

A Round-Up of Articles Recently Published

Conflicts scholars have been busy since my last round-up of published articles in February, so the time seems ripe for another list of potential material to add to your reading pile. The usual caveats apply: the list is limited to articles published in *English*, and even then is almost certainly not comprehensive. If you know of any articles, reviews or casenotes published in 2008 not included in either this list or the previous one, then **let me know**.

- M. Danov, '**Awarding exemplary (or punitive) antitrust damages in EC competition cases with an international element - the Rome II Regulation and the Commission's White Paper on Damages**' (2008) 29 *European Competition Law Review* 430 - 436.

Discusses the importance of choosing the most appropriate EU jurisdiction to bring private proceedings to enforce competition law and to claim punitive or exemplary damages in jurisdictions where those remedies are available. Considers the absence of proposals for procedural harmonisation in the Commission White Paper on Damages actions for breach of the EC antitrust rules. Examines whether Regulation 864/2007 (Rome II) will require national courts which ordinarily do not award exemplary damages for breach of competition law to change their practice when it comes into force.

- C. Joerges, '**Integration through de-legalisation?**' (2008) 33 *European Law Review* 291 - 312. Abstract:

*Discusses theories of governance and law with reference to changes in the forms of European governance, including the European committee system, the principle of mutual recognition, and the open method of coordination. Asks whether the rule of law is challenged by the change of governance proclaimed by the Commission's White Paper on European Governance in 2001. Suggests a shift towards a **conflict of laws** approach in the conceptualisation of European law and governance.*

- A. Scott, '**Reunion Revised?**' (2008) *Lloyd's Maritime and Commercial*

Law Quarterly 113 - 118. Abstract:

Discusses the European Court of Justice ruling in Freeport Plc v Arnoldsson (C-98/06) on the national court's jurisdiction to hear connected claims against foreign domiciliaries together with the main action against a domiciled defendant under Regulation 44/2001 (Judgments Regulation) art.6(1). Considers whether claims against a parent company and its subsidiary were connected even if the two claims had different legal bases. Examines whether the legal basis of each claim was relevant to jurisdiction under the ruling in Reunion Europeenne SA v Spliethoff's Bevrachtungskantoor BV (C-51/97). Looks at the possibility of abusive claims brought solely to found jurisdiction for connected claims.

- A. Rushworth, '**Assertion of ownership by a foreign state over cultural objects removed from its jurisdiction**' (2008) *Lloyd's Maritime and Commercial Law Quarterly* 123 - 129.

Discusses the Queen's Bench Division judgment in Iran v Barakat Galleries Ltd on preliminary issues in an action to recover antiquities taken without permission from Iran, examining whether the court had jurisdiction to enforce foreign law by returning property to a foreign sovereign.

- A. Briggs, '**Review: Brussels I Regulation (2007), edited by Ulrich Magnus and Peter Mankowski**' (2008) *Lloyd's Maritime and Commercial Law Quarterly* 244 - 246.
- J. Davies, '**Breach of intellectual property warranties and jurisdiction**' (2008) 19 *Entertainment Law Review* 111 - 113. Abstract:

Comments on the Chancery Division judgment in Crucial Music Corp (Formerly Onemusic Corp) v Klondyke Management AG (Formerly Point Classics AG) on whether to set aside service out of the jurisdiction in a dispute about warranties in a copyright licensing agreement for music. Considers the place of performance and the place where damage was sustained within the meaning of the Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1988 art.5.

- A. Staudinger, '**From international conventions to the Treaty of**

Amsterdam and beyond: what has changed in judicial cooperation in civil matters? (2007) *European Legal Forum* 257 – 265. Abstract:

Discusses the shift from treaties and directives towards secondary EC law in the fields of European civil procedure law and conflict of law rules. Considers the scope of the allocation of competence under the EC Treaty arts 61(c) and 65, the absence of unified conflict of law rules within the inner market and the decreasing national competence and external competence of the EU Member States. Examines advantages and disadvantages of the shift from treaties and directives towards regulations, including in relation to legal consistency in the inner market, reducing sources of law, review and modernisation of regulations, the extent of conformity to a coherent system, and proceedings for a preliminary ruling.

- P. Hay, **'The development of the public policy barrier to judgment recognition within the European Community'** (2007) *European Legal Forum* 289 – 294. Abstract:

Discusses the extent to which national public policy concerns present an obstacle to the harmonisation of areas of substantive law, focusing on the role of public policy in trans-border litigation, in particular in relation to judgment recognition in the EU. Reviews traditional defences to judgment recognition, the defences in Regulation 44/2001 art.34 relating to violation of procedural due process or national public policy, and English judgments awarding or recognising punitive damages or contingent fees. Comments on calls for the public policy exception to be abandoned.

- S. Calabresi-Scholz, **'Brussels I Regulation Article 5(2): the concept of "matters relating to maintenance" – autonomous interpretation'** (2007) *European Legal Forum* 294 – 295. Abstract:

Comments on the German Federal Supreme Court ruling in Bundesgerichtshof (XII ZR 146/05) on whether the German courts had jurisdiction to hear a claim by a German domiciled divorced spouse for compensation from her former husband, who had transferred his domicile from Germany to France, for the disadvantages she suffered as a result of the limited real income splitting under German tax law. Considers whether the action was a matter relating to

maintenance within the meaning of Regulation 44/2001 art.5(2).

- T. Simons, '**Lugano Convention Article 21: lis alibi pendens - priority**' (2007) *European Legal Forum* 296 – 297. Abstract:

Comments on the Swiss Federal Supreme Court judgment in Bundesgericht (4A 143/2007) on whether an application to stay Swiss proceedings, under the Lugano Convention art.21, on the basis that the defendants had lodged a negative declaratory action in the Italian courts prior to the commencement of the Swiss proceedings, should be refused on the basis that the defendants' comportment had been fraudulent.

- L. Osona, '**Brussels I Regulation Article 33(2), Article 1(2)(d): contract for the supply of services - arbitration clause**' (2007) *European Legal Forum* 297 – 298. Abstract:

Reviews the Dusseldorf Court of Appeal ruling in Oberlandesgericht (Dusseldorf) (I 3 W 13/07) on whether an order of a Spanish court denying jurisdiction over a dispute on the basis that the agreement between the parties contained an arbitration clause in favour of an arbitration court in Barcelona should be recognised by the German courts.

- S. Magniez, '**Brussels II Regulation Article 2(1)(a), (2) and (6): jurisdiction over matrimonial matters - last habitual residence of the spouses**' *European Legal Forum* 301 – 302. Abstract:

Comments on a Luxembourg Court of Appeal ruling dated June 6, 2007 on whether the Luxembourg courts had jurisdiction under Regulation 1347/2000 to hear divorce proceedings brought by the ambassador of Luxembourg to Greece where the spouses had been resident in Greece and where the husband had returned to Luxembourg and the wife had moved to Germany. Considers whether the husband had established a habitual residence in Greece.

- C. Wadlow, '**Bugs, spies and paparazzi: jurisdiction over actions for breach of confidence in private international law**' (2008) 30 *European Intellectual Property Review* 269 – 279. Abstract:

This, the first of two connected articles, discusses the allocation of jurisdiction for breach of confidence actions, focusing on trade secrets. Reviews cases under common law, the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1968 and Regulation 44/2001.

- G. Ward, '**Protection of the right to a fair trial and civil jurisdiction: the institutional legitimacy in permitting delay**' (2008) *Juridical Review* 15 – 31. Abstract:

Examines the operation of the right for proceedings to be heard within reasonable time, provided by the European Convention on Human Rights 1950 art.6, in the context of civil jurisdiction, with reference to case law on the compatibility of the reasonable time requirement with: (1) the lis pendens system of the Brussels civil jurisdiction regime; and (2) the forum non conveniens doctrine.

- S. Kingston & C. Burrows, '**Europe and beyond**' (2008) 76 *Family Law Journal* 5 – 7. Abstract:

This, the second of a two-part article on the approach in different countries towards jurisdiction in family proceedings, considers the application of Regulation 1347/2000 (Brussels II) through case law of the European Court of Justice and domestic courts of Member States. Discusses the jurisdictional rules followed by non-EU countries, giving information on the jurisdiction, domicile, residence and matrimonial property provisions in Australia, Switzerland, Denmark, California, and New York.

- Y. Amin & A. Rook, '**Capacity to marry and marriages abroad**' (2008) 152 *Solicitors Journal* 8 – 10. Abstract:

Examines the Court of Appeal ruling in Westminster City Council v IC on whether: (1) the marriage of a British man with severe learning disabilities conducted over the telephone to a woman in Bangladesh, which was valid according to Sharia law was recognised as a valid marriage according to English law, where it was accepted by the parties that the man lacked the capacity to marry in accordance with English law; (2) the court's inherent jurisdiction was usurped by the Mental Capacity Act 2005; and (3) the court

could prevent the man leaving the jurisdiction to travel to Bangladesh.

- W. Shi, '**Review: Private International Law and the Internet (2007) by Dan Jerker B. Svantesson**' (2008) 13 *Communications Law* 64 – 65.
- C. Knight, '**Of coups and compensation claims: Mbasogo reassessed**' (2008) 19 *King's Law Journal* 176 – 182. Abstract:

Comments on Adrian Briggs's analysis of the Court of Appeal decision in Mbasogo v Logo Ltd (No.1), on the justiciability of Equatorial Guinea's claim for compensation against the participants of an attempted coup, which appeared in the Law Quarterly Review (2007, 123(Apr), 182-186). Evaluates Briggs's assessment of the Court's application of the rule that the English courts lack jurisdiction to hear an action for the enforcement of a public law brought by a foreign state. Considers how this rule was applied in the Court of Appeal decision in Iran v Barakat Galleries Ltd where the state party attempted to enforce Iranian law.

- C. Bjerre & S. Rocks, '**A transactional approach to the Hague Securities Convention**' (2008) 3 *Capital Markets Law Journal* 109 – 125. Abstract:

Examines the scope and effect of the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary (the Hague Securities Convention). Reviews the background to the Convention, its core agreement based mechanism, including the substantive issues for which the Convention prescribes applicable law, key definitions, the Convention's scope, the main ways that parties can draft agreements to achieve the Convention's effect and the "Qualifying Office" requirement, and the Convention's impact on agreements which do not fully use the Convention's core agreement based mechanism, including the fall back rules and pre-Convention agreements.

- B. Ubertazzi, '**The law applicable in Italy to the capacity of natural persons in relation to trusts**' (2008) 14 *Trusts & Trustees* 111 – 119. Abstract:

Examines Italian law on the capacity of natural persons in relation to trusts. Reviews the substantive law categories of capacity under Italian private

international law and the four rules on the law applicable to capacity related to international trade of natural persons. Discusses Italian law applicable to the capacity of the settlor, trustee, protector and beneficiary and to the capacity to choose the governing law of the trust.

- I. Thoma, '**Applicable law to indirectly held securities: a non-“trivial pursuit”**' (2008) 23 *Butterworths Journal of International Banking & Financial Law* 190 - 192. Abstract:

Discusses conflict of laws issues arising in connection with indirectly held securities. Considers difficulties in the application of the lex cartae sitae rule. Examines the respective approaches to conflict of laws of the EC law of the place of the relevant intermediary (PRIMA), the free choice of applicable law under the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary and the draft UNIDROIT Convention on Intermediated Securities.

- D. Rosettenstein, '**Choice of law in international child support obligations: Hague or vague, and does it matter? - an American perspective**' (2008) 22 *International Journal of Law, Policy and the Family* 122 - 134. Abstract:

Discusses, from a US perspective, the choice of law rules under the draft Convention on the International Recovery of Child Support and other Forms of Family Maintenance. Considers the significance and value of these rules, and compares them to the regime applicable in US child support proceedings.

- S. James, '**Rome I: Shall we Dance?**' (2008) 2 *Law & Financial Markets Review* 113 - 122. Abstract:

Discusses whether the UK should opt into the Draft Regulation on the law applicable to contractual obligations (Rome I), comparing Rome I with the Convention on the Law Applicable to Contractual Obligations 1980 (Rome Convention), including the provisions on: (1) party autonomy; (2) applicable law in the absence of express choice; (3) overriding laws; (4) insurance contracts; (5) consumer contracts; (6) contracts of carriage; and (7) assignment. Illustrates the operation of the Rome I Regulation with flowcharts, and presents

text from the Regulation in boxes. Notes how its applicable law clauses differ from those of Regulation 864/2007 (Rome II Regulation).

- L. Enneking, '**The common denominator of the Trafigura case, foreign direct liability cases and the Rome II Regulation: an essay on the consequences of private international law for the feasibility of regulating multinational corporations through tort law.**' (2008) 16 *European Review of Private Law* 283 – 312. Abstract:

Identifies a trend towards claims that parent companies should be liable in their home country for damage caused by their subsidiaries abroad. Cites the claim issued in 2006 in the UK against Trafigura Beheer BV for environmental damage caused in the Ivory Coast as an example of this type of claim. Appraises the adequacy of regulation of international corporate activities and considers whether tort law could fill gaps in the regulatory framework. Examines the background to and provisions of Regulation 864/2007 (Rome II) and the impact it could have on tortious liability in this field.

- A. Mills, '**Arbitral jurisdiction and the mischievous presumption of identity of foreign law**' (2008) 67 *Cambridge Law Journal* 25 – 27. Abstract:

*Examines the Commercial Court judgment in *Tamil Nadu Electricity Board v ST-CMS Electric Co Private Ltd* on whether a dispute over the pricing arrangements under an electricity supply contract between two Indian parties, which involved elements to be determined by Indian regulatory authorities, fell outside the scope of an arbitration agreement governed by English law. Considers the extent and validity of the supposed presumption of English law that, if the content of foreign law is not proved satisfactorily, the equivalent English law rule will apply.*

- R. Bailey-Harris, '**Jurisdiction: Brussels II revised**' (2008) 38 *Family Law* 312 – 314. Abstract:

*Reports on the European Court of Justice decision in *Sundelind Lopez v Lopez Lizazo* on whether the Swedish or French court had jurisdiction in a divorce petition where the respondent was a Swedish national but was habitually*

resident in France. Comments on Regulation 2201/2003 arts 3, 6 and 7 and whether a court of a member State has exclusive jurisdiction where the respondent is neither habitually resident in, nor a national of, a Member State.

- D. Eames, '**The new Hague Maintenance Convention**' (2008) 38 *Family Law* 347 – 350. Abstract:

Discusses the Convention on the International Recovery of Child Support and other Forms of Family Maintenance 2007. Considers: (1) the scope of the Convention and provisions therein in relation to recognition and enforcement of judgments, including the grounds upon which recognition can be refused, and the definition of a maintenance arrangement; (2) the Protocol on applicable law; and (3) the EU draft Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

- M. Matousekova, '**Private international law answers to the insolvency of cross border groups: comparative analysis of French and English case law**' (2008) *International Business Law Journal* 141 – 163. Abstract:

Compares the approaches of French and UK courts to the conflict of laws issues arising from the insolvency of cross border groups of companies, particularly whether to adopt different strategies towards each entity in a group. Reviews the relevant provisions of French domestic law, the UK statutory regime before and after 2006, and case law on the policy of each jurisdiction towards application of the conflict of laws rules in Regulation 1346/2000. Considers the extent to which French courts have applied the principle of automatic recognition to the UK's centralisation of group interests.

- Y. Farah, '**Allocation of jurisdiction and the internet in EU law**' (2008) 33 *European Law Review* 257 – 270. Abstract:

Assesses the scope and interpretation of Regulation 44/2001 Art.15(1)(c) in its application to electronic consumer contracts. Outlines policy considerations and whether they are achieved by Regulation 44/2001. Questions whether traditional rules determining jurisdiction are adequate or whether internet-

specific rules are required. Discusses the concept of a consumer contract, the jurisdictional risks for website operators, the meaning of the words “directs such activities” in Art.15(1)(c), the principle of good faith, and fairness. Compares the EU and the US approach.

- S. Voigt, ‘**Are international merchants stupid? Their choice of law sheds doubt on the legal origin theory**’ (2008) 5 *Journal of Empirical Legal Studies* 1 – 20. Abstract:

Evaluates the legal origin hypothesis, the commonly held view in economic literature that common law systems are superior to civil law systems, by examining the choice of law of international trade transactions in cases referred to the International Court of Arbitration. Presents data in tables comparing the expected proportion of contracts choosing the law of a common law jurisdiction with the actual findings. Considers the effects and implications of the legal origin hypothesis.

- I. Fletcher, ‘**Alfa Telecom Turkey Ltd v Cukurova Finance International Ltd**’ (2008) 21 *Insolvency Intelligence* 61 – 64. Abstract:

Comments on the British Virgin Islands High Court decision in Alfa Telecom Turkey Ltd v Cukurova Finance International Ltd on the role of expert evidence in the proof of foreign law, and the meaning of the words “to appropriate the collateral” in the Financial Collateral Arrangements (No.2) Regulations 2003 reg.17, implementing Directive 2002/47. Notes the novelty of a Commonwealth court having to interpret an English statutory provision not previously considered by the English courts, and the reference made by the court to the Directive as an aid to interpretation.

- P. Shine, ‘**Establishing jurisdiction in commercial disputes: arbitral autonomy and the principle of kompetenz-kompetenz**’ (2008) *Journal of Business Law* 202 – 225. Abstract:

Examines the balance of power between the courts and arbitral tribunals on questions of jurisdiction. Analyses the judgments in Fiona Trust & Holding Corp v Privalov and Albon (t/a N A Carriage Co) v Naza Motor Trading SDN BHD on the extent to which a challenge to the validity of an agreement containing an

arbitration clause affects the validity of the clause itself. Considers the application of the principles set out in those cases in other cases. Notes the approach of other countries which have also adopted the UNCITRAL Model Law for International Commercial Arbitration 1985 as the basis for their arbitration legislation.