Symeonides on Issue by Issue Analysis and Depeçage

Dean Symeon C. Symeonides (Willamette University – College of Law) has posted Issue-by-Issue Analysis and Dépeçage in Choice of Law: Cause and Effect on SSRN.

This Article discusses two interrelated features of modern American choice-of-law approaches: (1) issue-by-issue analysis, and (2) dépeçage.

Issue-by-issue analysis stands for the proposition that, in choosing the law to be applied to a multistate case, a court should focus on the particular issue(s) for which the laws of the involved states would produce a different outcome, rather than on the case as a whole. Logic suggests and experience confirms that this mode of analysis is more likely to produce individualized, nuanced, and thus rational resolutions of conflicts problems than the traditional mode of wholesale choices.

Dépeçage is the potential and occasional result of issue-by-issue analysis. It occurs when the court applies the laws of different states to different issues in the same cause of action. Although this phenomenon appears anomalous to the uninitiated, in reality it is not as problematic as it appears. For example, although the majority of American courts routinely use issue-by-issue analysis, this use produces surprisingly few instances of actual dépeçage, and, in most of those cases, dépeçage is innocuous. In the remaining few cases, dépeçage can be problematic, but courts employing modern approaches have all the flexibility to avoid it — and they do.

The Article concludes that the low — and easily avoidable — risk of an occasionally problematic dépeçage is not a good reason to eschew issue-by-issue analysis in light of the clear and considerable advantages of this analysis in producing apt choice-of-law solutions.

The article in forthcoming in the *University of Toledo Law Review*.

Draft Commentary of the Draft Hague Principles on Contracts

The Hague Conference on Private International Law has released a Draft Commentary of the Draft Hague Principles on Choice of Law in International Contracts.

The Commentary is written article by article. Various members of the Working Group have had primary drafting responsibility for certain Articles. They are as follows:

Preamble	Jan Neels
Article 1	Yuko Nishitani and Paco Garcimartín
Article 2	Lauro Gama and Geneviève Saumier
Article 3	Lauro Gama and Geneviève Saumier
Article 4	Dieter Martiny and Jan Neels
Article 5	Jan Neels and Dieter Martiny
Article 6	Marielle Koppenol-Laforce and Thomas Kadner Graziano
Article 7	Bénédicte Fauvarque-Cosson and Ivan Zykin
Article 8	Yuko Nishitani and Dieter Martiny
Article 9	Paco Garcimartín and Richard Frimpong Oppong
Article 10	Neil Cohen and Daniel Girsberger

Article 11	Andrew Dickinson and Geneviève Saumier
Article 12	Yuko Nishitani and Paco Garcimartín

H/T: Brooke Marshall

ECJ Rules on Freedom of Member States to Consider Statutes Implementing EU Directives Mandatory Rules

On 17 October 2013, the Court of Justice European Union delivered its judgment in United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare (Case C-184/12).

The issue before the Court was again whether national laws implementing the EU Commercial Agency Directive could be found to be mandatory rules in the meaning of the 1980 Rome Convention (and indeed the Rome I Regulation).

The difference with the *Ingmar* case was that the parties had not chosen the law of a third state to govern their transaction, but rather the law of a Member state. However, the forum had chosen to go beyond the protection required by the Directive. The issue was therefore whether the choice of a national law which afforded the minimum protection required by the Directive could be overriden by a national statute which had gone farther than what the Directive required.

The Court held that it was possible.

> *49 Thus, to give full effect to the principle of the freedom of contract of the*

parties to a contract, which is the cornerstone of the Rome Convention, reiterated in the Rome I Regulation, it must be ensured that the choice freely made by the parties as regards the law applicable to their contractual relationship is respected in accordance with Article 3(1) of the Rome Convention, so that the plea relating to the existence of a 'mandatory rule' within the meaning of the legislation of the Member State concerned, as referred to in Article 7(2) of that convention, must be interpreted strictly.

50 It is thus for the national court, in the course of its assessment of whether the national law which it proposes to substitute for that expressly chosen by the parties to the contract is a 'mandatory rule', to take account not only of the exact terms of that law, but also of its general structure and of all the circumstances in which that law was adopted in order to determine whether it is mandatory in nature in so far as it appears that the legislature adopted it in order to protect an interest judged to be essential by the Member State concerned. As the Commission pointed out, such a case might be one where the transposition in the Member State of the forum, by extending the scope of a directive or by choosing to make wider use of the discretion afforded by that directive, offers greater protection to commercial agents by virtue of the particular interest which the Member State pays to that category of nationals.

51 However, in the course of that assessment and in order not to compromise either the harmonising effect intended by Directive 86/653 or the uniform application of the Rome Convention at European Union level, account must be taken of the fact that, unlike the contract at issue in the case giving rise to the judgment in Ingmar, in which the law which was rejected was the law of a third country, in the case in the main proceedings, the law which was to be rejected in favour of the law of the forum was that of another Member State which, according to all those intervening and in the opinion of the referring court, had correctly transposed Directive 86/653.

Ruling:

Articles 3 and 7(2) of the Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 must be interpreted as meaning that the law of a Member State of the European Union which meets the minimum protection requirements laid down by Council Directive

86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents and which has been chosen by the parties to a commercial agency contract may be rejected by the court of another Member State before which the case has been brought in favour of the law of the forum, owing to the mandatory nature, in the legal order of that Member State, of the rules governing the situation of self-employed commercial agents, only if the court before which the case has been brought finds, on the basis of a detailed assessment, that, in the course of that transposition, the legislature of the State of the forum held it to be crucial, in the legal order concerned, to grant the commercial agent protection going beyond that provided for by that directive, taking account in that regard of the nature and of the objective of such mandatory provisions.

Hague Conference Publishes Proceedings of 20th Session

The Permanent Bureau of the Hague Conference on Private International Law has announced that the volume of the *Proceedings of the Twentieth Session*, Tome II, *Judgments* has recently been published.

This book can be ordered online through Intersentia Publishing.

Forum Shopping and Post-Award

Judgments

Such is the title of a recent article co-authored by L. Silberman (Martin Lipton Professor of Law, New York University School of Law) and M. Scherer (School of International Arbitration, Queen Mary, University of London; Wilmer Cutler Pickering Hale and Dorr LLP, m.scherer@qmul.ac.uk), published in *Forum Shopping in the International Commercial Arbitration Context*, ed. F. Ferrari, Sellier, 2013, pp.313-345. The abstract reads as follows:

> *Forum shopping has become increasingly common in the context of post-award judgments. Post-award judgments can take several forms, depending on whether the award is set aside, confirmed, recognized or enforced. Creative parties may forum shop for a set-aside, confirmation, recognition or enforcement judgment and seek to rely on its effects in subsequent proceedings relating to the same award in another country. The courts in that other country will have to assess the effects they give to the foreign post-award judgment, including under existing doctrines of res judicata, issue/claim estoppel. The paper examines how courts should respond to such forum shopping attempts. It assesses whether a decision to set aside, confirm, recognize or enforce an arbitral award might affect subsequent attempts to recognize or enforce that award elsewhere.*

The paper is also available on SSRN (click here).

Commission's Proposal for Amending the Small Claims Regulation

On 19 November 2013, the European Commission issued its proposal for a Regulation amending Regulation (EC) No 861/2007 of the European Parliament and the Council of 11 July 2007 establishing a European Small Claims Procedure

and Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure.

In a press release, the Commission insisted on the following amendments:

- Raise the threshold for filing a 'small claim' from €2 000 up to €10 000. This will notably benefit SMEs, making the procedure applicable to 50% of business claims (up from 20% today). Consumers also stand to benefit since about one fifth of their claims exceed €2 000.
- Widen the definition of what is a 'cross-border' case in order to help more consumers and businesses resolve their cross-border disputes.
- Cap court fees: Under the existing small claims procedure court fees can be disproportionate, in some cases even exceeding the value of the claim itself. Today's proposal will ensure that court fees do not exceed 10% of the value of the claim, and the minimum fee cannot be higher than €35. It will also require that court fees can be paid online by credit card.
- Cut paperwork and travel costs: The new rules will enable claimants to launch the procedure online: email will become a legally valid means of communication between the parties involved, and teleconferencing or videoconferencing will become natural tools in oral hearings, wherever these are necessary.

H/T: Maarja Torga

Vacancy at the University of Zurich

Professor Tanja Domej from the Faculty of Law at the University of Zurich is seeking to fill the position of a Research and Teaching Associate (PhD candidate). Candidates should have an excellent academic track record and should be interested in the chair's main research areas (civil procedure, private law, private international law and comparative law). A thorough command of German is required. The successful candidate will have excellent knowledge of Swiss civil

procedure or will at least be willing and able to acquire such knowledge quickly.

For more information click here.

Unfair Terms in Low-Cost Airline Contracts: A Spanish Court Takes a Bold Step

Many thanks to Cristian Oró Martínez, Senior Research Fellow at the MPI Luxembourg.

The Commercial Court (*Juzgado de lo Mercantil*) nº 5 of Madrid delivered on 30 September 2013 a judgment in an action brought by the Spanish consumer association *Organización de Consumidores y Usuarios* (OCU) against the Irish airline Ryanair. OCU asked the Commercial Court to declare that 20 of the general terms and conditions used by the airline are unfair, and hence should not be binding on consumers, as provided by the Spanish Law on the protection of consumers and users (which transposed Directive 93/13, on unfair terms in consumer contracts). OCU also sought an injunction to prevent Ryanair from continuing to use these allegedly unfair terms and conditions.

In its judgment, the Commercial Court held that 8 of the general terms issued by Ryanair are unfair, and hence void. These terms deal with a variety of issues relating to the contract of carriage concluded between the airline and its customers: (i) the choice of Irish law and the submission to Irish courts (Art. 2.4); (ii) the limitation of accepted travel documents (Art. 3.1.1 and annex on travel documentation); (iii) the 40 € fee for the re-issue of a boarding card at the airport (annex with table of optional fees); (iv) the possibility for the airline to refuse to carry passengers or their baggage (Art. 7.1.1); (v) the prohibition to carry in the checked baggage certain items, including money, jewels, cameras, computers, medicines, glasses, mobile phones, tobacco or passports (Arts. 8.3.2 and 8.3.3); (vi) the possibility for the airline to charge a storage fee for luggage not collected

within a reasonable time (Art. 8.8.1); (vii) the possibility for the company to change the flight timing without having to justify it, and without giving the passenger the option to terminate the contract (Arts. 9.1.1 and 9.1.2); and (viii) the prohibition to pay in cash any fee or tax charged at the airport (Art. 18). According to the judgment, Ryanair should refrain from using these terms in future contracts.

To date, all these clauses continue to appear on the airline's website. The judgment of the Commercial Court of Madrid can of course be appealed – and it is highly likely this has been the case. Its effective impact, therefore, remains to be seen. However, it may constitute a first step for the protection of consumers against alleged abuses by low-cost airlines.

Nevertheless, from a PIL perspective, the question which arises is whether the Spanish court was right in assessing the compatibility of the contract with Spanish consumer legislation. Ryanair claimed that the choice of Irish legislation was valid under Art. 5(2) of the Rome I Regulation, which allows parties to choose, among others, the law of the country where the carrier has its habitual residence. The court fails to address this allegation, and simply states that the choice of court and choice of law clause is invalid under Art. 90.3 of the Law on the protection of consumers and users. The reason would be that it causes a significant imbalance in the parties' rights and obligations and hinders the consumer's right to take legal action, insofar as it forces this weak party to litigate in a foreign country and under a foreign law, thus increasing the costs of the suit.

The Commercial Court bases its reasoning not only on the Spanish Law on consumer protection, but also on the provisions of Directive 93/13 and on some judgments in which the ECJ has interpreted it. It is arguable that, under Art. 23 of the Rome I Regulation, the Directive on unfair terms could trump the conflictual solution of Art. 5(2) of the Rome I Regulation. However, even in such scenario, the Commercial Court should have justified the reason why the Spanish transposition of the Directive on unfair terms should prevail over the Irish transposition. The problem stems from the Spanish Law on the protection of consumers and users, which purports to apply when the contract is closely connected with the territory of a State party to the EEA, *irrespective of the law chosen by the parties* (Art. 67.1). It is arguable that this provision should be read in light of Art. 6(2) of Directive 93/13, which states that "Member States shall

take the necessary measures to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law *of a non-Member country*". Thus, the Spanish legislation should only prevail over the parties' choice of a third-State law, but not over the choice of the law of a Member State. Indeed, in the latter case the protection granted by the Directive is in principle guaranteed – at least as long as the ECJ does not declare that that particular Member State failed to correctly transpose it.

Therefore, the assessment of all the allegedly unfair terms should have probably been carried out under Irish law. The ensuing question is: would they be held unfair under Irish law? Or even: should they be considered unfair under the Directive itself? If so, the ECJ may end up having its say in the issue. We shall keep an eye on future developments – just as low-cost airlines will surely also do.

German Federal Court of Justice refers question on lis-pendens-rule to ECJ

By Jonas Steinle, LL.M.

Jonas Steinle is a doctoral student at the chair of Prof. Dr. Matthias Weller, Mag.rer.publ. at the EBS University for Economics and Law in Wiesbaden and a scholarship holder at the Max Planck Institute for Intellectual Property and Competition Law in Munich.

On 18 September 2013 the German Federal Court of Justice (*Bundesgerichtshof*) referred the question for a preliminary ruling to the European Court of Justice (V ZB 163/12) as to whether the *lis pendens*-rule in Art. 27 para. 1 Brussels I Regulation does apply even if the court second seised has exclusive jurisdiction under Art. 22 of the Brussels I Regulation.

The facts:

The claimant seeks to enforce a land charge (*Grundschuld*) against the defendant's real estate, which is located in Hamburg. He therefore brought an action in the regional court (*Landgericht*) of Hamburg. However, before this claim in Hamburg was launched, the defendant had already brought proceedings against the claimant in a court in Milan, seeking a negative declaratory relief that the land charge is invalid and that it therefore must not be enforced. As a result of this, two proceedings were pending simultaneously in Hamburg and in Milan.

The landlord and defendant in the Hamburg-based proceedings accordingly argued that the court in Hamburg must stay its proceedings according to Art. 27 para. 1 Brussels I Regulation until the court in Milan (which had been seised first) has ruled on its own jurisdiction. This application for suspension was rejected in all instances and finally was referred for final appeal (*Rechtsbeschwerde*) to the Federal Court of Justice.

The Federal Court of Justice takes the view that the regional court in Hamburg has exclusive jurisdiction under Art. 22 Brussels I Regulation to hear the case. However, as the regional court in Hamburg had been seised second, the Federal Court had doubts as to whether the regional court in Hamburg must stay its proceedings under Art. 27 para. 1 Brussels I Regulation even if it has exclusive jurisdiction under Art. 22 Brussels I Regulation.

Comments:

The manoeuvre which was performed by the defendant in this case is not new at all. The defendant launched what is called in international procedural law an 'Italian torpedo'. However, the circumstances in which this torpedo was used are new and therefore have set a precedent.

The 'Italian torpedo' is a litigation tactic whereby the presumptive defendant of a claim anticipates the proceedings against him by bringing an action against the presumptive claimant on his part. Such claim usually consists of an application for a negative declaratory relief in a jurisdiction other than the one where the presumptive defendant is going to be sued. The objective in doing so is simply to delay the proceedings in the venue where the proceedings in the end will take place, since the court at that place which has been seised second must stay its proceedings according to Art. 27 para. 1 Brussels I Regulation until the court first seised has ruled on its jurisdiction. Usually, the courts in the jurisdiction where

the Torpedo-claim is brought are known for being somewhat slow on the draw.

In the case at hand, there was hardly any connection to the courts of Italy. The enforcement of the land charge is a purely domestic claim under German law and the reason why the negative declaratory relief was sought in the courts of Italy in particular seems more like a flimsy excuse than a real substantiation of that claim. Accordingly, the appeal court (*Beschwerdegericht*) in Hamburg rejected to stay the proceedings because it alleged that the defendant in the Hamburg-based proceedings hat brought a vexatious claim in the courts of Milan, solely to delay the proceedings in Hamburg. The situation at hand can therefore very well be classified as an example of an 'Italian torpedo'-claim.

In the past, the tactic of the 'Italian torpedo' often was used to thwart a jurisdiction agreement according to Art. 23 Brussels I Regulation. This was due to the *Gasser* case (C-116/02) in which the ECJ had ruled that even where the court second seised had exclusive jurisdiction according to a jurisdiction agreement, it must nevertheless stay the proceedings until the court first seised has decided on its jurisdiction. This ruling had opened up a debate about the *lis-pendens*-rule which finally induced the European legislator to introduce an exception to the *lis-pendens*-rule for jurisdiction agreements under Art. 31 para. 2 of the revised version of the Brussels I Regulation (Regulation (EU) No 1215/2012) which for the most part comes into force on 10 January 2015. The revision of the Brussels I Regulation will finally bring an end to the 'Italian torpedo' in connection with jurisdiction agreements.

The case at hand shows however, that the story of the 'Italian-torpedo' is not yet finished. Although this case is based on the same tactical considerations, the context is a slightly different one. It addresses an issue that had been left open by the ECJ in previous cases (C-351/89 – *Overseas Union Insurance*, para. 20 et seqq.; C-116/02 – *Gasser,* para. 44 *et seqq.*) and which has been subject to a controversial debate in legal literature (e.g. Weller in Hess/Pfeiffer/Schlosser, The Brussels I-Regulation (EC) No 44/2001, para. 403; see also the sources in para. 18 of the reference of the Federal Court of Justice).

It is conceivable that the ECJ will give precedence to the *lis-pendens*-rule yet another time and adopt the formal approach that it has been taking since the *Gasser*-case. The wording of Art. 27 para. 1 Brussels I Regulation does not provide for an exception in cases where the court second seised has exclusive

jurisdiction under Art. 22 Brussel I Regulation.

The key consideration that justifies the very formal approach towards situations of *lis pendens* by the Brussels I Regulation is to avoid the risk of irreconcilable judgments in the European judicial area. Since decisions from other Member States are recognized and enforced on a regular basis under the Brussels I Regulation, the situation of irreconcilable judgments must by any means be prevented by hindering parallel proceedings from the scratch.

However, in the case at hand there appears to be one crucial difference to this argument and that is Art. 35 para. 1 Brussels I Regulation. According to Art. 35 para. 1 Brussels I Regulation a decision must not be recognised if it conflicts with Art. 22 Brussels I Regulation which is exactly the case in the proceedings at hand. If the ECJ is going to give precedence yet another time to the *lis-pendens*-rule, the Court cannot rely anymore on its argument that the *lis-pendens*-rule must prevail for the sake of hindering the issuance and recognition of conflicting decisions.

In fact, for the situation in the present case, the court in Milan is obliged to decline jurisdiction according to Art. 25 Brussels I Regulation if the Federal Court of Justice is right in holding that its requirements are fulfilled and the court in Hamburg therefore is competent to hear the case under Art. 22 Brussels I Regulation. One can however see in the case at hand that courts sometimes do not immediately use the tool provided in Art. 25 Brussels I Regulation (also the court of first instance in Milan did not use it) and that one possibly can litigate on whether the requirements of Art. 25 Brussels I Regulation are fulfilled. This does not make things easier for the present case and it is to be awaited how the European Court of Justice will decide on the issue. Eventually a decision can be expected in the near future since the higher regional court (*Oberlandesgericht*) München had already referred exactly the same question to the ECJ already in February 2012 (OLG München, 16 February 2012 – 21 W 1098/11).

Territorial Laws in a Global Era

On November 22 and 23 the Research Project "The Architecture of Regulatory Competition" at the University of Helsinki will host a seminar on "Territorial Laws in a Global Era". The programme reads as follows:

Friday, 22 November 2013

- 8.45 – 9.15 Registration and Coffee
- 9.15 – 9.30 Opening
- 9.30 – 11.30 Session I
  Erin O'Hara O'Connor: Law markets in global commerce (Key note)
  Jan Smits: Law as a package: On the limits of choice
- 11.30 – 12.30 Lunch
- 12.30 – 14.30 Session II
  Giesela Rühl: Competition for contract laws: Fiction or reality? Dream or nightmare?
  Teemu Juutilainen: Competition theory for property law: From fragments to whole
- 14.30 – 15.00 Coffee
- 15.00 – 17.00 Session III
  Peter Cserne: National judicial styles: Do they persist and do they matter in a global law market?
  Katri Havu: No-one's law at the interface of EU rights and national remedies and procedure – insights
- 18.00 Seminar dinner at Spis (http://spis.fi/)

Saturday, 23 November 2013

- 9.00 – 11.00 Session IV
  Gralf-Peter Calliess: Transnational private law: Between uniform law, legal pluralism, and competition of jurisdictions
  Lécia Vicente: Bringing the essence of lex mercatoria back: Evolving business practices, networking of market agents and competition as sources of European company law
- 11.00 – 12.00 Lunch
- 12.00 – 14.00 Session V

Elaine Fahey: The EU as a direct and indirect rule-exporter and standard bearer: Between theory and practice
Emilia Korkea-aho: Implementation of territorial laws in a global era: An emerging arena for regulatory competition