Vitamin C and Comity

Following up on last week's post on the Second Circuit's comity decision in the Vitamin C Antitrust Litigation case, Professor Bill Dodge of UC Davis has the following thoughts (also cross-posted on Opinio Juris here)

American law has many doctrines based on international comity—doctrines that help mediate the relationship between the U.S. legal system and those of other nations. The Second Circuit's decision last week in the *Vitamin C Antitrust Litigation* case correctly identified an international comity issue. But did it choose the right comity tool to address that issue?

Plaintiffs alleged that defendants, two Chinese companies, participated in a cartel to fix the price of vitamin C exported to the United States in violation of U.S. antitrust law. Defendants did not deny the allegations, but argued that Chinese law required them to coordinate export prices. The Chinese Ministry of Commerce backed the defendants in an amicus brief explaining Chinese law. The district court, however, declined to defer to the Ministry's interpretation of Chinese law, awarding the plaintiffs $147 million in damages and permanently enjoining the defendants from further violations of U.S. antitrust laws.

On appeal, defendants argued that the district court should have dismissed on grounds of foreign state compulsion, international comity, act of state, and political question. While the political question doctrine rests on separation of powers, the other three grounds are all doctrines of prescriptive comity. As I have explained in a recent article, American law is full of international comity doctrines, each with its own specific requirements.

To avoid confusion, it is worth noting at the outset that although the Second Circuit repeatedly framed the question as whether the district court should "abstain from exercising jurisdiction,"*Vitamin C* was clearly not an international comity abstention case. International comity abstention is a doctrine of adjudicative comity, or deference to foreign courts. The Second Circuit has held that it is available only if parallel proceedings are pending in a foreign court. See *Royal & Sun Alliance Ins. Co. of Canada v. Century Intern. Arms, Inc.*, 466 F.3d 88, 93-94 (2d Cir. 2006). The same is true in most other circuits that have adopted the doctrine (the cases are collected here at pp. 2112-14). The main

exception is the Ninth Circuit, whose decision in *Mujica v. Airscan Inc.*, 771 F.3d 580 (9th Cir. 2014), applied a broad and uncertain comity abstention doctrine that conflicts with its own precedents, those of other circuits, and even the Supreme Court's. Because no parallel antitrust claims against these defendants were pending in Chinese courts, international comity abstention would not have been an appropriate ground on which to dismiss this case.

Instead, the Second Circuit properly viewed the *Vitamin C* case as raising questions of prescriptive comity—deference to foreign lawmakers—which U.S. law has developed a number of different doctrines to address (for discussion see here at pp. 2099-2105). The court relied particularly on an interest-balancing, comity doctrine commonly associated with *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976), *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979), and Section 403 of the Restatement (Third) of Foreign Relations Law. In the court's view, this doctrine authorized it to "balance the interests in adjudicating antitrust violations alleged to have harmed those within our jurisdiction with the official acts and interests of a foreign sovereign in respect to economic regulation within its borders" (slip op. at 4). The idea that U.S. courts are institutionally capable of balancing the interests of foreign governments against our own has the subject of significant criticism over the past three decades.

Moreover, it is hard to see how this particular prescriptive comity doctrine survives the Supreme Court's later decisions in *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993), and *F. Hoffmann-La Roche Ltd. v. Empagran, S.A.*, 542 U.S. 155 (2004), both of which declined to apply a multi-factor balancing approach in antitrust cases. The Second Circuit read *Hartford* "narrowly" (slip op. at 20) not to preclude such an approach, particularly when compliance with both U.S. and foreign law was impossible. But the Second Circuit did not even mention *Empagran*, which expressly rejected case-by-case balancing as "too complex to prove workable." *Empagran* recognized that ambiguous statutes should be construed "to avoid unreasonable interference with the sovereign authority of other nations," but it also said in no uncertain terms that "application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused." Plaintiffs unquestionably alleged domestic

antitrust injury in *Vitamin C*, making the application of U.S. law reasonable and consistent with prescriptive comity, at least has the Supreme Court has understood these concepts in the antitrust context.

The act of state doctrine is a separate and distinct manifestation of international comity, requiring that the acts of foreign sovereigns performed within their own territories be deemed valid. But the Supreme Court has made clear that the act of state doctrine applies only when a U.S. court must "declare invalid, and thus ineffective as 'a rule of decision for the courts of this country,' the official act of a foreign sovereign." *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., International*, 493 U.S. 400, 405 (1990). To find that the defendants fixed the price of vitamin C, the district court did not have to find any part of Chinese law invalid or even to evaluate the conduct of the Chinese government. It only had to find that Chinese law did not immunize the defendants' own conduct from liability under U.S. law.

The best fitting tool to address the prescriptive comity issue in *Vitamin C* would seem to be the doctrine of foreign state compulsion (also known as foreign sovereign compulsion), which sometimes allows a U.S. court to excuse violations of U.S. law on the ground that the violations were compelled by foreign law. That is precisely what defendants had argued in this case. Although the exact contours of this doctrine are uncertain, the U.S. government has recognized it as a defense in antitrust cases. See Antitrust Enforcement Guidelines for International Operations ¶ 3.32 (1995). China represented that its law compelled the defendants to coordinate export prices for vitamin C, and the Second Circuit considered itself bound by China's interpretation of its own laws (slip op. at 30), which seems reasonable at least in these circumstances.

Unfortunately for the defendants, there are at least two potential problems with foreign state compulsion in this case. First, it appears that defendants may have asked the Chinese government to mandate their price fixing. See slip op. at 36-37. At least some authority suggests that a defendant wishing to claim foreign state compulsion as a defense must try in good faith to obtain relief from the compulsion from the foreign state. See, e.g., *Societe Internationale v. Rogers*, 357 U.S. 197, 208-09, 213 (1958). Second, it appears that defendants may have fixed prices at levels higher than those mandated by the Chinese government. See slip op. 38. The Second Circuit found this irrelevant to its "comity" analysis but seemed to acknowledge that such facts would preclude a foreign compulsion

defense. See id.

U.S. courts have many tools at their disposal to address international comity issues. But sometimes no tool fits. “International comity” is not a universal wrench offering unlimited judicial discretion to dismiss cases that seem problematic. It is a principle underlying specific doctrines, with specific requirements, developed over many years to keep judicial discretion within bounds.

Conference on the new European Matrimonial Property Regulations in Würzburg

The German Notary Institute and the Chair of Civil Law, Private International Law and Comparative Law at the University of Regensburg are hosting a joint conference on the new Matrimonial Property Regulations for spouses and registered partners. The conference (in German language) will take place on 10 February 2017 in Würzburg. Speakers include:

- Professor Andrea Bonomi, Université de Lausanne
- Professor Michael Coester, Ludwig Maximilians University Munich
- Dr Christoph Döbereiner, Notary Public in Munich
- Professor Anatol Dutta, University of Regensburg
- Dr Andreas Köhler, University of Passau
- Professor Christian Kohler, Europa-Institut at the Saarland University
- Professor Stephan Lorenz, Ludwig Maximilians University Munich
- Professor Peter Mankowski, University of Hamburg
- Joanna Serdynska, European Commission, Brussels
- Dr Rembert Süß, German Notary Institute, Würzburg
- Dr Johannes Weber, German Notary Institute, Würzburg

The **programme** can be downloaded here.

Doctoral Seminars on EU Private International Law at the University of Padova

During the months of **October-December 2016**, Professor *Christian Kohler* (Europa-Institut, University of Saarbrücken) will give a series of doctoral seminars on European Private International Law at the University of Padova, where he will be a *Visiting Scientist* during this period.

The programme can be found here.

Professor *Bernardo Cortese*, who has organized the series, warmly invites applications from PhD students with a focus on International and EU Law.

Conference: Cross Border Family Litigation in Europe. The Brussels IIbis Recast (Milan, 14 october 2016)

The University of Milan (Department of International, Legal, Historical and Political Studies) will host on **Friday 14 October 2016** (14h00) a conference on "**Cross border family litigation in Europe. The Brussels IIbis recast**".

Here is the programme (the sessions will be held in English and Italian):

Welcoming addresses

- *Chiara Tonelli* (Vice-Rector for Research, Univ. of Milan)
- *Laura Ammannati* (Director of the Department of International, Legal, Historical and Political Studies)

Chair: *Stefania Bariatti* (Univ. of Milan)

The Brussels IIbis recast

- *Joanna Serdynska* (Civil Justice Policy, DG Justice, European Commission): The Commission's proposal
- *Anatol Dutta* (Universität Regensburg – MPI Hamburg): A comment on the Commission's Proposal from a member of the Commission's Expert Group

Round Table – The Commission's Proposal: exchange of views among judges, practitioners and academics

- *Giuseppe Buffone* (Milan Court, Family Division)
- *Monica Velletti* (Rome Court, Family Division)
- *Suzanne Todd* (Whiters LPP, London)
- *Cinzia Calabrese* (President of AIAF Lombardia)
- *Carlo Rimini* (Univ. of Milan)
- *Ilaria Viarengo* (Univ. of Milan)

Closing remarks: *Stefania Bariatti* (Univ. of Milan)

Venue: Sala Lauree, Facoltà di Scienze Politiche, Economiche e Sociali, University of Milan.

(Many thanks to Prof. Ilaria Viarengo for the tip-off)

Opening of the European and Private International law Section

in Blog Droit Européen

Many thanks to Alexia Pato, PhD candidate at the Universidad Autónoma, Madrid, for this piece of news. And my best wishes!

Today, blog droit européen officially celebrates the opening of its European and private international law section (hereafter, EU and PIL section), which is edited and coordinated by Karolina Antczak (Ph.D. candidate at Université de Lille), Basile Darmois (Ph.D. candidate at Université Paris Est Créteil) and Alexia Pato (Ph.D. candidate at Universidad Autónoma de Madrid). In a recently published inaugural post (available here), they present their project in detail. In particular, they expose the positive interactions between PIL and European law, as well as their friction points. Undoubtedly, the increasingly tight links that are forged between these two disciplines encourage legal experts to collaborate and exchange their views. The creation of the mentioned section in blog droit européen contributes to the achievement of this objective.

The Content of the European and Private International Law Section

Although the EU and PIL section has just been inaugurated, more food for thought will be uploaded soon. Readers will find articles diving into PIL issues, and we will be covering additional areas such as international civil litigation, as well as the internal market and its four freedoms. Don’t miss our upcoming co-signed article on Brexit, highlighting its legal consequences from an international perspective. Also, on its way is a post discussing the EU’s competence to adopt minimum standards of civil procedure. Additionally, the team plans to upload interviews with professors and legal experts, who debate fundamental EU and PIL matters. These interviews will be available in video format. Lastly, readers will be able to stay updated by reading our posts on the latest legal news.

Contribute to the European and Private International Law Section

In order to foster constructive debates and extract the merits of collaborative learning, we welcome any Ph.D. candidate, professor, or legal professional to voice his/her opinion on the EU and PIL section. You may submit your ideas in the form of a post (approximately 1.000 words), which consists of a critical assessment on a particular topic. Working papers, video conferences and tutorials are equally welcome (for more information on how to contribute, click here).

Articles can be written in either French or English.

What is blog droit européen?

Blog droit européen is a website that provides information with an interactive touch on a broad range of legal topics such as: digital single market, Economic and monetary Union, competition law, and so on. In particular, its purpose is to gather together students, investigators, professors, and legal experts who share a common and enhanced interest for European law at large (EU, ECHR, impact of European law on States' public and private laws). The originality of blog droit européen lies in two essential features: firstly, the blog delivers high quality and varied contents, including interviews (of ECJ members and professors), call for papers and conferences, not to mention working papers and legal columns, which critically analyse EU law. Secondly, the use of e-techniques of information sharing, like Facebook, Twitter, and YouTube make this blog interactive and user friendly. From an organizational perspective, blog droit européeen is run and edited by young investigators from different legal backgrounds in different Universities across Europe (for an overview of our team, click here). Thanks to Olivia Tambou (Lecturer at Université Paris-Dauphine), our dedicated team leader and creator/editor of the blog, for connecting us and making this project possible.

See you soon on blog droit européen!

Comity or Compulsion

On Tuesday, the United States Court of Appeals for the Second Circuit issued a decision reversing a $147.8 million price-fixing judgment against two Chinese manufacturers of Vitamin C. The plaintiffs alleged that the Chinese manufacturers engaged in price fixing and supply manipulation in violation of U.S. antitrust laws. In its first ever appearance as an amicus before a U.S. court, the Chinese government filed a formal statement asserting that Chinese law required the Chinese manufacturers to set prices and reduce the quantities of Vitamin C sold abroad. Relying on this statement, the Second Circuit held that because the Chinese manufacturers could not comply with both Chinese law and the U.S.

antitrust laws, principles of international comity compelled dismissal of the case.

This case raises a host of interesting questions. First, did the Second Circuit reach the right result? Second, is this a comity case or a foreign sovereign compulsion case? Third, what level of deference is due to a foreign sovereign that appears in private litigation to explain their country's laws? Fourth, should U.S. judges defer to such an explanation?

It will be interesting to see whether this case makes it to the United States Supreme Court.

Conflicts Conference in Toronto

The following information is provided by the conference organizers. Given how rare conflict of laws conferences are in Canada, I am delighted to pass this along.

The CJPTA: A Decade of Progress

In 2016, the *Court Jurisdiction and Proceedings Transfer Act* marks its tenth year in force. Adopted in British Columbia, Saskatchewan and Nova Scotia, the CJPTA has clarified and advanced the law of judicial jurisdiction. This symposium will assess the progress made by the CJPTA across the range of issues addressed and critically evaluate the capacity of the CJPTA: to provide leadership for the law in other parts of Canada; to enable further development in the law; and to meet the needs of Canadians in the years ahead in a world of increasing cross-border dealings.

Details:

Friday, October 21, 2016 (expected to run from 9am to 4:30pm)

University Club of Toronto (380 University Avenue, just north of the American consulate)

Co-chaired by Professor Janet Walker (Osgoode) and Lisa Munro (Lerners LLP)

with the assistance of Dr. Sagi Peari and Gerard Kennedy

We are excited to bring you a fantastic lineup of speakers and panelists discussing a wide range of topics pertaining to CJPTA and judicial jurisdiction.

Space is limited. Kindly RSVP to

Sagi Peari (SPeari@osgoode.yorku.ca)
or
Gerard Kennedy (GerardKennedy@osgoode.yorku.ca)

by October 3, 2016.

Out now: Future Prospects for Comparative Law – Symposium in Honour of Hein Kötz

On the occasion of *Hein Kötz'* 80th birthday in November 2015, a symposium in his honour was held at the Max-Planck-Institute for Comparative and International Private Law in Hamburg/Germany. The presentations given at this event have now been published (in German) by Mohr Siebeck, Tübingen: Zukunftsperspektiven der Rechtsvergleichung, ed. by *Reinhard Zimmermann*, 2016; XX, 267 pages.

Following an explanation by the editor as to why this is not a *Festschrift*, the volume contains contributions by *Christiane Wendehorst* (Vienna) on the comparison of legal systems, by *Ralf Michaels* (Duke) on religious laws and post-secular comparative law, by *Giesela Rühl* (Jena) on comparative law and European conflict of laws: the forgotten dimension, by *Eva-Maria Kieninger* (Würzburg) on principles and basic concepts of property law as objects of comparative law, by *Gralf-Peter Calliess* (Bremen) on the role of comparative law in the context of a competition between legal orders, by *Marc-Philippe Weller*

(Heidelberg) on future prospects for comparative law in private international and corporate law, and by *Jan von Hein* (Freiburg/Br.) on market regulation by tort law from a comparative perspective. The book concludes with closing remarks by *Hein Kötz*.

Further information is available here.

Conference on the "Codification of Private International Law" – Cologne, 23-24 September 2016

This year does not only mark 30 years since the great reform of German private international law of 1986, but it is also the 35th anniversary of the foundation of the *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)*. Therefore, Professor *Heinz-Peter Mansel*, President of the German Council for Private International Law, and Professor *Jan von Hein*, chairman of the Council's 2nd Commission, are pleased to announce that a celebratory conference will take place on **23-24 September 2016** at the University of Cologne (Germany) under the title: **"Codification of Private International Law: German Experience and European Perspectives Thirty Years After the PIL-Reform of 1986"**. The conference, which will be held in German, will look at how Private International Law has evolved in the past and provide an outlook for future responsibilities and challenges of the field.

The conference programme (in German) is available here.

Conference: “Le successioni internazionali in Europa” (International Successions in Europe) – Rome, 13 October 2016

The Faculty of Law of the **University of Rome “La Sapienza”** will host a German-Italian-Spanish conference on **Thursday, 13th October 2016, on International Successions in Europe**. The conference has been convened for the **presentation of the volume “The EU Succession Regulation: a Commentary”**, edited by Alfonso-Luís Calvo Caravaca (University “Carlos III” of Madrid), Angelo Davì (University of Rome “La Sapienza”) and Heinz-Peter Mansel (University of Cologne), published by Cambridge University Press, 2016. The volume is the product of a research project on “The Europeanization of Private International Law of Successions” financed through the European Commission’s Civil Justice Programme.

Here is the programme (available as .pdf):

Welcome addresses: *Prof. Enrico del Prato* (Director, Department of Legal Sciences, University “La Sapienza”); *Prof. Paolo Ridola* (Dean, Faculty of Law, University “La Sapienza”); *Prof. Angelo Davì* (University “La Sapienza”).

First Session

Chair: *Prof. Ugo Villani* (University of Bari, President of SIDI-ISIL – Italian Society for International Law)

- *Prof. Javier Carrascosa González* (University of Murcia): La residenza abituale e la clausola di eccezione (Habitual Residence and Exception Clause);
- *Prof. Cristina Campiglio* (University of Pavia): La facoltà di scelta del diritto applicabile (Choice of the Applicable Law by the Testator);
- *Prof. Erik Jayme* (University of Heidelberg): Metodi classici e nuove norme di conflitto: il regolamento relativo alle successioni (Traditional Methods and New Conflict Rules: the EU Regulation Concerning

Succession);
- *Prof. Claudio Consolo* (University “La Sapienza”): Il coordinamento tra le giurisdizioni (Coordination between Jurisdictions).

Second Session

Chair: *Prof. Sergio Maria Carbone* (University of Genova)

- *Prof. Peter Kindler* (University of Munich): I patti successori (Agreements as to Succession);
- Round Table: The European Certificate of Succession
  Introduction: *Prof. Claudio Consolo* (University “La Sapienza”);
  Participants: *Dr. Ana Fernández Tresguerres* (Notary in Madrid); *Dr. Paolo Pasqualis* (Notary in Portogruaro); *Dr. Fabian Wall* (Notary in Ludwigshafen).

Concluding remarks: *Prof. Sergio Maria Carbone* (University of Genova).

(Many thanks to Prof. Fabrizio Marongiu Buonaiuti, University of Macerata, for the tip-off)