Hess on West Tankers

Burkhard Hess is professor of law and director of the Institute for Comparative Law, Conflict of Laws and International Business Law in Heidelberg. He has published extensively in the areas of private international law and international procedural law and is co-author of the General Report of the Study on the Application of Regulation Brussels I ("Heidelberg Report").

1. The outcome of the ECJ's judgment is not surprising and, from the point of view of continental procedural law, the findings are completely in line with the framework of the Brussels I Regulation. As the Italian court in Syracuse has been seised under the Regulation, it is for this court to decide on its jurisdiction (Article 5 no 3 Brussels I) and (this is only the second issue) on the scope and the validity of the arbitration clause (Article II NYC).

Despite of some heated criticism which has been brought forward against the conclusions of AG *Kokott*, the Court comprehensively followed her reasoning. The line of arguments developed in para. 24 of the judgment seems to be similar to the arguments of the ECJ in the Lugano Opinion: The Grand Chamber relies on the *effet utile* of the Regulation, its "objective of unification of the rules of conflicts of jurisdiction in civil and commercial matters and the free movement of decisions in those matters". Mutual trust is only used as an additional argument, but much later (para. 30). In my view the judgment demonstrates that the ECJ is "defending" the proper operation of the Regulation and, finally, the priority of Community law. West Tankers is, as Lugano, a political decision.

2. However, as the AG clearly stated, the present situation under the Brussels I Regulation is not satisfactory. With all due respect, I disagree with *Adrian Briggs* that the issues raised by the House of Lords and the ECJ are not important. After West Tankers, the issue should be addressed in the context of the expected revision of the Brussels I Regulation. In this respect I would like to come back to the proposals of the Heidelberg Report:

The Heidelberg Report on the Application of Brussels I proposed a different mechanism for the protection of arbitration agreements. According to this proposal, a new Article 27 A shall address the situation of threatening parallel arbitral and litigious proceedings, especially when a party institutes proceedings

in a domestic court of a Member State instead of enforcing the arbitration agreement. Article 27 A should read as follows: *"A court of a Member State shall stay the proceedings once the defendant contests the jurisdiction of the court with respect to existence and scope of an arbitration agreement if a court of the Member State that is designated as place of arbitration in the arbitration agreement is seised for declaratory relief in respect to the existence, the validity, and/or scope of that arbitration agreement".*

This provision aims to concentrate all proceedings on the validity of the arbitration agreement in the domestic courts of the Member State where the arbitration takes place. In this respect, the Heidelberg Report proposes to insert a new Article 22 no 6 to the Brussels I_Regulation. The new articles shall establish an exclusive competence for proceedings challenging the validity of the arbitration agreement. These proceedings shall exclusively take place in the Member State in which the arbitration takes place.

Article 27 A shall operate as follows: Imagine that a civil court in Member State A is called upon by a party contesting the validity of an arbitration clause providing for arbitration in Member State B. Under Article 27 A Brussels I, the civil court in Member State A shall stay its proceedings until the matter has been referred to the competent court in Member State B. The court in Member State B then decides exclusively on the validity of the arbitration clause (see Article 72 of the English Arbitration Act). In addition, the civil court of Member State A, when staying its proceedings, may set a time limit for the plaintiff (who is contesting the validity of the arbitration clause) to access the courts in Member State B where the arbitration shall take place. Still, the other party may seek redress in the courts of Member State B to get a judgment on the validity of the arbitration clause. If the plaintiff does not institute arbitral proceedings in the "designated" Member State B in a timely manner, the civil court of Member State A will dismiss its proceedings. This example illustrates the proposal's intention to give full effect to arbitration agreements and to achieve uniform results in all EU Member States.

3. Besides, I fully agree with *Horatia Muir Watt's* recent remark that the principle of mutual trust does not automatically imply the (absolute) priority of the court first seised in parallel litigation. European procedural law also provides for a (untechnical) hierarchy between the courts of different Member States (striking examples are found in Articles 11 and 20 of the Brussels II_*bis* Regulation). To my

opinion, the Brussels I Regulation should also adopt a hierarchical system giving priority to the court agreed upon in choice of court agreements and to the courts of the place of arbitration in arbitration proceedings.

I am well aware that the proposal of the Heidelberg Report to delete the arbitration exception of Article 1 (2)(d) has been criticised by many stakeholders of the "arbitration world". However, after West Tankers/Adriatica the legal doctrine should elaborate a more balanced solution in the framework of Brussels I.

4. Finally, some authors raised the question whether the findings of the ECJ also relate to third states. I don't believe that the Grand Chamber addressed this constellation. However, as the judgment refers to general principles of EC law (paras. 24 and 30), their application in relation to third states seems to be unlikely.

III International Seminar on Private International Law

The III International Seminar on Private International Law, coordinated by Professors José Carlos Fernández Rozas and Pedro de Miguel Asensio, took place at the Faculty of Law, Universidad Complutense de Madrid, on the 5th and 6th February. The Seminar, entitled "Self-regulation and unification of international contract law", was divided into five sessions dedicated to offering a different perspective on the leitmotif of the encounter. Each session involved a general introduction, followed by communications from researchers and professionals of law. The seminar was rich in contents, and also a good opportunity for the meeting and discussion of academics and lawyers from different parts of Spain, as well as from European and Latin American countries.

As was only to be expected, the recent Rome I Regulation was the main topic of the first session. The general introduction was given by the Spanish

representative in the negotiations, Professor Garcimartín Alferez, who highlighted the main features of the text and explained the reasons that led to them. His intervention was followed by five papers on specific aspects of the new instrument. First, Professor Asin Cabrera, from La Laguna, focused on International maritime labour contracts, and in particular on the difficulties in determining the law applicable to them with the criteria laid down by art. 8 of the Rome I Regulation. Professor Gardeñes Santiago, from Barcelona (Universidad Autonoma), also referred to Art. 8 of the Regulation, this time from a general point of view, regretting the missed opportunity to change the orientation of the article: that is, correcting its logic of proximity in order to transform it into a rule with substantive guidance. After him, Rosa Miquel Sala, from Bayreuth, presented art. 7, which incorporates insurance contracts into the Regulation. Alberto Muñoz Fernandez, from the University of Navarra, reflected on legal representation as a phenomenon partially excluded from the Regulation. Finally, Paula Paradela Areán, from Santiago de Compostela, summarized the Spanish courts practice on the Rome Convention throughout its 15 years of life.

The second session, entitled "Substantive Unification and international trade: universal dimension", was held on Thursday afternoon. Professor Sánchez Lorenzo, from Granada, took charge of the general introduction. He was followed by Professor M.J. Bonell, from La Sapienza (Italy), who focused on the UNIDROIT principles and their possible contribution to a global law of contracts. Professor Garau Juaneda, from the University of Palma de Mallorca, exposed the problems of the retention of title in today's international trade. Professor Espiniella González, from the University of Oviedo, explained the dual role of the place of delivery in international contracts: for the determination of the applicable law, and as a criterion of international jurisdiction. Speaking from his own experience in international arbitration, Alfedro de Jesús O. referred to the arbitrator's role as an agent to promote internacional self-regulation. Professor Otero García, from the ComplutenseUniversity of Madrid, referred to standards in international trade regulation, highlighting the efforts undertaken by stakeholders in their harmonization. Professor Carmen Vaquero from Valladolidtalked about the legal treatment of the delay to comply withobligations. The session ended with the intervention of Professor Boutin, from Panama, with an entertaining account of the history of the freedom of choice of the applicable law in Latin American countries.

The first session on Friday morning dealt with international unification from a European perspective. The general introduction, given by Professor Pedro de Miguel, discussed the need for standardization at the European level in parallel to the UNIDROIT Principles; his presentation brought up points like the scope of standardization and how it could be carried out. Professor Leible, of Bayreuth, addressed the question of whether the common frame of reference can be chosen by the parties to a contract as applicable law: a question that raised an interesting debate between Professor Leible and Professor M.J. Bonell. Marta Requejo Isidro, from Santiago de Compostela, made reference to the relationship between the harmonization of consumer protection through Directives, and art. 3.4 of the Rome I Regulation. Professor D. Pina, from Lisbon, then alluded to the influence of competition rules on private contracts, and finally, Cristian Oró from Barcelona (Universidad Autonoma) reflected on art. 9 of the Rome I Regulation and its implications for competition rules as mandatory provisions.

The fourth session, on the new trends on international contracts, also took place on Friday morning. The general introduction this time was presented by Professor Forner Delaygua (University of Barcelona). He was followed by A. Boggiano, from Buenos Aires, who recalled the traditional dispute centered on the choice of lex mercatoria as the law applicable to an international contract. Professor Juan José Álvarez Rubio from the University of País Vascospoke about international maritime transport in the Rome I Regulation, indicating the continuity with respect to the Rome Convention, and highlighting divergences from the UN Draft of 2007. Professor Nicolás Zambrana Tévar, from University of Navarra, presented some of the main issues that determine the character of the indirect holding system; the exposition paid special attention to the transaction mechanism of financial instruments. José Heriberto García Peña, from the Instituto Tecnologico deMonterrey, closed the meeting with a paper centered on the difficulties in determining the law applicable to on-line contracts, especially in the absence of choice of law.

The final session, held on Friday afternoon, focused on Latin America, with the attendance of Professor Lionel Perez Nieto, from the UNAM of Mexico, who explained the evolution of international uniform (conventional) law in Latin American countries, differentiating the experience of Mexico and Venezuela from that of the other States. Professor Roberto Davalos, from Havana, made an entertaining description of the cultural and legal features of China, emphasizing

those that, from his experience, make it difficult to contract with partners from this Asian country. Hernán Muriel Ciceri, from Sergio Arboleda University in Bogota, offered a comparison between the Rome I Regulation and the Convention of Mexico of 1994. Finally, Iñigo Iruretagoiena Aguirrezabalaga (University of País Vasco) referred to investment arbitration, underlining the characteristics that make it different from the paradigm of contractual arbitration.

The seminar was brought to a close by Professor Ms Elisa Pérez Vera, now a member of the Spanish Constitutional Court. All the presentations and papers will soon be published in the Anuario Español de Derecho Internacional Privado.

Many thanks to Paula Paradela Areán and Vesela Andreeva Andreeva.

ECJ Judgment in West Tankers

The European Court of Justice delivered its judgment in *West Tankers* this morning (we had previously reported on the conclusions of Advocate General Kokott in this case).

The issue before the court was, in the words of the court,

> *19. … essentially, whether it is incompatible with Regulation No 44/2001 for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement, even though Article 1(2)(d) of the regulation excludes arbitration from the scope thereof*

The ECJ answers that it is indeed incompatible:

> *It is incompatible with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the*

courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement.

In order to reach this conclusion, the Court offers a reasoning in two steps. First, the Regulation applies. Second, the Regulation excludes anti-suit injunctions.

Scope of Regulation 44/2001

This was arguably the key issue. The Regulation excludes arbitration from its scope. Yet, the Court finds that the Regulation still controls:

In that regard it must be borne in mind that, in order to determine whether a dispute falls within the scope of Regulation No 44/2001, reference must be made solely to the subject-matter of the proceedings (Rich, paragraph 26). More specifically, its place in the scope of Regulation No 44/2001 is determined by the nature of the rights which the proceedings in question serve to protect (Van Uden, paragraph 33).

Proceedings, such as those in the main proceedings, which lead to the making of an anti-suit injunction, cannot, therefore, come within the scope of Regulation No 44/2001.

However, even though proceedings do not come within the scope of Regulation No 44/2001, they may nevertheless have consequences which undermine its effectiveness, namely preventing the attainment of the objectives of unification of the rules of conflict of jurisdiction in civil and commercial matters and the free movement of decisions in those matters. This is so, inter alia, where such proceedings prevent a court of another Member State from exercising the jurisdiction conferred on it by Regulation No 44/2001.
It is therefore appropriate to consider whether the proceedings brought by Allianz and Generali against West Tankers before the Tribunale di Siracusa themselves come within the scope of Regulation No 44/2001 and then to ascertain the effects of the anti-suit injunction on those proceedings.

In that regard, the Court finds, as noted by the Advocate General in points 53 and 54 of her Opinion, that, if, because of the subject-matter of the dispute, that is, the nature of the rights to be protected in proceedings, such as a claim for damages, those proceedings come within the scope of Regulation No 44/2001, a

preliminary issue concerning the applicability of an arbitration agreement, including in particular its validity, also comes within its scope of application. This finding is supported by paragraph 35 of the Report on the accession of the Hellenic Republic to the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1978 L 304, p. 36) ('the Brussels Convention'), presented by Messrs Evrigenis and Kerameus (OJ 1986 C 298, p. 1). That paragraph states that the verification, as an incidental question, of the validity of an arbitration agreement which is cited by a litigant in order to contest the jurisdiction of the court before which he is being sued pursuant to the Brussels Convention, must be considered as falling within its scope.

Regulation 44/2001 excludes anti-suit injunctions

Once the Regulation was found applicable, it could certainly be expected, in the light of *Turner*, that the Court would not allow anti-suit injunctions:

It follows that the objection of lack of jurisdiction raised by West Tankers before the Tribunale di Siracusa on the basis of the existence of an arbitration agreement, including the question of the validity of that agreement, comes within the scope of Regulation No 44/2001 and that it is therefore exclusively for that court to rule on that objection and on its own jurisdiction, pursuant to Articles 1(2)(d) and 5(3) of that regulation.

Accordingly, the use of an anti-suit injunction to prevent a court of a Member State, which normally has jurisdiction to resolve a dispute under Article 5(3) of Regulation No 44/2001, from ruling, in accordance with Article 1(2)(d) of that regulation, on the very applicability of the regulation to the dispute brought before it necessarily amounts to stripping that court of the power to rule on its own jurisdiction under Regulation No 44/2001.

It follows, first, as noted by the Advocate General in point 57 of her Opinion, that an anti-suit injunction, such as that in the main proceedings, is contrary to the general principle which emerges from the case-law of the Court on the Brussels Convention, that every court seised itself determines, under the rules applicable to it, whether it has jurisdiction to resolve the dispute before it (see,

to that effect, Gasser, paragraphs 48 and 49). It should be borne in mind in that regard that Regulation No 44/2001, apart from a few limited exceptions which are not relevant to the main proceedings, does not authorise the jurisdiction of a court of a Member State to be reviewed by a court in another Member State (Case C?351/89 Overseas Union Insurance and Others [1991] ECR I-3317, paragraph 24, and Turner, paragraph 26). That jurisdiction is determined directly by the rules laid down by that regulation, including those relating to its scope of application. Thus in no case is a court of one Member State in a better position to determine whether the court of another Member State has jurisdiction (OverseasUnion Insurance and Others, paragraph 23, and Gasser, paragraph 48).

Further, in obstructing the court of another Member State in the exercise of the powers conferred on it by Regulation No 44/2001, namely to decide, on the basis of the rules defining the material scope of that regulation, including Article 1(2)(d) thereof, whether that regulation is applicable, such an anti-suit injunction also runs counter to the trust which the Member States accord to one another's legal systems and judicial institutions and on which the system of jurisdiction under Regulation No 44/2001 is based (see, to that effect, Turner, paragraph 24).

Lastly, if, by means of an anti-suit injunction, the Tribunale di Siracusa were prevented from examining itself the preliminary issue of the validity or the applicability of the arbitration agreement, a party could avoid the proceedings merely by relying on that agreement and the applicant, which considers that the agreement is void, inoperative or incapable of being performed, would thus be barred from access to the court before which it brought proceedings under Article 5(3) of Regulation No 44/2001 and would therefore be deprived of a form of judicial protection to which it is entitled.

Consequently, an anti-suit injunction, such as that in the main proceedings, is not compatible with Regulation No 44/2001.

Choice of Law in the American Courts in 2008

Symeon Symeonides has posted the twenty-second instalment of his annual survey on US choice of law decisions on SSRN. Here's the abstract:

> *This is the Twenty-Second Annual Survey of American Choice-of-Law Cases. It covers cases decided by American state and federal courts from January 1 to December 31, 2008, and reported during the same period. Of the 3,249 conflicts cases meeting both of these parameters, the Survey focuses on those of the 1023 appellate cases that may add something new to the development or understanding of choice of law. The Survey is intended as a service to fellow teachers and students of conflicts law, both within and outside the United States. Its purpose is to inform, rather than to advocate.*
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> *The following are among the cases discussed in this Survey: Two U.S. Supreme Court cases and several intermediate court cases delineating the extraterritorial reach of the Constitution and federal statutes, and one Supreme Court case on the domestic effect of a judgment of the International Court of Justice; A New Jersey Supreme Court case abandoning Currie's interest analysis in tort conflicts in favor of the Restatement (Second), and a New Mexico Supreme Court case abandoning the traditional approach in contract conflicts (but only in class actions) and adopting the "false conflict doctrine" of the Restatement (Second); Several cases applying (and one not applying) the law of the parties' common domicile to torts occurring in another state; Cases involving cross-border torts and applying the law of whichever of the two states (conduct or injury) favors the plaintiff; Product liability cases granting forum non conveniens dismissals in favor of alternative fora in foreign countries and those countries' responses by enacting "blocking" statutes; Cases refusing to enforce clauses precluding class-action or class-arbitration; Cases illustrating the race to the courthouse between insurers and their insureds; Cases recognizing Canadian or Massachusetts same-sex marriages, and a case refusing to recognize a Pakistani talaq (unilateral, non-judicial divorce); and a case refusing to recognize a foreign judgment that conflicted with a previous judgment from another country.*

The survey is forthcoming in the *American Journal of Comparative Law* (vol. 57, 2009), but you can also download it for free from SSRN. (*Bonus link: here's our item on last year's survey, and here's the one from 2006*.) As always, highly recommended.

Publication: Heidelberg Report on the Application of Regulation Brussels I

The General Report of the Study on the Application of Regulation Brussels I in the (former) 25 Member States (Study JLS/C4/2005/03) has recently been published:

"The Brussels I Regulation 44/2001
Application and Enforcement in the EU"
edited by *Burkhard Hess*, *Thomas Pfeiffer* and *Peter Schlosser*

The study has been conducted under the direction of *Prof. Dr. Burkhard Hess*, *Prof. Dr. Thomas Pfeiffer* (both Heidelberg) and *Prof. Dr. Peter Schlosser* (Munich) on behalf of the European Commission.

The report is based on interviews, statistics and practical research in the files of national courts and includes several recommendations with regard to a future improvement of the Regulation. In particular, the report proposes to delete the arbitration exception in Article 1 No. 2 (d) in order to bring ancillary proceedings relating to arbitration under the scope of the Brussels I Regulation which will be one of the topics discussed at the forthcoming **Conference on Arbitration and EC Law** taking place in Heidelberg from 5th to 6th December.

The Table of Contents is available here.

More information on the book can be found at the website of Hart Publishing as well as the Beck Verlag.

ISBN: 9781841139012; Sept 2008; 256pp; £66; US$138
Customers in the UK, Europe and Rest of World can place orders directly with Hart Publishing, Oxford, UK
Customers in the US can place orders with International Specialised Book Services, Portland, Oregon

See for more information on this study also our previous posts which can be found here , here and here.

Spanish PIL periodicals (II): Anuario Español de Derecho Internacional Privado

The Anuario Español de Derecho Internacional Privado is an annual magazine specialized in Private International law. It was born in 2000 on an ambitious initiative of Prof. Dr. José Carlos Fernández Rozas (Complutense University, Madrid), in order to provide the Spanish scientific community with accurate and updated information about conflicts of laws in a wide range of subjects, such as commercial arbitration, procedural law, contracts law, tort law, property rights or family and succession law. Besides doctrinal contributions, every volume includes reference to the latest legislative reforms, both Spanish or relating to the Community, and to the international agreements signed by our country in the field of Private International Law. Punctual news of the work in progress or achieved in different international forums (UNIDROIT, UNICUTRAL, The Hague Conference, etc) are also enclosed, as well as deep and critical studies of the jurisprudence and of the administrative Spanish practice on PIL.

The publication is constructed in different sections, some of which are fixed. Each issue begins with an ambitious doctrinal title that gathers relevant scientific contributions from Spanish and foreign authors -translated into Spanish. It is usually followed by a section on legislation (Textos legales), and another,

quite exhaustive one, on case law (Jurisprudencia: each volume systematizes several hundreds of decisions of the Spanish courts). A third section reproduces practices materials (Materiales de la práctica española). The Anuario also reports on national and international congresses, meetings and seminars, and gives notice of the whole Spanish bibliography on PIL (research monographs as well as editorials), appeared throughout the year.

Contents of the Anuario's latest issue:

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- José Blas FUENTES MAÑAS
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Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (5/2008)

Recently, the September/October issue of the German legal journal "Praxis des Internationalen Privat- und Verfahrensrechts" (**IPRax)** was released.

It contains the following **articles/case notes (including the reviewed decisions)**:

- ***Rolf Wagner***: "Der Grundsatz der Rechtswahl und das mangels Rechtswahl anwendbare Recht (Rom I-Verordnung) – Ein Bericht über die Entstehungsgeschichte und den Inhalt der Artikel 3 und 4 Rom I-Verordnung" – the English abstract reads as follows:

> *In the second half of 2007 the Portuguese EU-Presidency has achieved a political agreement in the negotiations on the regulation of the European*

Parliament and the Council on the law applicable to contractual obligations. The work on this so-called Rome I Regulation was then finalized under the Slovenian EU-Presidency in the first half of 2008. It will become applicable in the EU member states (without Denmark) as from 17 December 2009. The following remarks provide an overview on the history and content of two key provisions of the Regulation. These are, more specifically, the provision on choice of law (Article 3 Rome I Regulation) and the general provision on the law applicable in absence of a choice of law (Article 4 Rome I Regulation).

- ***Alexander H. Stopp***: "Die Nichtübertragbarkeit der Lizenz beim Unternehmenskauf: Anwendbares Recht bei fremdem Lizenzstatut im Lichte des § 34 UrhG – Zur Sonderanknüpfung des § 34 Abs. 5 S. 2 UrhG" – the English abstract reads as follows:

The author deals with the application of the German Copyright Act in cases of mergers and acquisitions with regard to international software licensing contracts. The German Copyright Act provides for automatic transfer of the usage rights to the buyer in a merger situation. Contractual non-transferability clauses in international licensing contracts will step in to stop automatic transfer to the buyer. Under German domestic law, non-transfer provisions are, however, in principle admitted by the consent exception in the German Copyright Act (Section 34 Subsection 5 of the German Copyright Act). German rules on standard terms will often void such provisions in licensing terms for being overly broad or unspecific, if they are not specifically designed to address the merger situation. As a general rule, the law of the country in which legal protection is sought for the transfer should apply to the transfer as opposed to the country of the author's citizenship or the law chosen in the licensing agreement. However, the author suggests that the consent provision of the German Copyright Act (Section 34 Subsection 5 of the German Copyright Act) allows for the application of the law of the contract, which will in the cases discussed often be foreign law.

- ***Dorothee M. Kaulen***: "Zur Bestimmung des Anknüpfungsmoments unter der Gründungstheorie – Unter besonderer Berücksichtigung des deutsch-US-amerikanischen Freundschaftsvertrags" – the English abstract reads as follows:

According to the prevailing opinion, article XXV para. 5, s. 2 of the Treaty of Friendship, Commerce and Navigation between the United States of America and the Federal Republic of Germany from 1954 represents a rule of conflict of laws. Applying this interpretation, in German-US-American corporate conflict of laws the law of legal persons is determined by the incorporation principle . Furthermore, it can be expected that the German corporate conflict of laws will soon give up the idea of the seat principle and adopt the incorporation principle completely. However, under the incorporation principle, the question of how the place of incorporation should be determined remains. Different ideas have been discussed like the place of the process of incorporation, the place of the registered office, the place of registration by the secretary of state, the place free chosen, the place of the law under which the corporation is organised, or the place where the law gave the corporation legal personality. This paper investigates all these possible concretizations of the incorporation principle and concludes that under the incorporation principle a corporation is determined by the law of the place of its registration, or failing that, by the law of the place where it is organised, or failing that, by the law of the place that has the closest connection to the corporation.

- ***Alice Halsdorfer***: "Der Beitritt Deutschlands zum UNESCO-Kulturgutübereinkommen und die kollisionsrechtlichen Auswirkungen des neuen KultGüRückG" – the English abstract reads as follows:

In connection with Germany's ratification of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970, a new version of the Law on the Return of Cultural Objects (KultGüRückG) entered into force. The most fundamental improvements are return claims for cultural objects which have been unlawfully removed from the territory of contracting states according to s 6 (2) KultGüRückG and import restrictions for cultural objects listed in the List of Important Cultural Property of the Contracting States according to s 14 (1) KultGüRückG. Regarding the conflict of laws, the traditional lex rei sitae will be replaced after the return of a cultural object by the lex originis of the contracting state from which the object has been unlawfully removed according to ss 5 (1), 9 KultGüRückG. As a result, the lex originis functions as a control mechanism which might correct the validity of intermediary acquisitions of property with retroactive effect. In addition, the new import restrictions have to

be considered German mandatory rules which may affect the validity of contractual obligations irrespective of the applicable law according to art. 34 EGBGB. However, certain gaps remain due to the fact that the lex originis has not been fully and unconditionally embodied and that the import restrictions as mandatory rules do not refer to the foreign laws on cultural objects themselves. Despite of these gaps, the ratification of the convention and the new legislation are important steps towards a better protection of cultural property under German law.

- ***Burkhard Hess*** on the ECJ's judgment in case C-14/07 (*Weiss und Partner*): "Übersetzungserfordernisse im europäischen Zivilverfahrensrecht"
- ***Stephan Gregor*** on a decision of the Local Court Berlin-Lichtenberg dealing with the question of the determination of the place of performance with regard to contracts on air transport: "Der Gerichtsstand des Erfüllungsorts beim Luftbeförderungsvertrag"
- ***Astrid Stadler*** on a decision of the Federal Constitutional Court dealing with the question of whether a state is allowed to refuse the fulfilment of private individuals' payment claims in case of a national state of emergency caused by a financial crisis: "Pacta sunt servanda – auch im Falle argentinischer Staatsanleihen"
- ***Boris Schinkels*** on a decision of the Higher Regional Court Stuttgart dealing inter alia with the question of international jurisdiction for actions against the controlling and the controlled stock corporation of a European cross-border de facto group regarding injunctions prohibiting measures to the detriment of the controlled corporation: "Ansprüche auf Unterlassung nachteiliger Maßnahmen gegen beherrschende und beherrschte Aktiengesellschaft im europäisch-grenzüberschreitenden faktischen AG-Konzern"
- ***Harald Koch*** on a judgment of the Higher Regional Court dealing with a creditor's action to set aside in case of the donation of property allocated abroad: "Gläubigeranfechtung der Schenkung eines ausländischen Grundstücks"
- ***David Bittmann***: "Die Voraussetzungen der Zwangsvollstreckung eines Europäischen Vollstreckungstitels" – the English abstract reads as follows:

The decision of the Austrian Supreme Court (OGH) is one of the first published decisions concerning Regulation (EC) No. 805/2004 creating a European Enforcement Order for uncontested claims, which is in force since October 2005. The OGH had to deal with two main problems regarding the enforcement of a European Enforcement Order (EEO) in the state of execution (here Austria): The first question was, whether the service of the debtor with the EEO is a condition for the enforcement of the foreign decision. Here the OGH stated that this is not the case. The second question was, whether and when the EEO has to be translated. As to this point, the OGH held that a translation was only necessary in case that the certification of the judgment as an EEO, which is made by using a standard form, contains written additions which go beyond the mere ticking of the respective points of the standard form. This article outlines the conditions for the enforcement of an EEO in the state of execution by critically considering the decision of the OGH. Thus the focus will be first on the question whether the debtor has to be served with the EEO before examining possible consequences if this is not the case. Finally the article goes into the matter under which circumstances the EEO has to be translated.

- ***Ben Steinbrück***: "US-amerikanische Beweisrechtshilfe für ausländische private Schiedsverfahren" – the English abstract reads as follwos:

For many years U.S. courts have ruled out state-court support in the taking of evidence for foreign private arbitration according to 28 U.S.C. § 1782. In 2004, however, the U.S. Supreme Court ruled that section 1782 applies to all foreign and international tribunals if they act as adjudicatory bodies. In the wake of this decision district courts have started to grant discovery orders in aid of foreign arbitration proceedings. Despite some occasional concerns in the United States that the application of section 1782 to foreign private arbitration would lead to procedural disadvantages to US-parties, these decisions may turn the tide in favour of a more arbitration-friendly case law. A flexible and well-balanced application of section 1782 to private international arbitration is not only perfectly in line with the U.S. Supreme Court's interpretation of this provision. Also strong policy considerations militate in favour of granting parties to foreign private arbitrations access to evidence located in the United States.

- ***Dominique Jakob/Danielle Gauthey Ladner:*** "Die Implementierung

des Haager Trust-Übereinkommens in der Schweiz" – the English abstract reads as follows:

On 1st July 2007 the Hague Convention on the Law Applicable to Trusts and on their Recognition of 1 July 1985 (HTC) entered into force in Switzerland. The authors present the new implementing Chapter 9a of the Swiss Private International Law Statute (PILS; art. 149a-149e) as well as two new articles of the Swiss Insolvency Law Statute (ILS; art. 284a, 284b). The new provisions facilitate the recognition of trusts in Switzerland and aim to avoid contradictions between the PILS and the HTC. Swiss substantive law has not been modified. Chapter 9a PILS expressly refers to the HTC regarding the definition of a trust and the applicable law (art. 149a and c). Yet it is broader, since it contains provisions on jurisdiction (art. 149b) as well as provisions on the recognition and enforcement of decisions in matters concerning trust law (art. 149e). The new chapter further applies to trusts which are not evidenced in writing (art. 149a). Of particular interest is the fact that the Swiss legislator expressly recognises internal trusts (art. 149c § 2 and art. 13 HTC), thus arousing anew the question of the compatibility of family trusts with Swiss public policy, since entailed estates (fideicommiss) are prohibited under Swiss Law (art. 335 of the Swiss Civil Code). For the authors family trusts do not contravene against Swiss public policy as long as their duration is limited in time. The two new articles in the ILS stipulate the segregation of the trust assets in insolvency proceedings concerning the trustee or the trust itself, thus resolving this question once and for all.

- ***Arkadiusz Wowerka*** on the law applicable to factoring according to Polish choice of law rules: "Das auf das Factoring anwendbare Recht nach polnischem Kollisionsrecht"

As well as the following **information**:

- ***Frank Beckstein*** on the international conference "Intellectual Property and Private International Law": "Tagungsbericht zur Internationalen Konferenz 'Intellectual Property and Private International Law'"
- ***Martin Winkler*** on a conference on patent law which has taken place in Düsseldorf: "Internationalverfahrensrechtliche Probleme der Patentstreitigkeiten – Düsseldorfer Patentrechtstage 2008"

- ***Wolfram Prusko*** on the conference "The Future of of Secured Credit in Europe": "'The Future of Secured Credit in Europe' – Ein Konferenzbericht"

The AG Opinion in West Tankers

Advocate General Kokott's Opinion in **Allianz SpA (formerly Riunione Adriatica Di Sicurta SpA) and Others v West Tankers Inc.** is out, and the House of Lords (and most common law practitioners) are not going to find it a pleasurable read.

The question, you will remember, is whether anti-suit injunctions to give effect to arbitration agreements are compatible with the Brussels I Regulation (No 44/2001), in the wake of the ECJ decisions in *Gasser* and *Turner*. The door had been closed on issuing injunctions restraining legal proceedings in other Member States, except (as was quickly pointed out in London) perhaps where that injunction was granted in order to uphold an agreement to arbitrate. Article 1(2)(d) of the Brussels I Regulation does, after all, provide that the Regulation shall not apply to arbitration.

The reference by the House of Lords also cited (among other things) the practical effect that a negative answer would have on arbitration in London; if injunctions were no longer to be part of the judicial arsenal, then London's popularity as an arbitral seat would significantly diminish. Parties would simply choose New York, Singapore, or other arbitration centres, where injunctions could still be issued.

The exclusion argument under 1(2)(d) is given short shrift by AG Kokott:

> *56. Every court seised is therefore entitled, under the New York Convention, before referring the parties to arbitration to examine those three conditions. It*

cannot be inferred from the Convention that that entitlement is reserved solely to the arbitral body or the national courts at its seat. As the exclusion of arbitration from the scope of Regulation No 44/2001 serves the purpose of not impairing the application of the New York Convention, the limitation on the scope of the Regulation also need not go beyond what is provided for under that Convention.

In its judgment in Gasser the Court recognised that a court second seised should not anticipate the examination as to jurisdiction by the court first seised in respect of the same subject-matter, even if it is claimed that there is an agreement conferring jurisdiction in favour of the court second seised. () As the Commission correctly explains, from that may be deduced the general principle that every court is entitled to examine its own jurisdiction (doctrine of Kompetenz-Kompetenz). The claim that there is a derogating agreement between the parties – in that case an agreement conferring jurisdiction, here an arbitration agreement – cannot remove that entitlement from the court seised.

That includes the right to examine the validity and scope of the agreement put forward as a preliminary issue. If the court were barred from ruling on such preliminary issues, a party could avoid proceedings merely by claiming that there was an arbitration agreement. At the same time a claimant who has brought the matter before the court because he considers that the agreement is invalid or inapplicable would be denied access to the national court. That would be contrary to the principle of effective judicial protection which, according to settled case-law, is a general principle of Community law and one of the fundamental rights protected in the Community. ()

There is no indication otherwise in Van Uden. In that case the Court had to give a ruling regarding jurisdiction in respect of interim measures in a case which had been referred to arbitration in the main proceedings. In that context the Court stated that, where the parties have excluded the jurisdiction of the courts in a dispute arising under a contract and have referred that dispute to arbitration, there are no courts of any State that have jurisdiction as to the substance of the case for the purposes of the Brussels Convention. ()

That statement is certainly correct. The justification for the exclusive jurisdiction of the arbitral body specifically requires, however, an effective

arbitration agreement covering the subject-matter concerned. It cannot be inferred from the judgment in Van Uden that examination of preliminary issues relating thereto is removed from the national courts.

It is also not obvious why such examination should be reserved to the arbitral body alone, as its jurisdiction depends on the effectiveness and scope of the arbitration agreement in just the same way as the jurisdiction of the court in the other Member State. The fact that the law of the arbitral seat has been chosen as the law applicable to the contract cannot confer on the arbitral body an exclusive right to examine the arbitration clause. The court in the other Member State – here the court in Syracuse – is in principle in a position to apply foreign law, which is indeed often the case under private international law.

Finally it should be emphasised that a legal relationship does not fall outside the scope of Regulation No 44/2001 simply because the parties have entered into an arbitration agreement. Rather the Regulation becomes applicable if the substantive subject-matter is covered by it. The preliminary issue to be addressed by the court seised as to whether it lacks jurisdiction because of an arbitration clause and must refer the dispute to arbitration in application of the New York Convention is a separate issue. An anti-suit injunction which restrains a party in that situation from commencing or continuing proceedings before the national court of a Member State interferes with proceedings which fall within the scope of the Regulation.

The Advocate General found the House of Lords' practical arguments similarly unconvincing. The comparison with other arbitration centres such as New York and Bermuda was rebuffed with, "To begin with it must be stated that aims of a purely economic nature cannot justify infringements of Community law." The point Lord Hoffman made about individual autonomy – the parties' choice to submit to arbitration, and not be bothered by the fuss of court proceedings – was seen as co-existing peacefully with a negative answer to the question: "proceedings before a national court outside the place of arbitration will result only if the parties disagree as to whether the arbitration clause is valid and applicable to the dispute in question. In that situation it is thus in fact unclear whether there is consensus between the parties to submit a specific dispute to arbitration." AG Kokott does, however, go on to point out the flaw in that

argument:

> *If it follows from the national court's examination that the arbitration clause is valid and applicable to the dispute, the New York Convention requires a reference to arbitration. There is therefore no risk of circumvention of arbitration. It is true that the seising of the national court is an additional step in the proceedings. For the reasons set out above, however, a party which takes the view that it is not bound by the arbitration clause cannot be barred from having access to the courts having jurisdiction under Regulation No 44/2001.*

One more problem was alluded to (echoing the concerns of the House of Lords): the arbitral body (and its supporting national courts) and the courts which take subject-matter jurisdiction under the Regulation may not agree on the scope or validity of the arbitration clause. Conflicting decisions then follow. The Regulation, capable of keeping the peace between two national courts when conflicting decisions arise under Arts 27 and 28, is powerless to solve the dilemma; Article 1(2)(d), you will still remember, *excludes* arbitration. What to do, then? Kokott concludes:

> *72. A unilateral anti-suit injunction is not, however, a suitable measure to rectify that situation. In particular, if other Member States were to follow the English example and also introduce anti-suit injunctions, reciprocal injunctions would ensue. Ultimately the jurisdiction which could impose higher penalties for failure to comply with the injunction would prevail.*
>
> *Instead of a solution by way of such coercive measures, a solution by way of law is called for. In that respect only the inclusion of arbitration in the scheme of Regulation No 44/2001 could remedy the situation. Until then, if necessary, divergent decisions must be accepted. However it should once more be pointed out that these cases are exceptions. If an arbitration clause is clearly formulated and not open to any doubt as to its validity, the national courts have no reason not to refer the parties to the arbitral body appointed in accordance with the New York Convention.*

It may come as a disappointment to common law lawyers, but the Opinion won't really come as a surprise; the writing was on the wall post-*Gasser* and *Turner*, and it would have been extraordinary for the powers that be in Luxembourg to

upset the delicate conflicts ecosystem created by those decisions (and the one in *Owusu*) by placing those cases involving a *prima facie* valid arbitration clause outside of the scope of the Regulation entirely. If you're going to produce poor decisions, one could say, you might as well do it *consistently*.

Those in civil law jurisdictions may disagree that the Opinion in *West Tankers* represents a bad day for the business of solving disputes in London – see the articles by the Max Plank Institute, for instance. Some others, however, may begin to wonder whether the European Union's pursuit of the hallowed principle of 'legal certainty' will end with the removal of any and all discretionary national court powers – indeed, the removal of common law private international law itself. The tension between common and civil law traditions is likely to continue as we proceed along the path to complete Europeanization of the conflict of laws; and at the moment, the common law is looking decidedly battered and bruised.

Submission of Abstracts for the 2009 NYU Conference

The *Journal of Private International Law* will hold its third major conference at New York University on April 17-18, 2009. As was the practice at the prior conferences at the University of Aberdeen in 2005 and at the University of Birmingham in 2007, we are including a "**call for papers**" to be presented at the conference with a view to having the final papers submitted for consideration for publication in the Journal. Thus, in addition to a number of previously-invited speakers, **a limited number of paper-presenters will be selected on the basis of abstracts of 500 words submitted to Professor Linda Silberman at New York University (linda.silberman@nyu.edu) and Professor Paul Beaumont at the University of Aberdeen (p.beaumont@abdn.ac.uk) by October 31, 2008**. The abstracts will be considered by Professor Silberman and the editors of the Journal, Professor Paul Beaumont and Professor Jonathan Harris, and a decision made by 1 December, 2008.

There are three specific conference panels planned over the course of the afternoon of April 17th and the full day on April 18th. They are

1. International Commercial Law
2. US and European Conflicts Methodologies: Is It Time for a U.S. Restatement?
3. Transnational Litigation and Arbitration

We will be selecting papers and presenters related to these topics. Even if your paper is not selected for presentation at the Conference given the limited number of slots, we hope you will consider submitting the paper to the Journal for eventual publication. In addition, the morning of April 17th will be devoted to presentations of papers by legal scholars at an early stage in their academic or professional careers, and we particularly encourage doctoral students, students completing fellowships, and those who have relatively recently completed their doctoral studies to offer abstracts on any aspect of private international law. We contemplate smaller parallel sessions in order to offer opportunity for presentations by a large number of such scholars.

Also note that on April 16, 2009, there will be a day-long conference in tribute to the work of Professor Andreas Lowenfeld of New York University. Journal Conference participants may wish to attend that event as well.

Further details about both the Lowenfeld tribute and the Journal Conference will follow shortly.

Arbitral Awards Violating European Antitrust Laws: French Courts Cannot Help

Are French courts willing to review arbitral awards on the ground that arbitrators violated European antitrust laws? As a matter of principle, French courts are

extremely reluctant to review arbitral awards on the merits. In theory, an exception remains when the award violates French international public policy, but actual instances where French courts have found such violations are very few.

Now, on June 1999, the European Court of Justice held in *EcoSwissChina* that member states ought to consider that article 81 of the EC Treaty belongs to their public policy for the purpose of reviewing arbitral awards. In that case, however, Dutch courts had been unable to review the compatibility of the award with EU antitrust law because the plaintiff had failed to challenge the award in a timely fashion. The ECJ held that it did not intend to change the procedural laws of the member states and that the obligation under Dutch law to initiate the challenge proceedings within 3 months was such procedural rule which could prevent an actual verification of the proper application of antitrust laws.

Is that changing anything to the French position? Not if the reluctance to review awards can be presented as the consequence of the application of a French procedural rule. Question: could that be a procedural rule which prevents review not only in some cases (say when the plaintiff did not act in a timely fashion), but in all cases? For instance, what about a local rule of procedure providing that courts only review the most obvious violations of public policy rules?

In November 2004, the Paris Court of Appeal had ruled in *Thales Air Defense v. GIE Euromissiles* that there was such a procedural rule in France. The French rule was that only violations of French public policy which were "obvious, actual and concrete" (*flagrante, effective et concrete*) would be sanctioned. As a consequence, in *Thalès*, the Court had dismissed a challenge in a case where the parties had arguably shared the relevant European market. The issue of the validity of the contract had not been raised during the arbitration.

SNF vs CYTEC

In a judgement of June 4, 2008, the French Supreme Court for private matters (*Cour de cassation*) addressed the issue for the first time.

The parties were two European chemical companies, Dutch Company CYTEC and French company SNF. The business of SNF was to sell a given chemical product, PMD, which could only be produced by using another chemical product, AMD. CYTEC was one of the sole producer in Europe of AMD, so SNF had to get it from

CYTEC. In the early 1990s, the parties concluded successive exclusive purchase agreements (one in 1991, one in 1993) whereby SNF undertook to purchase AMD exclusively from CYTEC for 8 years. The contract provided for ICC arbitration in Brussels, Belgium, in case of dispute.

In January 2000, SNF stopped purchasing from CYTEC arguing that the contract violated European antitrust laws (Art 81 and 82 of the European Treaty). In May 2000, CYTEC initiated arbitral proceedings seeking compensation for breach of contract. In a counterclaim, SNF argued that the contract was contrary to European antitrust laws and as such ought to be set aside.

In a first award rendered on 5 November 2002, the tribunal found that the contract did violate article 81 of the European Treaty, as by obliging SNF to purchase exclusively from CYTEC, the exclusive purchase agreement prevented SNF from accessing the market of AMD. The tribunal set aside the contract and held that the parties were equally liable for it. In a second award made on 28 July 2004, the tribunal ruled on the financial consequences of the nullification of the contract but ordered solely SNF to compensate CYTEC.

In that case, competition law issues had been discussed before the arbitrators, so much so that the contract had been annuled on the ground that it violated it. This was not, however, the end of the story. SNF argued that, by compensating CYTEC only, the tribunal had managed to have the contract indirectly produce effect, and had thus violated antitrust laws anyway. It thus challenged the validity of the award before Belgian courts (as the seat of the arbitration was Brussels). On 8 March 2007, the Brussels first instance court accepted the argument and set aside the arbitral awards on that ground (SNF went on to sue the ICC in Paris for failing to verify whether the arbitrators had properly complied with public policy. The French judgement dismissing the action can be found here (in French, at p. 30)).

Meanwhile, however, CYTEC had sought enforcement of the awards in France, where they were declared enforceable in 2004. One after the other, all French courts found that the awards were not contrary to French public policy, as the violations were not obvious. The *Cour de cassation* confirmed last the position of French courts by ruling that no evidence of an “obvious, actual and concrete” violation of public policy had been provided. Note that, from a French point of view, the fact that the awards were eventually set aside by Belgian courts is

irrelevant, as the French doctrine is that international arbitration is delocalized.

Interim conclusion: do not provide for arbitration in Brussels for disputes arising out of this kind of contract. Also, avoid rue de la Loi or rue Joseph II.

A critical difference between the *Thales* case and the *CYTEC* case is obviously that, in the *CYTEC* case, EU competition law had been applied. The judgment of the *Cour de cassation* puts this forward as one of the reasons for its decision. Remarkably, the judgment also says that the amount of compensation falls outside of the scope of the public policy ground for review. French judgments are always very short and subject to interpretation, but it seems that the Court rules that it will never find a violation of EU antitrust laws where a party was denied damages as a consequence of an antitrust violation. So, in this case, there was no chance whatsoever it would deny recognition to the awards. Why should compensation be excluded from public policy? The court does not say.

Final conclusion: one wonders what European institutions will think of all these subtle distinctions.