Article in Commemorance of Arthur Taylor von Mehren

An article by *Symeon C. Symeonides* (Willamette University College of Law, Salem, Oregon) on the life and work of A*rthur Taylor von Mehren*, who has passed away on January 16, 2006, has recently been published in English in the German law journal "Praxis des Internationalen Privat- und Verfahrensrechts" (IPRax 2007, 261).

Here is a short excerpt:

> *As noted by his colleagues, Arthur was a "pure scholar", a "scholar's scholar", with "astonishing depth and range" and "a mind ever restless for new territory to explore." His published work spans the entire field of comparative law, both public and private, all branches of private international law (jurisdiction, choice of law, and recognition of judgments), as well as international commercial arbitration. He authored or co-authored 210 publications: ten books, four monographs, 119 articles, 48 book reviews (the most unselfish form of scholarship), and 29 reports and other writings. Most of them were published in English, but several were published in French and German, which Arthur spoke fluently, as well as in Spanish, Italian and Japanese.*

Yearbook of Private International Law, vol. VIII (2006)

The VIII volume (2006) of the *Yearbook of Private International Law* (published by Sellier and Staempfli in association with the Swiss Institute of Comparative Law) **is expected in June**. It contains a huge number of articles, national reports, commentaries on court decisions and other materials, up to

nearly 500 pages.

The main section ("Doctrine") of the volume is devoted to the memory of Prof. Petar Šar?evi?, who co-founded the periodical in 1999 with *Prof. Paul Volken* (a biography and list of publications of Prof. Šar?evi? can be found in the *Liber Memorialis* dedicated to his memory, published by Sellier in 2006: "Universalism, Tradition and the Individual", edited by *J. Erauw*, *V. Tomljenovi?* and *P. Volken*).

A presentation of the new volume is provided by the current editors of the Yearbook, *Prof. Paul Volken* and *Prof. Andrea Bonomi*, in the "Foreword":

> *The present volume of the Yearbook is a special one for at least two reasons. First, it includes a section devoted to the memory of the Yearbook's spiritual father, the late Petar Šar?evi?. […]*
>
> *This special section features twelve most interesting contributions by colleagues from no less than eleven countries and three continents, thus confirming once again the worldwide reputation of Petar Šar?evi? and his Yearbook. The papers deal with a wide array of subjects ranging from classical themes such as the protection of children in inter-country adoptions and abduction cases, the principle of comity in United States case law and new national conflict codifications, to very fashionable topics like non-marital unions and same-sex marriages, up to the new challenging questions of the conflict régime of euthanasia and living wills. […]*
>
> *With the intention of bringing the celebratory aim of the present volume in harmony with the general goals of the Yearbook, we have maintained in the current issue most of our traditional sections. We thus have the pleasure of presenting the reader with several most interesting national reports, as well as commentaries on court decisions and recent developments from various African, Asian and European countries. We will not mention all of them here, but we are pleased to stress that, in line with the purpose of extending with each passing year the Yearbook's information network, the present volume hosts for the first time contributions from Greece, India, Latvia, Qatar and Tunisia.*
>
> *In order to make the Yearbook more attractive for practitioners, we have also enlarged the section on national court decisions and included contributions on*

international arbitration. And last but not least, this year's 'Forum' section summarizes the contents of two excellent doctoral theses on the pending European conflict system. One article analyzes the new system taking into account the scope of application of secondary Community legislation, while the other focuses on the conflict of laws aspects of the ever growing case law of the European Court of Justice.

Here's the list of articles published in the "Doctrine" section (we highly recommend to browse the whole table of contents of the volume, which is not reproduced here in its entirety):

- *Alfred E. von Overbeck*: Three Steps With Petar Šar?evi? (downloadable from the publisher's website)
- *Tito Ballarino*: Is a Conflict Rule for Living Wills and Euthanasia Needed?
- *Katharina Boele-Woelki, Ian Curry-Sumner, Miranda Jansen, Wendy Schrama*: The Evaluation of Same-Sex Marriages and Registered Partnerships in the Netherlands
- *Alegría Borrás*: Competence of the Community to Conclude the Revised Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters – Opinion C-1/03 of 7 February 2006: Comments and Immediate Consequences
- *Lawrence Collins*: The United States Supreme Court and the Principles of Comity: Evidence in Transnational Litigation
- *William Duncan*: Nationality and the Protection of Children across Frontiers, and the Example of Intercountry Adoption
- *Jasnica Garaši?*: What is Right and What is Wrong in the ECJ's Judgment on Eurofood IFSC Ltd
- *Huang Jin*: Interaction and Integration between the Legal Systems of Hong Kong, Macao and Mainland China 50 Years after Their Return to China
- *Ulrich Magnus*: Set-off and the Rome I Proposal
- *Yuko Nishitani*: International Child Abduction in Japan
- *Yasuhiro Okuda*: Reform of Japan's Private International Law: Act on the General Rules of the Application of Laws
- *Robert G. Spector*: Same-Sex Marriages, Domestic Partnerships and Private International Law: At the Dawn of a New Jurisprudence in the United States.

The table of contents of the previous volumes of the Yearbook (1999-2005) is available on the website of Sellier – European Law Publisher, in the "Private International Law" section (use the "serial" dropdown menu on the top of the page).

Italian Society of International Law's XII Annual Meeting (Milan, 8-9 June 2007)

The **Italian Society of International Law (Società Italiana di Diritto Internazionale – SIDI)** will hold its **XII Annual Meeting at the University of Milan on 8-9 June 2007**. The conference is devoted to **"International Economic Relations and the Evolution of Their Legal Regime – Subjects, Values and Instruments"** ("I rapporti economici internazionali e l'evoluzione del loro regime giuridico – soggetti, valori e strumenti").

The meeting is structured in three sessions: the first one deals with the topic in a public international law perspective, the second one focuses on contracts in international trade law and the third one on arbitration as a dispute resolution method.

Here's the programme of the second and third sessions (*our translation; the sessions will be held in Italian, except otherwise specified*):

Second session (Friday 8 June 2007, 15:00)

Contracts in International Trade ("La disciplina dei contratti nel commercio internazionale")

Chair and introductory remarks: *Giorgio Sacerdoti* ("Luigi Bocconi" University, Milan)

- The Law Applicable to Contracts: Conflict of Laws and Substantive Rules

(in English): *Richard Plender* (QC, London)
- Party Autonomy in International Economic Relations and its Limits ("L'autonomia privata nelle relazioni economiche internazionali e i suoi limiti"): *Sergio Maria Carbone* (University of Genoa)

Shorter reports:

- EC Rules on Jurisdiction in Contracts ("I criteri comunitari di giurisdizione in materia di contratti"): *Francesco Salerno* (University of Ferrara)
- Protection of the Weaker Party ("La protezione del contraente debole"): *Andrea Bonomi* (University of Lausanne)
- The Impact of EC Antitrust Rules on Enterprise Autonomy ("L'incidenza delle norme comunitarie antitrust sull'autonomia delle imprese"): *Francesco Munari* (University of Genoa)
- Party Autonomy vis-à-vis *lex contractus*, *lex societatis* and *lex mercatus* in the EC Market of Rules ("L'autonomia negoziale tra *lex contractus*, *lex societatis* e *lex mercatus* nel mercato comunitario delle regole"): *Massimo Benedettelli* (University of Bari)

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Third Session (Saturday 9 June 2007, 9:00)

Dispute Resolution: Arbitration ("La soluzione delle controversie: la via arbitrale")

Chair and introductory remarks: *Riccardo Luzzatto* (University of Milan)

- International Commercial Arbitration: Evolution Trends ("L'arbitrage commercial international: tendances évolutives") (in French): *Pierre Mayer* (University of Paris I, Panthéon-Sorbonne)
- Arbitration in Investment Disputes: Developments and Uncertainties ("L'arbitrato in materia di investimenti: sviluppi e incertezze"): *Andrea Giardina* (University of Rome "La Sapienza")

Round Table:

Luca Radicati di Brozolo (Università Cattolica del Sacro Cuore, Milan); *Stefano Azzali* (Chamber of National and International Arbitration of Milan); *Lucy Reed* (Freshfields Bruckhaus Deringer, New York); *Alexis Mourre* (Castaldi Mourre

Sprague, Paris); *Cesare Fabozzi* (University of Milan).

For further information and registration, see the website of SIDI-ISIL.

First Issue 2007 of "Rivista di Diritto Internazionale Privato e Processuale"

The first issue for 2007 of *Rivista di Diritto internazionale privato e processuale* (*RDIPP*, published by CEDAM, Padova), one of Italy's leading journals in private international law, has been recently released. It provides quarterly a complete coverage of the different sectors of conflict of laws and jurisdictions, with articles, comments, legal texts and cases by Italian, foreign and EC Courts. All the articles in this issue are in Italian, and unfortunately just an English translation of the titles is available, but no abstract. Here's the list:

ARTICLES

- *F. Mosconi* (University of Pavia), The protection of the Internal Order of the Forum: Balancing Italian Law, International Conventions and EC Regulations (La difesa dell'armonia interna dell'ordinamento del foro tra legge italiana, convenzioni internazionali e regolamenti comunitari);
- *S.M. Carbone* (University of Genoa), Lex mercatus and lex societatis vis-à-vis Principles of Private International Law and Financial Markets Rules (Lex mercatus e lex societatis tra principi di diritto internazionale privato e disciplina dei mercati finanziari);
- *F. Salerno* (University of Ferrara), EC Jurisdiction Criteria in Matrimonial Matters (I criteri di giurisdizione comunitari in materia matrimoniale).

COMMENTS

- *C. Amalfitano* (University of Milan), The European Arrest Warrant, the Italian Corte di Cassazione and the Protection of Fundamental Human

Rights (Mandato d'arresto europeo, Corte di Cassazione e tutela dei diritti fondamentali dell'individuo);

- *A. Atteritano*, The Jurisdiction of National Courts to Enforce Foreign Arbitration Awards under the 1958 New York Convention (La «jurisdiction» del giudice statale nei procedimenti di «enforcement» dei lodi arbitrali stranieri disciplinati dalla Convenzione di New York del 1958).

The *RDIPP* is not available online (for subscription information, refer to the publisher's website, CEDAM).

An archive of the TOCs since 1998 is available on the ESSPER website (an online project for indexing articles of Italian journals and working papers in law and other social sciences, headed by the library of LIUC University of Castellanza).

Mixed Contracts, the Vienna Sales Convention and the Brussels Convention

Ulrich G Schroeter (University of Freiberg – Faculty of Law) has posted "**Vienna Sales Convention: Applicability to 'Mixed Contracts' and Interaction With the 1968 Brussels Convention**" on SSRN; it originally appeared in the *Vindobona Journal of International Commercial Law and Arbitration, Vol. 5, pp. 74-86, 2001*. The abstract reads:

> *The present article discussed various questions pertaining to the interpretation of Article 3(1) and (2) of the United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980 (CISG), the provisions which deal which so-called 'mixed contracts', i.e. contracts that involve elements of a 'sale' proper alongside obligations to manufacture or produce goods or to supply labour or other services.*

In its second part, the paper elaborates on the interaction between the CISG's provisions defining the place of performance (Articles 31 and 57 CISG) on one hand and Article 5(1) of the Brussels Convention of 27 September 1968 on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters and its successor, Article 5(1) of the EC Council Regulation 44/2001 of 22 December 2000 on the Recognition and Enforcement of Judgements in Civil and Commercial Matters on the other hand.

You can download the paper from **here**.

Conferences on Conflicts at the Cour de Cassation in March

The *Cour de cassation*, the French supreme court for civil, commercial and criminal matters, organises conferences on a variety of topics. Although a few were held in English, they are generally in French. The speakers have been academics, lawyers or judges, both from France and from abroad.

Two conferences dealing either directly or indirectly with conflicts issues will be organised in March. The first one will take place on March 5th from 6:30 to 8:30 pm. Professor Alegrias Borras will talk on the "freedom of movement of family in Europe". The second one will take place on March 13th from 6:30 to 8:30 pm. Professor Emmanuel Gaillard will talk on the "case law of the Cour de cassation on international arbitration". For conferences organised on other topics, click here.

To attend, the Court only asks for prior registration, but it is also possible to walk in. No fees are charged. Registration online is possible, both for the Gaillard conference and for the Borras conference.

Insolvency and the Conflict of Laws: A Review of English Cases in 2006

Andrew McKnight (Salans) has written written his annual review in the *Journal of International Banking Law and Regulation* on **legal developments during 2006 of interest to practitioners in the insolvency and conflict of laws fields** (*J.I.B.L.R. 2007, 22(4)*). Here's the abstract:

> *This, the second part of a two part article, examines legal developments during 2006 of interest to practitioners in the insolvency and conflict of laws fields. Reviews the UK adoption of the Model Law on Cross Border Insolvency 1997, the range of issues examined by the Court of Appeal in Manning v AIG Europe UK Ltd and other case law on topics including common law assistance in foreign insolvency proceedings, cross border insolvencies, transactions at an undervalue, administration expenses, court powers to determine a state's entitlement in a bank account, jurisdiction agreements, sovereign immunity, conflict of laws rules concerning tortious issues and international arbitration.*

Cases referred to: *Cambridge Gas Transport Corp v Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2006] UKPC 26; [2006] 3 W.L.R. 689 (PC (IoM)); *HIH Casualty & General Insurance Ltd v Axa Corporate Solutions (formerly Axa Reassurance SA)* [2002] EWCA Civ 1253; [2002] 2 All E.R. (Comm) 1053 (CA (Civ Div)); *Manning v AIG Europe UK Ltd* [2006] EWCA Civ 7; [2006] Ch. 610 (CA (Civ Div)); *AY Bank Ltd (In Liquidation), Re* [2006] EWHC 830; [2006] 2 All E.R. (Comm) 463 (Ch D (Companies Ct)); *Svenska Petroleum Exploration AB v Lithuania (No.2)* [2005] EWHC 2437; [2006] 1 All E.R. (Comm) 731 (QBD (Comm)); *Trafigura Beheer BV v Kookmin Bank Co* (Preliminary Issue) [2006] EWHC 1450; [2006] 2 All E.R. (Comm) 1008 (QBD (Comm)); *Harding v Wealands [2006] UKHL 32*; [2006] 3 W.L.R. 83 (HL).

Choice of Law in American Courts in 2006: Twentieth Annual Survey

Dean Symeon Symeonides has just released his latest annual salvo into surveying the vast array of choice of law cases in American federal and state courts. Of the 2,598 conflicts cases referencing such matters this past year, the Survey focuses on those cases that may add something new to the development or understanding of choice of law issues. The Survey is intended as a service to fellow teachers and students of conflicts law, both within and outside the United States. Its central purpose is to inform rather than to advocate.

This year's Survey covers the following topics and sub-topics:

I. Methodology (1. Torts; 2. Contracts; 3. The Methodological Count);

II. Torts in General (1. Car-Lessor's Liability; 2. "No play, No pay" Rules; 3. Other Traffic Accident Cases; 4. "Border-Line" Cases (Literally); 5. Cross-Border Pollution 6. Cross-Border Medical Malpractice; 7. Consumer Fraud; 8. Premises Liability; 9. Sexual Assault);

III. Products Liability (1. Inverse Conflicts; 2. Direct or True Conflicts);

IV. Contracts (1. Contracts with Choice-of-Law Clauses; a. Employment Contracts; b. What Law Governs Choice-of-Forum Clauses; c. Choice-of-Law and Arbitration Clauses; 2. Contracts without Choice-of-Law Clauses; a. Attorney Fees; b. CISG);

V. Insurance Conflicts (1. Automobile Insurance; 2. Other Insurance Conflicts);

VI. Statutes of Limitation;

VII. Privileges and Immunities;

IX. Defense of Marriage Act; and

X. International Cases (1. Hypothetical Jurisdiction and Forum Non Conveniens

;2. Alien Torts Claims Act; 3. Extraordinary Rendition and TVPA; 4. Suits Against Foreign Governments; 5. Yahoo! and Foreign Judgments; 6. Extraterritorial Reach of Federal Statutes; a. Sarbanes-Oxley; b. Civil Rights Act of 1871; c. Criminal Statutes; d. Patents and Trademarks).

The AALS Section on Conflict of Laws has characterized these surveys as "enormously informative and influential" and "extraordinarily helpful to the members of the Section, other academics, the Bench and the practicing bar." Dean Symeonides' latest survey is available on the SSRN, and will be published in an upcoming volume of the American Journal of Comparative Law. The 2006 edition will also be forthcoming on the American Society of Comparative Law website.

Private International Law Applied to Business

Yasmine Lahlou & Marina Matousekova have written an article in the latest issue of the *International Business Law Journal* on "Private International Law Applied to Business" (No.4, 2006, p.547-573). The abstract states:

In the field of conflicts of laws, French courts were referred disputes relating to employment and factoring agreements. The issues of procedural agreements and court's duty in applying foreign laws were dealt with, as well as the impact of public policy rules on insurance contracts. French courts also ruled on the issue of court's jurisdiction as regards agency agreements and insolvency proceedings as well as on States' jurisdictional immunities.

In community law, the ECJ and French courts ruled on the notion of the « centre of a debtor's main interests » in the sense of Article 3.1 of the EC Regulation 1346/2000 on insolvency proceedings as well as on problems of transmission of acts between Member States (EC Regulation 1348/2000). The ECJ also ruled on the res judicata of a decision having infringed community law.

English courts ruled on an anti suit injunction in regard of the violation of an arbitration agreement and on jurisdictional immunities. French and Irish courts ruled, on the ground of Article 5.1 of the Brussels Convention, on the issue of courts' jurisdiction in the field of brokerage contracts and sale of goods. The French Cour de cassation, the ECJ and the English High Court ruled, on the ground of Article 5.3 of the Brussels Convention, on territorial jurisdiction in the field of intellectual property rights, damages caused by car accidents, and misleading declarations. The ECJ was also interrogated as to the application of Article 16.1 of the Convention to damages to real estates, while the Cour de cassation was asked to rule upon the application of Article 16.4 of the Convention to registered intellectual property rights. The Cour de cassation also had to rule, on the ground of Article 6.1 of EC Regulation, on the link of connexity between main claims and claims in guarantee. The English High court was referred an issue of lis pendens with regard to the date of accession of a State to EC Regulation 44/2001. The Cour de cassation also ruled, on the ground of Article 27.1 of the Brussels Convention, on lis pendens in an action for infringement of intellectual property rights. In the field of recognition and enforcement, French, English and Italian courts ruled, on the ground of Article 27 of the Brussels Convention, on possible breaches of rules of public policy, on the regularity of a notification to the defendants, and on the purported contradiction between national and foreign decisions. The ECJ ruled, on the ground of Articles 34 and 36 of the Convention, on the consequences of an irregularity of the notification of the foreign decision with regard to its exequatur. The French Cour de cassation and the Paris Court of Appeal ruled on the enforceability of foreign judgments in the sense of Article 47.1 of the Convention.

As regard to private international law in the US, the District Court of New York recalled the criteria for American courts to have jurisdiction over class action in securities fraud claims, while the US Court of Appeals of the First Circuit ruled on the extra-territoriality of the Whistleblower provision of the Sarbanes Oxley Act.

Those with access to the IBLJ can download the article, or you can buy the article for 47 Euros from the IBLJ website.

U.S. Decisions: December 2006 Round-Up: Part II

Again with thanks to the International Civil Litigation Blog for many of the citations below, Part II of the December 2006 round-up will discuss a few significant case developments in the fields of International Discovery and Foreign Sovereign Immunity. More expanded discussion of these cases, and a few others pertaining to these topics, can be found at that site and other sites linked below.

INTERNATIONAL DISCOVERY

Linde v. Arab Bank, PLC, 2006 WL 3422227 (E.D.N.Y. Nov. 25, 2006).

In this case, a number of Israeli and American individuals and estates pressed actions against Arab Bank for aiding and abetting murder, conspiracy to commit murder, provision of material support to terrorists, committing and financing terrorism and other related claims. Arab Bank claimed that bank secrecy laws in Jordan, Lebanon, and the Palestinian Monetary Authority (recognized by the United States) prevent the disclosure of certain records. At issue here is whether foreign bank secrecy laws can shield Arab Bank's records from discovery. Violations of these laws involve criminal penalties of fines and incarceration, and plaintiffs apparently conceded that some of the information they sought in discovery would require violating the secrecy laws.

Nonetheless, the Court concluded that the U.S. interests in combating terrorism trumped a foreign state's interest in bank secrecy, holding that:

> *"there is no question that important interests of the United States would be undermined by noncompliance with the discovery orders issued by the court. As the court has already recognized, those interests are articulated in statutes on which some of the claims in this litigation rest: "Congress has expressly made criminal the providing of financial and other services to terrorist organizations and expressly created a civil tort remedy for American victims of international terrorism." Linde v. Arab Bank, PLC, 384 F.Supp.2d 571, 584 (E.D.N.Y.2005).*

> *The discovery sought here is transactional and other evidence of precisely those financial and other services at which the statutes here are aimed. Without that discovery, the interests expressed in those statutes will be difficult if not impossible to vindicate in this action."*

According to the court, although maintaining bank secrecy is an important interest of the foreign jurisdictions where the discovery sought here resides, that interest must yield to the interests of combating terrorism and compensating its victims. As members of the Middle East and North Africa Financial Action Task Force, both Jordan and Lebanon have expressly adopted a policy not to rely on bank secrecy laws as a basis for protecting information relating to money laundering and terrorist financing. Although the Palestinian Monetary Authority has apparently not expressly adopted any policies recognizing the subordination of bank secrecy to the interest of fighting terrorism, it is not a state, and its interests therefore need not be accorded the same level of deference accorded to "states" in considering comity. In any event, as the Palestinian Monetary Authority operates in an area governed at least in part by other authorities that have themselves engaged in terrorist activity, it would be absurd for this court to exalt the bank secrecy interests of those under the jurisdiction of the Palestinian Monetary Authority over the anti-terrorism interests of the United States and other recognized states in the region.The court ultimately concluded that Arab Bank should, with this opinion in hand, seek permission from appropriate governments to disclose information. The court deferred further action pending the outcome of this process. News source and blog discussions of this case can be found here and here.

SEC v. Sandifur, 2006 U.S. Dist. LEXIS 89428 (W.D. Wash. 2006)

This case involves an action against Defendants for securities fraud. A witness who is a United States citizen working in Luxembourg has declined Defendant's request to voluntarily appear in the United States for a deposition. The Walsh Act however, provides a U.S. Court with subpoena power over a national or resident of the United States who is in a foreign country if "it is not possible to obtain [a witness's] testimony in admissible form without his personal appearance." *28 U.S.C. § 1783(a)*. The issue presented here is whether the party seeking that subpoena power should be required to resort to the procedures outlined in the Hague Evidence Convention as a "possible" means of obtaining the testimony

without a Walsh Act subpoena. The court noted that:

> *"Under the Walsh Act, subpoenas may be issued when it is "impractical" to obtain the information. . . . Impracticality occurs, for example, where resort to alternative methods is unlikely to produce the relevant evidence in time to meet impending discovery deadlines. The court held that "[u]se of the Hague Convention procedures in this case would be impractical. . . . [T]he discovery deadline of February 17, 2007 is only a few months away. Though the Parties disagree on precisely how long the Hague Convention procedures generally take to process letters of request, . . . it can take up to a year, and that at the end of the process the government of Luxembourg may exercise its right Under Article 23 of the Hague Convention not to grant such a request. [T]he issue here is not that the Hague Convention procedures are merely inconvenient because they would require more resources or expertise to implement, but rather that they are impractical in the context the looming discovery deadline and overall trial schedule. [T]he Walsh Act does not require a harsh rule of 20/20 hindsight to see whether it ever would have been possible to obtain the information via other means but rather whether, looking forward, it "is not possible to obtain [the] testimony in admissible form without [the witness's] personal appearance." 28 U.S.C. § 1783(a) (emphasis added). While a party's unreasonable delay may factor into the "interests of justice" analysis, the Act thus does not require denial of a subpoena where the alternative means would once have been theoretically feasible."*

Accordingly, the court held that "Defendants demonstrated that it is not possible to obtain [the requested] testimony in admissible form without his personal appearance and have thus satisfied both requirements to obtain a Walsh Act subpoena." The subpoena was accordingly granted.

Finally, the court discussed where the deposition should occur. The court considered London, but decided that this alternative would infringe upon the sovereignty of the UK. Forcing the foreign party to fly to New York seemed an excessive burden to the party and the court. Therefore, the court held that the deposition should proceed in Luxembourg. As for the infringement on Luxembourg's sovereignty:Any potential infringement on Luxembourg's sovereignty is outweighed by the imposition that the alternatives would impose on the nonparty witness. The Supreme Court has held that "American courts are not

required to adhere blindly to the directives" of countries who oppose unauthorized, American-style discovery even when they have gone so far as to enact "blocking statutes." Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 544 n. 29 (1987); see also Valois of America Inc. v. Ridson Corp., 183 F.R.D. 344; Rich v. KIS California, Inc, 121 F.R.D 254, 258 (M.D.N.C. 1998). While this Court recognizes that the "interest of foreign nations in the sanctity and respect of their laws is both important and deserving of significant respect," see In re Vitamins Antitrust Litig., 120 F. Supp. 2d 45, 54 (D.D.C. 2000), in this case any potential sovereignty concerns are outweighed by the countervailing considerations regarding the significant burden that would otherwise be imposed on a nonparty witness. This decision, particularly that the Hague Evidence Convention is an "impractical" process, seems to further weaken the strength of that Convention in U.S. Courts.

In re Application of Roz Trading Ltd., 2006 WL 3741078 (N.D. Ga. Dec. 19, 2006)

Roz Trading, the Coca-Cola Export Company ("CCEC"), and the government of Uzbekistan entered a contract for a joint venture. Roz Trading alleges that Uzbekistan and CCEC seized its interest in the venture and accordingly brought its claim before the International Arbitral Centre of the Austrian Federal Economic Chamber in Vienna (the "Centre") in accordance with the contractual arbitration clause. Roz Trading sought the assistance of the court to obtain discovery from the Coca-Cola Company to be used in the arbitration.

Roz Trading relied upon 28 U.S.C. §1782(a) in requesting judicial assistance for document discovery. The court addressed whether section 1782(a) includes arbitrations before the Centre, a private arbitral forum. The Coca-Cola Company argued that the Centre is not a "tribunal" for purposes of §1782(a) because it is a private institution whose proceedings are voluntary and arbitral. Taking guidance from *Intel v. AMD*, 542 U.S. 241 (2004), wherein the Supreme Court determined that the Directorate-General of Competition for the Commission of the European Communities was a "tribunal," the court here held that private arbitral panels are also "tribunals" for 1782(a) purposes. In *Intel*, the Supreme Court drew special attention to the 1964 amendment to 1782(a) which "deleted the words 'in any judicial proceeding pending in any court in a foreign country,' and replaced them

with the phrase 'in a proceeding in a foreign or international tribunal,'" and characterized §1728(a) tribunals as "first-instance decisionmaker[s], capable of rendering a decision on the merits, and as part of the process that could ultimately lead to final resolution of the dispute." Here, the Centre performs just such a function. Accordingly, "[t]he Court held that the Centre is a 'foreign or international tribunal' within the meaning of § 1782(a)." In so holding, the court expressly disagreed with both the Second and the Fifth Circuits which, prior to *Intel v. AMD*, held that only governmental bodies qualify as tribunals under 1782(a). *See Nat'l Broad. Co., Inc. v. Bear Stearns & Co., Inc.*, 165 F.3d 184 (2d. Cir.1999) and *Republic of Kazahkstan v. Beidermann*, 168 F.3d 880 (5th Cir.1999).

As a question of first impression in the Eleventh Circuit, the court issued an opinion fully supportive of international arbitration and robust judicial assistance for such forums. This opinion also fulfills the prediction of some commentators that *Intel v. AMD* would cause some courts to revisit whether private arbitration constitutes a tribunal under §1782.

FOREIGN SOVEREIGN IMMUNITY

Powerex Corp. v. Reliant Energy Services, No. 05-85 (U.S. 2006)

In a possible watershed case regarding the Foreign Sovereign Immunity Act, the Supreme Court has now twice re-listed the cert. petition in *Powerex Corp. v. Reliant Energy Services*, 05-85, thereby pushing back its grant or denial of Certiorari until after its holiday break. The Questions Presented by the Petition are:

> *1. Whether an entity that is wholly and beneficially owned by a foreign state's instrumentality, and whose sole purpose is to perform international treaty and trade agreement obligations for the benefit of the foreign state's citizens, may nonetheless be denied status as an "organ of a foreign state" under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1603(b)(2), based on an analysis of sovereignty that ignores the circumstances surrounding the entity's creation, conduct, and operations on behalf of its government.*
>
> *2. Whether an entity is an "organ of a foreign state" under the FSIA when its shares are completely owned by a governmental corporation that, by statute, performs all of its acts as the agent of the foreign sovereign.*

The cases grew out of the energy crisis in California in 2000 and 2001. Powerex contends that it is an arm of the province of British Columbia in Canada, but the NInth Circuit Court rejected that argument. The full Petition is available courtesy of SCOTUS Bloghere. The SG has recommended that the Court grant on the first question. The decision of the Ninth circuit opinion is available here.

Agudas Chasidei Chabad of U.S. v. Russian Federation, 2006 WL 3476236 (D.D.C. Dec. 4, 2006)

This is fascinating case blending history and international law. It involves the proper possession of the historic collection of books and materials of the Agudas Chasidei Chabad ("Chabad"), an organization of Jewish religious communities located worldwide with origins in the Russian Empire. The organization's complaint against the Russian Federation and several Russian state agencies alleges that the defendants illegally took and retained a library and archive of Jewish religious books and manuscripts after World War II, which Chabad claims to rightfully own. On a motion to dismiss, the court heard: (1) Whether the Foreign Sovereign Immunities Act precludes jurisdiction over the case in US federal court; (2) Whether the act of state doctrine, which instructs US courts to presume the validity of actions taken by foreign governments within their territories, should preclude the court from ruling on the plaintiffs' claims; (3) Whether forum non conveniens should compel dismissal of the plaintiffs' action.

The Foreign Sovereign Immunities Act embodies the longstanding tradition of foreign sovereign immunity, but the Act includes a series of exceptions, one of which, the expropriation exception, the court found applicable to this case. For the exception to apply, the court needed to find that (1) property rights are at issue; (2) the property was taken in violation of international law; and (3) the property is owned or operated "by an agency or instrumentality of the foreign state and that agency or instrumentality' engages in commercial activity in the United States." The court granted the motion to dismiss regarding the library of works. Discussing the second prong, it concluded that the alleged taking of the property took place in the early 1920s, when the Fifth and Sixth Rebbes of the Chabad were citizens of the Soviet Union. In order for a taking to violate international law, the court reasoned, it must involve a state taking the property of citizens of a foreign state, and that condition was not satisfied in this case. Regarding the archives, however, the court found that the complaint alleged a

violation of international law. Specifically, the archival materials were seized by the Nazis during WWII and, at the end of the war, they were appropriated by the Soviet Red Army in Poland in 1945. By the time the property taking occurred, the sixth Rebbe had become a Latvian citizen and the Chabad had been formally constituted as a New York Corporation, satisfying the requirement that the taking be conducted by a state actor against citizens of a foreign state. The court also found the first and third prongs easily met with regard to the archives.

The court then found the Act of State doctrine inapplicable to this case because the taking in question did not occur within Soviet territory. While "[t]he act of state doctrine directs courts in the United States to presume the validity of 'acts of foreign sovereigns taken within their own jurisdictions,'" neither the initial seizure of the library by the Nazis nor the subsequent appropriation of the library by the Soviet Union took place in Soviet territory. Consequently, the court held the act of state doctrine to be inapplicable to this case.

Finally, the court rejected the invitation to dismiss on forum non conveniens grounds, finding that the defendants had failed to satisfy their burden to demonstrate the existence of a viable alternative forum. Additionally, the court found that the costs of hearing the case in the United States, including the expenses of document translation and the difficulty of accessing evidence currently located within the Russian Federation, did not justify moving the case to an alternative forum. Finally, the court noted strong public interest factors in resolving the dispute in the plaintiff's chosen forum, including the DC Circuit's location in the nation's diplomatic and political epicenter, the longstanding interest that the United States government has taken in the dispute, and the lack of regard that the Russian government has shown in allowing the archives to fall into disrepair. These factors, taken together, led the court to find that the defendants had failed to overcome the strong presumption in favor of the plaintiffs' chosen forum.

Some news discussions of this case can be found here. Opinio juris has this commentary.