contracts (PICC). The UNIDROIT Principles on international commercial contracts are considered the most important set of rules which parties to an international contract can choose to govern their agreement. Moreover, they are becoming increasingly indispensable in international arbitration. There will be particular emphasis on: use of the PICC in international arbitration; damages; assignment of rights / contracts; coexistence of CISG, PICC and CFR.

Target group is primarily: practitioners of law dealing with transnational commercial law.

Click here for further information

Summer Academy on International Dispute Resolution

The Heidelberg Center for International Dispute Resolution in cooperation with the International Chamber of Commerce (ICC) and the German Institution of Arbitration (DIS) will hold its 7th Summer Academy on International Dispute Resolution at the **University of Heidelberg, Germany**, from **16 to 19 June 2010**.

Under the guidance of renowned international speakers, the participants will immerse themselves in **Alternative Dispute Resolution** and **International Commercial Arbitration**. Course language will be English.

The Summer Academy includes a social program, featuring such events as a welcome reception, weather and number of participants permitting, a boat trip

and a summer party. Thus, the participants can get in touch with the speakers and the organizers and enjoy the historic atmosphere of Heidelberg.

List of Speakers:

Christian **Duve** (Attorney at Law, Partner, Freshfields Bruckhaus Deringer) – Peter **Kraft** (Attorney at Law, DIS) – Herbert **Kronke** (Professor of Law, University of Heidelberg) – Patricia **Nacimiento** (Attorney at Law, Partner, White & Case) – Jan Heiner **Nedden** (Counsel, ICC International Court of Arbitration) – Dirk **Otto** (Attorney at Law, Partner, Norton Rose) – Michael **Polkinghorne** (Avocat au Barreau de Paris, Solicitor, Partner, White & Case) – Peter **Tochtermann** (Judge)

Further information on the program as well as a registration form can be found here.

Publication: Galgano & Marrella, Diritto e Prassi del Commercio Internazionale

Prof. Francesco Galgano (emeritus in the University of Bologna Law School and founder of Galgano Law Firm) and *Prof. Fabrizio Marrella* ("Cà Foscari" University of Venice) have recently published "Diritto e Prassi del Commercio Internazionale" (CEDAM, 2010), vol. LIV of the "Trattato di Diritto Commerciale e di Diritto Pubblico dell'Economia", one of the most authoritative Italian legal series, directed by *Prof. Galgano*.

A presentation has been kindly provided by the authors (the complete TOC is available on the publisher's website):

> *The problems affecting cross-border transactions from a legal standpoint as well as arbitration have boomed in the last years. This book is the first*

systematic and accurate analysis of International Business Law updated to the most important reforms in the European Union such as: the Lisbon Treaty; Regulation Rome I on the law applicable to contractual obligations and Regulation Rome II on the law applicable to non contractual obligations. New competences for international trade negotiations have been attributed by Member States to the EU. Moreover, an entirely new choice of law regime has been introduced in the European Union affecting world international contracts and transnational arbitration. In addition,new instruments have been generated from the business side such as the new UCP 600 (the Uniform Customs and Practice for Documentary Credits, i.e. a set of rules on the issuance and use of letters of credit utilised by bankers and commercial parties in more than 175 countries in trade finance).

Beautifully written by two world reputed Authors in the field, the purpose of this work is to closely examine actors and sources of International Commercial Law with particular reference to contracts for the sale of goods and other forms of exports; licensing of intellectual property; and foreign direct investment.

Title: Diritto e Prassi del Commercio Internazionale, by *Francesco Galgano* and *Fabrizio Marrella*, CEDAM (series: Trattato di Diritto Commerciale e di Diritto Pubblico dell'Economia, vol. LIV), Padova, 2010, XLVIII-956 pages.

ISBN: 978-88-13-28228-8. Price: EUR 98.

Anti-suit injunctions, again and again

On Thursday, 18 March 2010, the weblog of the *Journal of Intellectual Property Law and Practice* published a piece of news under the title "Exclusive jurisdiction clauses and antisuit injunctions", on a new English case on anti-suit injunctions under the Brussels Regulation (the "other" State being a third State). I have been allowed to reproduce the facts of the case; an analyse by David Wilson and Joanna

Silver is to be found here.

Many thanks to the authors and to Professor Jeremy Phillips, blogmaster of the JIPLP weblog

"Skype, domiciled in Luxembourg, offered free-to-download software that enabled users to communicate over the internet. Joltid, a BVI company, owned certain software that was integral to Skype's business. Skype and Joltid entered into a written agreement, by which Joltid granted Skype a worldwide licence to use a form of its software, the object code, but retained sole control of the source code. Clause 19.1 of the licence stated:

Any claim arising under or relating to this Agreement shall be governed by the internal substantive laws of England and Wales and the parties submit to the exclusive jurisdiction of the English courts.

In March 2009 Joltid, claiming that Skype had breached the licence by using and accessing the source code, purported to terminate it. In response, Skype commenced proceedings in England, claiming that the purported termination was invalid and the licence remained in force. Skype accepted that it had used the source code, but denied this was a breach. According to Skype, Joltid had supplied the source code rather than the object code. This amounted to a variation of the licence. If not, Joltid was estopped from alleging breach or had waived the right to demand strict compliance. In response, Joltid sought a declaration that the licence was validly terminated, as well as an injunction and financial remedies. Joltid subsequently registered its copyright in the source code in the USA and commenced proceedings in the USA against Skype and its various investors (which were not parties to the licence) for copyright infringement.

Skype claimed that these US proceedings were in breach of clause 19.1 of the licence and sought an anti-suit injunction in the UK proceedings to restrain them. Since Skype was domiciled in Luxembourg, Article 23(1) applies in relation to clause 19.1 of the licence. Lewison J began by assessing whether the claims against Skype in the US proceedings fell within the scope of clause 19.1. Joltid argued that its claims in the US proceedings did not arise out of the licence since they were predicated on the assumption that the licence had been terminated. Lewison J rejected this interpretation as unduly narrow. Interpretation of a jurisdiction clause is a matter of national law (*Benincasa, Knorr-Bremse* (supra),

and in *Fiona Trust*, Longmore LJ in the Court of Appeal, applauded by Lord Hoffmann in the House of Lords, stated that 'the words "arising out of" should cover "every dispute except a dispute as to whether there was ever a contract at all"'. Lord Hoffmann added that clause construction should start from the assumption that commercial parties are likely to have intended that all disputes are to be decided by the same tribunal. Accordingly, Lewison J concluded that the US proceedings initiated by Joltid did relate to a dispute covered by clause 19.1.

The court then considered whether Skype was entitled to an anti-suit injunction to prevent any further steps being taken in the US proceedings. Lewison J began by agreeing with Skype that, following Owusu, the UK court should not decline to exercise its exclusive jurisdiction under Article 23(1) on the basis of discretionary considerations such as forum non conveniens and that the UK proceedings should not therefore be stayed in favour of the US proceedings. Lewison J rejected Skype's argument that the tests for staying domestic proceedings and granting anti-suit injunctions were 'two sides of the same coin' and that it followed that, if the court could not stay its own proceedings, it must grant an anti-suit injunction. In *Turner and West Tankers*, the ECJ held that where proceedings are initiated in another Member State in breach of a jurisdiction or arbitration clause, a court should not grant an anti-suit injunction; it is for each court to rule on whether it has jurisdiction to resolve the dispute before it. Skype argued that this line of authority only applies where both jurisdictions are Member States, but Lewison J rejected this. He noted that Skype's argument that there was no discretion to stay the UK proceedings was founded on *Owusu,* where the ECJ drew no distinction between Member and non-Member States. Thus if Skype was right about this issue, the ECJ's approach to anti-suit injunctions must also be equally applicable in the case of non-Member States. Nonetheless Lewison J concluded that, as a matter of discretion, an anti-suit injunction should be granted. Since there was no dispute that the licence was valid, even if terminated, there was a breach of clause 19.1 and the court would need a good reason before declining to enforce by injunction the parties' contractual bargain on jurisdiction. There was no such reason here. Lewison J considered that the standard *forum non conveniens* arguments prayed in aid by Joltid should be given little weight where, as here, the parties to an agreement of worldwide application deliberately agreed an exclusive jurisdiction clause appointing a neutral territory, and where such factors were eminently foreseeable when the parties entered into the licence. Otherwise, the clause would be deprived of its intended effect since, the more 'neutral' the forum

chosen, the less importance the parties must have placed on its convenience for any particular dispute. Another important factor was whether the grant or refusal of the injunction would enable all disputes between the parties to take place in a single forum. In this case, the court's decision either way could not avoid the risk of parallel proceedings; following *Owusu*, the court could not stay the UK proceedings, but it had no jurisdiction to restrain the US proceedings in respect of the parties that did not have the benefit of the exclusive jurisdiction clause."