Choice of Law in the American Courts in 2007: Twenty-First Annual Survey

With the start of a new year, and the concomitant end of an old one, comes the twenty-first instalment of Symeon Symeonides' annual survey of US decisions relating to choice-of-law issues. It is, as always, both a rigorous piece of research and an excellent resource. Here's the abstract:

> *This is the Twenty-First Annual Survey of American Choice-of-Law Cases. It covers cases decided by American state or federal courts from January 1 to December 31, 2007, and reported during the same period. Of the 3,676 conflicts cases meeting both of these parameters, the Survey focuses on the cases that deal with the choice-of-law part of conflicts law, and then discusses those cases that may add something new to the development or understanding of that part. 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. The following are among the cases reviewed in the Survey:*
>
> *A California Supreme Court decision involving recordings of cross border communications and another California case raising issues of cross-border discrimination in managing a web site; a product-liability decision of the New Jersey Supreme Court backtracking from its earlier pro-plaintiff decisions, and several other cases continuing to apply the pro-defendant law of the victim's home state and place of injury; several cases arising out of the events of September 11, 2001, and a few cases involving claims of torture (by them and us); the first guest statute conflict in years, as well as a case eerily similar to Schultz v. Boy Scouts of America, Inc.; two cases in which foreign plaintiffs succeeded, and many more cases in which US plaintiffs failed, to obtain certification of a nationwide class action; a case involving alienation of affections and one involving palimony between non-cohabitants; several cases involving deadly combinations of choice-of-law, choice-of-forum, and arbitration clauses; three cases involving the paternity or maternity of children born after artificial insemination, in three different combinations (known sperm donor,*

unknown sperm donor, and unknown egg donor); a case involving the child of a Vermont civil union and holding that DOMA does not trump the Parental Kidnapping Prevention Act; a case involving the constitutionality of a Missouri statute affecting out-of-state abortions of Missouri minors; and one US Supreme Court decision allowing federal courts to dismiss on forum non conveniens grounds without first affirming their jurisdiction, and another decision exonerating Microsoft from patent infringement charges arising from partly foreign conduct.

The survey is available to download, free of charge, **from here**. **Highly recommended**.

West Tankers, and Worldwide Freezing Orders

There are two casenotes in the new issue of the *Cambridge Law Journal* worthy of mention. Firstly, Richard Fentiman (*Cambridge*) has written on "Arbitration and the Brussels Regulation" – discussing the recent House of Lords decision (and reference to the ECJ) in *West Tankers Inc v. RAS – Ras Riunione di Sicurata SpA* [2007] UKHL 4. The introduction reads:

WHEN, if at all, may English courts restrain claimants from suing in other Member States? The European Court of Justice has declared such relief to be inconsistent with the principle of mutual trust embodied in Regulation 44/2201, governing jurisdiction in national courts: Case C-281/02 Turner v. Grovit [2004] ECR I – 3565. But when does the Regulation engage, so that the ban imposed in Turner applies? Perhaps it does so whenever the foreign proceedings are within the Regulation's material scope. If so, civil proceedings in the courts of Member States can never be restrained. Alternatively, perhaps the Regulation only engages when it governs jurisdiction in both the foreign and the English proceedings. Judicial proceedings in other Member States could thus be restrained, provided relief is sought in English proceedings beyond the

Regulation's reach.

Louise Merrett (*Cambridge*) has written a note on "Worldwide Freezing Orders in Europe" (C.L.J. 2007, 66(3), 495-498). Here's the abstract:

> *Examines the Court of Appeal decision in Banco Nacional de Comercio Exterior SNC v Empresa de Telecomunicationes de Cuba SA on whether the court had jurisdiction under Regulation 44/2001 Art.47 (Brussels Regulation) or the Civil Jurisdiction and Judgments Act 1982 s.25 to grant a worldwide freezing order over the defendant's assets where it was not connected to, nor resident in, England and the court had no jurisdiction over the subject matter of the proceedings.*

Available to subscribers (both online and in print).

Fourth issue of 2007's Journal du Droit International

The fourth issue of the French *Journal du Droit International (Clunet)* has been released. It contains three articles dealing with private international law issues (the table of contents in French can be found here).

First, the *Journal* offers the end of the article of Ms Legros (the first part of which was published in the third issue of the Journal) on Conflicts of Norms in the Field of International Contracts for Carriage of Goods ("*Les conflits de normes en matière de contrats de transport internationaux de marchandises*"). The second part of the study focuses on jurisdictional and enforcement issues.

The second article is authored by Professor Emmanuel Gaillard, who teaches at Paris XII university, and who is also a leading practionner of international commercial arbitration. It discusses the Representations of International Arbitration, Between Sovereignty and Autonomy ("*Souveraineté et autonomy:*

réflexions sur les représentations de l'arbitrage international"). The English abstract reads:

> *The autonomy of international arbitration vis-à-vis national legal orders raises important question of legal theory. There are several representations of international arbitration: that assimilating the arbitrator to the courts of a single legal system; that perceiving the autonomy of international arbitration as detached of national legal systems; and that considering such autonomy as anchored in the entirety of the legal systems that accept, under certain conditions, to recognize the arbitral award. Significant practical consequences follow from these distinctions.*

The third is authored by Didier Lamethe, who is the *Secrétaire Général* of EDF International, a subsidiary of the French national electricity company. His article discusses the Languages of International Arbitration ("*Les langues de l'arbitrage international : liberté or contraintes raisonnées de choix ou contraintes réglementées ?*"). The English abstract reads:

> *As far as international contracts are concerned, language plays a key part beyond the negotiation and the signature, in the event of deviations of interpretation ending up in an arbitration. Thus arises the question of the choice an the backgrounds of the choice of the language(s) regarding not only the proceedings, but also some sides of the proceedings. This essays puts up the principles of a sharing-out between the feasible and the forbidden, the content of arbitration rules making up a reference for a comparative analysis of great interest. Such an approach outlines the areas of freedom for the choice to be made and gives a demonstration of the imprecise figure of the constraints.*

Available to suscribers.

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

The latest issue of the French *Revue Critique de Droit International Privé* has been released. In addition to 9 comments of French and European cases, it contains two articles. The table of contents can be found here.

The first article is authored by Dr. A. Aldeeb Abu-Sahlieh, who teaches in Lausanne, Marseille and Palermo. It deals with Muslim Family and Inheritance Law in Swizterland (*Droit musulman de la famille et des successions en Suisse*). The English abstract reads:

> *The fundamental opposition between Coranic family law and the Swiss legal order concerns, on the one hand, the very conception of law, here the work of God, there the work of man, and on the other hand, the divisions of society, which on the one hand follow religious obedience, and on the other, territoriality or nationality. The resulting antagonisms are of daily and practical import, since they affect marriage, parent-child relationship or succession. They will find a solution only if, within the Arab world, sources of religious law are confined to the Coran, and indeed if social governance leaves room for reason, and, in the western world, if the concept of revelation reinvests its reason-liberating dynamic, and if there is a firm reaction to all violations of the principle of secularity and non-discrimination on the basis of race or religion.*

The second article is authored by Professor Hélène Chanteloup, who lectures at Amiens University. It addresses the issue of National Laws Being Taken into Account by EC Courts (*La prise en consideration du droit national par le juge communautaire. Contribution à la comparaison des méthodes et solutions du droit communautaire et du droit international privé*). The English abstract reads:

> *Far from the difficulties raised by the question of the right and duty of national courts when foreign law is applicable, the question of the status of the national laws pleaded in European litigations seems to be sobed with coherence and a relative simplicity. Except the specific case of the arbitration clause (art. 238*

CE), the national law cannot be applied by European judges. It is just taken into account like any other factual element of the situation. National law is treated as a question of fact. Therefore, it is not to be imputed to European judges and has to be proved by the party with evidence of all kinds. Furthermore, the European Court of Justice has always considered that this question of proof has to be solved in respect of the interests of the European law which contributes to the coherence and the stability of the procedural treatment of national law.

Articles of the *Revue Critique* cannot be downloaded.

Fourth Issue of 2007's International and Comparative Law Quarterly

The fourth issue 2007 of the ICLQ (Volume 56, Number 4, October 2007) has been recently published. The full TOC is available here. Contents dealing with PIL include:

- *TD Grant*, International Arbitration and English Courts:

The Court of Appeal, Civil Division, Longmore LJ, on 24 January 2007 handed down a decision in Fiona Trust v Privalov which clarifies the relation between sections 9 and 72 of the Arbitration Act 1996; affirms, again, in strong terms the separability (or severability) of an arbitration clause from the contract in which it is included; and, apparently for the first time in English courts, establishes that allegations of bribery may be subject to the jurisdiction of an arbitrator. The decision therefore holds interest in relation to the enforcement in the United Kingdom of agreements to arbitrate and, more generally, supports the position that arbitration has a role to play in international efforts to combat corruption.

- *Gilles Cuniberti*, The Liberalization of the French Law of Foreign Judgments (see our dedicated post here);
- *Andrea Schulz*, The Accession of the European Community to the Hague Conference on Private International Law.

The articles are available for download to ICLQ and Westlaw subscribers.

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- **Andrew Dickinson**, a Consultant to the firm in London, is a member of the North Committee (the UK Ministry of Justice's advisory committee on private international law issues) and on the editorial board of the *Journal of Private International Law*.
- **Edwin Peel**, Fellow of Keble College and a Consultant to the firm in London, convenes the conflict of laws course for the Bachelor of Civil Law degree at Oxford University.
- Dr **Hendrik Verhagen**, Professor of private international law, comparative law and civil law at Radboud University, Nijmegen, is an Advocate at the firm's Amsterdam office.

For further information on Clifford Chance and its conflict of laws capability, please see **CliffordChance.com** or contact Audley Sheppard, partner in the Arbitration and International Law Groups (email) or Andrew Dickinson (email) or Hendrik Verhagen (email).

For graduate and other recruitment opportunities, please see the careers section of the Clifford Chance website or contact us. See **www.cliffordchance.com** and Clifford Chance LLP's dedicated page on this site for general information about the firm.

Needless to say, this is a very exciting time for CONFLICT OF LAWS .NET, and there is a lot more news to come in the next couple of weeks as a direct result of this new sponsorship. We're very pleased to be working with a world-class law firm *and* a world-class publishing house, and we will be utilising those relationships for the benefit of private international law scholars and students around the world.

Paying Here, Seeking Restitution There.

A negative consequence of the availability of multiple fora in international litigation is the risk of conflicting decisions. Several adjudicators can retain jurisdiction and then reach conflicting, if not opposite, results on the merits. Is it a problem? It could be argued that it is for two different reasons. The first is that the legitimacy of the legal process is undermined when inconsistencies are produced. This is certainly true when this happens in one given legal order. However, when it happens in different legal orders, it seems to be the sad consequence of the autonomy of the legal orders involved. Arguably, there is no real inconsistency when autonomous legal orders adopt different solutions. The second reason why conflicting decisions can be a problem is because the parties may be ordered to take inconsistent actions. If a party is enjoined to do something by one court and ordered to refrain from doing it by another court, the position of that party becomes unbearable.

An interesting example of this last hypothesis is the case of a party being ordered to pay a sum of money in one jurisdiction, but being also able to successfuly seek restitution of that sum of money in another jurisdiction. I am not aware of many cases where this actually happened. Here is an interesting one involving a court and an arbitral tribunal.

The debtor was the State of Congo, which had borrowed money from a Libanese construction company, Groupe Tabet. Congo did not make the instalments repayment itself but ask Elf Congo, the Congolese subsidiary of the French oil company Elf, to do so, and to commit to do so to the lender. There were thus two different sets of contracts, the borrowing contracts between Congo and Tabet, and the repayment contract between Elf Congo and Tabet. There was certainly a third contractual relationship between Congo and Elf Congo, which explains why Elf Congo agreed to commit to the lender, but I do not have information on it, and it is not directly relevant.

Five years later, the State of Congo argued that the lender had received too much money and Elf Congo stopped paying back, probably after being instructed to do so by the State. The lender then decided to sue Elf Congo under the repayment contract before Swiss courts (I do not know whether this venue was chosen because the contract contained a clause providing for the jurisdiction of Swiss courts). A Geneva court ordered Elf Congo to pay 64 million Swiss francs (EUR 38 million) in 2001. The Swiss Federal Tribunal eventually confirmed the judgement in 2003. The Swiss decisions were declared enforceable in France in 2003 or in 2004. The State of Congo counter attacked by initiating arbitral proceedings under the borrowing contracts against the lender, as those contracts contained a clause providing for ICC arbitration in Paris, France. The arbitral tribunal did not rule completely in the State of Congo's favour, as it found in a first award that the State still owned EUR 16 million. But the tribunal found that the remaining EUR 22 million were not owned. In a second award made in 2003, it thus ordered the lender to enter into an escrow account agreement with Elf Congo, and to put on this account any monies that it would have to pay as a consequence of the Swiss judgment beyond EUR 16 million.

A dispute concerning the enforcement of the second award was then brought before French courts. On the one hand, the lender decided to challenge the second award and sought to have it set aside. On the other hand, the State of Congo was applying for a court order to comply with the same second award *sous astreinte*, i.e. for a judgement ordering the performance of the award and providing that the lender would have to pay a certain sum for each day of non-compliance. French courts refused to issue such order, as the proceedings challenging the award suspended its enforceability. A debate arose as to whether an exception existed in the case in hand, making the award immediately enforceable. The French supreme court for private and criminal matters (*Cour de cassation*) eventually ruled in a judgement of July 4th, 2007 that the enforcement of the award was suspended and that its performance could not be ordered judicially.

The case raises many issues of international arbitration. As far as the conflict of laws is concerned, the issue is whether there is a way to prevent the two adjudicators involved (i.e. Swiss courts and the ICC arbitral tribunal) from further ruling the contrary of each other.

Choice of Law In Convention Establishing Louvre Museum in Abu Dhabi

Which law governs the establishment of a Louvre museum in Abu Dhabi? The answer can be found in an international agreement concluded in March 2007 between the French state and the United Arab Emirates to that effect (the Agreement). The French Parliament has ratified the Agreement on 9 October 2007. The French text of the Agreement can be found here.

Although the Agreement was concluded between the two States, more actors are involved. One is the Louvre Museum. The Louvre Museum controls the use of the name *Louvre* and thus granted the United Arab Emirates (UAE) permission to use its name. Another actor is a new French agency established for the occasion, the International Agency for French Museums. The Agreement provides that the agency will advise the UAE on a variety of issues regarding the creation of the museum. Each of these two entities are autonomous and have legal personality under French law.

This background is necessary to understand the provisions of the Agreement dealing with choice of law (articles 17, 18 and 19). These provisions provide for a different choice of law depending on which of these entities is involved.

1) As between the States, article 17 provides that disputes ought to be resolved amicably. No rules of decision are provided.

2) As far as the Louvre is concerned, article 18 provides that any dispute regarding the use of the name *Louvre* shall be decided by French courts pursuant to French law.

3) Finally, article 18 provides that disputes between the agency and the UAE shall be resolved by way of arbitration, and article 19 provides that arbitral tribunals shall decide such disputes pursuant to English law. Interestingly enough, article

19 also provides that the contracting parties (i.e. the States) owe a duty of good faith to each other, and that so do the agency and the UAE.

These provisions raise several issues. First, why did the negotiators choose to distinguish between the Louvre Museum and the newly created agency? One possibility is that the subject matter of the potential dispute (use of the name *Louvre*) was perceived as belonging exclusively to courts and as being unarbitrable, as under the French law of arbitration, intellectual property is regarded as partly unarbitrable. Second, why did the negotiators choose English law, and why did they then add on a duty of good faith? It seems to me that the only reasonable answer to the first part of this second question is that they were looking for a law which was both sophisticated and "neutral". But then they decided to add on a duty of good faith. Were they scared of the consequences of the application of a law which was perceived as not including such a duty? What will it mean, however, from a practical perspective, for the tribunal to apply English law with a duty of good faith? All comments welcome!

Third Issue of 2007's Journal du Droit International

The last issue of the *Journal du Droit International* contains three articles dealing with conflict issues. They are all written in French.

The first is authored by Cecile Legros, who lectures at the Faculty of Law of Rouen. It deals with Conflicts of Norms in the Field of International Contracts for Carriage of Goods ("*Les conflits de normes en matière de contrats de transport internationaux de marchandises*"). The English abstract reads:

> *The originality of the international conventions in the field of international transport contracts comes from their comprising, in addition to rules regarding the international transport contract concerned, provisions on jurisdictional competence, arbitration, and sometimes even on recognition and enforcement. The present study aims at analysing these original provisions as well as their*

links with other international instruments. Could the existence of competence, enforcement and arbitration rules in different sources turn to a conflict of regulations or can such rules coexist? Such are the questions discussed in this study.

The first part of this essay will analyse these orginal rules on competence and enforcement, in order to afterwards be able to consider their relation to European Union instruments. The second part of this article will be published in the next issue of the Journal.

The second article with conflict implications is authored by Professor Manlio Frigo, who teaches at the University of Milan. The article studies The Role of Rules of Conduct Between Art Law and Regulation ("*Le role des règles de déontologie entre droit de l'art et régulation du marché*"). The English abstract reads:

In the field of international protection of cultural property, and of rules applicable to art work trading, beside the norms contained in international agreements, in the last years one can witness a proliferation of spontaneous or quasi-spontaneous rules that may be approximately classified in the category of rules of conduct. Whether we are dealing with rules capable of creating obligations at least of contractual nature, or with rules lacking true binding nature, we can nonetheless acknowledge a meaningfull likeness with the rules having developed in the commercial domain also by means of the lex mercatoria. In both cases indeed we are faced with a group of rules of conduct created by the same subjects to which they are addressed, functionning as instruments by which professionals milieux and categories involved self-regulate themselves. This study takes into account the main codes of conduct drafted by international organisations, international institutions and national institutions, both public and private, federations and associations, in order to attempt a first survey of their influence on international commerce as instruments of art market regulation.

Finally, Professor Yasuhiro Okuda, of Chuo University in Tokyo, offers a survey of the recent reform of international private law in Japan ("*Aspects de la réforme du droit international privé au Japon*"). The English abstract reads:

The Japanese statute on private international law that was well known as the Horei has been largely revised in 2006 and newly retitled as Act on the general rules on the application of laws. The new Act came into force on January 1st, 2007 and brings major changes in the field of contractual and non contractual obligations. This article deals with the comparison of these revised provisions and European laws, as well as the interpretation to be discussed before Japanese courts in the future. The text of this Act is translated in French as an appendix to this article.

An English translation of the Act by Professor Okuda can be found here.

Articles appearing in the *Journal du droit international* cannot be downloaded.

Christian Schulze, 'The 2005 Hague Convention on Choice of Court Agreements', (2007) 19 SA Merc LJ 140-150

The article discusses the 2005 Hague Convention's rules on jurisdiction (of the chosen and not-chosen courts) and the recognition and enforcement of resulting judgments. It then goes on to examine the role of the new convention in comparison to other conventions and to the Brussels I Regulation. Reference is made to the different objectives of these international instruments and to the more limited scope of the Hague Convention. The article also discusses jurisdiction agreements in general, pointing out that they are common in international commercial contracts and may be regarded as a prudent step for parties to take. The author describes the distinction between exclusive and non-exclusive choice of court agreements. He concludes by stating that this convention makes litigation a more viable alternative to arbitration since it ensures the enforcement of choice of court agreements in the same fashion as the

New York Convention (1958) does for arbitration agreements. He then expresses the hope that the new convention would draw as much interest as the New York Convention.