Kono and Jurcys on International Jurisdiction over the Cloud

Toshiyuki Kono and Paulius Jurcys (Kyushu University) have posted International Jurisdiction over Copyright Infringements in the Cloud on SSRN.

> *The emergence of the Internet, and more recently cloud computing, has tremendous technological, economic, social as well as cultural effects. Such technological development certainly affects legal framework and calls for careful assessment whether, and, if so how, the existing legal principles and doctrines should be adjusted. Despite the fact that cloud-based technologies have swiftly coated almost every aspect of communication, the discussion regarding its legal implications has been very fragmentary.*
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> *This paper focuses on a rather specific aspect concerning the intersection of private international law and intellectual property rights in the cloud environment. Although the Internet is one of the most economically rewarding markets for the exploitation of the intellectual property, the ubiquity of the world wide web is also associated with a number of risks. One of the risks which should be considered by right holders and intermediaries operating in the digital environment concerns potential litigation over the exploitation of intellectual property rights before a court of a foreign state. In private international law terms, this risk is known as international jurisdiction: in disputes between the parties from different states or disputes involving foreign subject matter, which court should adjudicate the case? Under what conditions should a national court of one state exercise its jurisdiction and decide a multi-state dispute? National laws usually contain certain rules or principles which guide the courts in deciding whether the jurisdiction should be asserted or not (e.g., defendant's residence or commitment tortious acts in the forum state).*
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> *The exercise of jurisdiction in multi-state intellectual property disputes has been subject to great controversies. Even the most distinguished courts in various countries stumbled when dealing with intricate quandaries involving cross-border exploitation of intellectual property rights. The exercise of jurisdiction over multi-state disputes involving territorially limited intellectual property rights has become even more complex with the advancement of digital*

communication technologies. Some of the underlying difficulties are discussed in this chapter which starts with a short illustration how cloud computing affects the exploitation of intellectual property assets. This discussion is followed by a closer analysis of the main principles which are employed by the courts across the Atlantic in deciding when to assert jurisdiction over multi-state intellectual property disputes. The fourth section poses a more general question of whether the existing legal framework is apt for the disputes involving cloud-related controversies. Finally, the activities which have been conducted by a special Committee under the auspices of the International Law Association are discussed.

Symeonides on Choice of Law in American Courts in 2012

Dean Symeon C. Symeonides (Willamette University – College of Law) has posted Choice of Law in the American Courts in 2012: Twenty-Sixth Annual Survey on SSRN. It is, as usual, to be published in the *American Journal of Comparative Law* (Vol. 61, 2013). Here is the abstract:

This is the Twenty-Sixth Annual Survey of American Choice-of-Law Cases. It is intended as a service to fellow teachers and students of conflicts law, in the United States and abroad.

Of the 4,300 cases decided in 2012 by state and federal courts, this Survey reviews 1,225 appellate cases, focusing on those cases that may contribute something new to the development or understanding of conflicts law, particularly choice of law. Highlights include:

- *Numerous cases exemplifying the valiant efforts of state courts, and some lower federal courts, to protect consumers, employees, and other presumptively weak parties from the Supreme Court's ever-expanding interpretation of the Federal Arbitration Act;*

- *A few cases enforcing choice-of-law clauses unfavorable to their drafters, and many more cases involving deadly combinations of choice-of-law and choice-of-forum clauses;*
- *Several interesting products liability cases, and other tort conflicts, including maritime torts and workers' compensation claims by professional football players;*
- *The first appellate case interpreting the recent amendments of the anti-terrorism exception to the Foreign Sovereign Immunity Act (FSIA);*
- *The first cases holding unconstitutional the Defense of Marriage Act (DOMA);*
- *A Massachusetts case holding that an undissolved Vermont same-sex union was an impediment to a subsequent same-sex marriage in Massachusetts;*
- *An Arizona case holding that a Canadian same-sex marriage was against Arizona's public policy, but — unlike other cases — also holding that the trial court had jurisdiction to annul the marriage and divide the parties' property;*
- *The first case in decades upholding a foreign marriage by proxy;*
- *A case upholding, on First Amendment grounds, an injunction against Oklahoma's "Anti-Shari'a" Amendment; and*
- *A case refusing to recognize a Japanese divorce, custody, and child support judgment rendered in a bilateral proceeding because the husband did not receive notice of a subsequent guardianship proceeding.*

Cross-Border Road Accidents Claims (Monograph)

Angel Espiniella Menéndez, lecturer of Private International Law at the University of Oviedo, has just published the book "Las reclamaciones derivadas de accidentes de circulación por carretera transfronterizos" (Claims arising from

Cross Border Road Accidents), which is number 185 in the Collection “Cuadernos de la Fundación Mapfre”. Based on the legal theory of obligations and addressed to the practitioners involved in this kind of litigation, the book aims to provide a comprehensive overview of a hypothetical complaint. To this end the monograph is divided into three sections: cross-border claims of injured parties against those allegedly liable; cross-border claims of injured parties against insurers; and cross-border claims for reimbursement among compensation duty bearers. Thus, the book analyzes the cross-border litigation against drivers, owners of vehicles , manufacturers of vehicles, persons claimed to be liable for the acts of others (employers, masters or principals), transferors of the vehicles, carriers, etc., and it also deals with the cross-border intervention of insurance companies, cross-border claim representatives, national funds of guarantees and compensation bodies, National Insurers’ Bureaux, and their correspondents.

After a thorough investigation the author concludes that the rules of the Rome II Regulation are more appropriate than those of the Convention of 4 May 1971 on the Law Applicable to Traffic Accidents, even though the Regulation does not contain specific rules on the subject matter; therefore, he recommends the denonciation of the Convention. He also suggests that the insurer coverage be governed by the law of the State where the accident occurs, regardless of the law of the State where the vehicle is normally based; and accordingly he prompts the amendment of the Directive 2009/103, Article 14. To conclude the author proposes separate, specific rules for claims among the entities providing coverage, including Bureaux, compensation bodies, guarantee funds, insurers, representatives and their correspondents.

Download a free copy here.

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (1/2013)

Recently, the January/February issue of the German law journal "Praxis des Internationalen Privat- und Verfahrensrechts" (**IPRax)** was published.

- ***Heinz-Peter Mansel/Karsten Thorn/Rolf Wagner***: "European conflict of laws: Progressing process of codification– patchwork of uniform law"

The article gives an overview on the developments in Brussels in the judicial cooperation in civil and commercial matters from November 2011 until November 2012. It summarizes current projects and new instruments that are presently making their way through the EU legislative process. It also refers to the laws enacted on a national level in Germany which are a consequence of the new European instruments. Furthermore, the article shows areas of law where the EU has made use of its external competence. The article discusses both important decisions and pending cases before the ECJ touching the subject matter of the article. In addition, the present article turns to the current projects of the Hague Conference as well.

- ***Stefan Leible/Doris Leitner***: "Conflict of laws in the European Directive 2008/122/EG"

The following essay is about the conflict of laws in the European Directive 2008/122/EG on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts, being effective since 2/23/2008 and being transformed into German law since 1/17/2011, and its relevance for German law. After giving information about the regulation's history, scope and content, the authors make a detailed analysis on the directive's conflict of laws rule art. 12 par. 2 as well as its national transformation rule art. 46b EGBGB and demonstrate the differences to the former legal norms.

- ***Christoph Benicke***: "Haager Kinderschutzübereinkommen" – the

English abstract reads as follows:

The 1996 Hague Protection of Children Convention provides a modern legal instrument in the field of international child protection and overcomes the shortcomings of the 1961 Hague Protection of Minors Convention. International jurisdiction is primarily assigned to the authorities of the State of habitual residence of the child. In addition, a flexible consideration of the particularities of the case is made possible by the fact that the jurisdiction may be transferred to the authorities of a State with which the child has a close relationship e.g. based on nationality. The principle that the court applies its own law promotes rapid and effective procedures. Since the general jurisdiction lies with the authorities in the State of the habitual residence of the child, the law of the habitual residence of the child will be applied in most proceedings. This is consistent with the choice of law rule in Article 16, which establishes the applicable law outside the realm of protective measures. The Convention also includes a modern system for the recognition and enforcement of decisions from other Contracting States. The international jurisdiction of the authority which issued the decision can still be checked, but the recognizing State is bound in respect to the factual findings in the decision to be recognized. Once recognition and enforceability are certified, the foreign decision will be enforced under the same conditions as a national one. Difficult questions arise about the relationship between the Hague Child Protection Convention and the Brussels II regulation. Among Member States the Brussels II regulation displaces the Protection of Children Convention for the jurisdictional issues in most cases. The same is true for the recognition and enforcement of decisions from other Member States of the Brussels II regulation. On the other hand, the choice of law rules of the Protection of Children Convention apply in all procedures, even when the jurisdiction is based on the Brussels II regulation.

- ***Jan von Hein***: "Jurisdiction at the place of performance according to Art. 5 no. 1 Brussels I Regulation in the case of a gratuitous consultancy agreement"

The annotated judgment of the OLG Saarbrücken deals with the question whether a gratuitous consultancy agreement falls within the scope of Art. 5 no. 1 Brussels I Regulation. After establishing that the present decision concerns a contract and not a mere act of courtesy, it is discussed whether Art. 5 no. 1(b)

or Art. 5 no. 1(a) Brussels I Regulation is applicable to a gratuitous consultancy agreement. Subsequently, the reasons why the non-remuneration is the decisive factor for ruling out the application of Art. 5 no. 1(b) Brussels I Regulation are elaborated followed by some remarks concerning the determination of the place of performance of the obligation in question under Art. 5 no. 1(a) Brussels I Regulation. The possibility of establishing a concurring competence – a forum attractivitatis – of the court having special jurisdiction in contract for related tort claims e.g. resulting from product liability is analysed. The annotation concludes with final remarks on the revision of the Brussels I Regulation and the proposed changes concerning the jurisdiction at the place of performance.

- ***Markus Würdinger***: "Language and translation barriers in European service law – the tension between the granting of justice and the protection of defendants in the European area of justice"

The problem of languages implicates considerable obstacles in international legal relations. Regulation No 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (European Regulation on the service of documents) provides in Article 8, in which cases the addressee may refuse to accept the document to be served. This right exists if the document is not written in, or accompanied by a translation into a language which the addressee understands (1. lit. a) or the official language of the Member State addressed or, if there are several official languages in that Member State, the official language or one of the official languages of the place where service is to be effected (1. lit. b). The article analyses this statute on the basis of a judgment of the LG Bonn (District Court Bonn), formulates principles of interpretation and arrives at the conclusion that the language of correspondence has by right a great importance in commercial legal relations. Whoever engages here in a certain language and is able to communicate adequately in it, has in case of doubt not the right provided by Article 8 of the Regulation to refuse the acceptance of the document to be served.

- ***Christian Tietje***: "Investitionsschiedsgerichtsbarkeit im EU-Binnenmarkt" – the English abstract reads as follows:

More than 170 Bilateral Investment Treaties (BITs) exist between the EU Member States. In the last years several investment arbitrations were initiated by investors from EU Member States against other Member States. This has led to an intense legal and political discussion on intra-EU BITs with regard to their validity and enforceability as well as the effects of public international law on European Union Law in general. In this context, the EU Commission calls on the EU Member States to denounce the existing intra-EU BITs because of an alleged incompatibility with Union law. This contribution discusses and illustrates relevant legal issues of this debate based on a recent Decision of the Regional High Court of Frankfurt, Germany. The Court in its decision of 10 May 2012 intensively discussed the question of whether intra-EU-BITs are in violation of EU law and thus not applicable as a base for jurisdiction of an international tribunal. The Court convincingly rejects all arguments in this regard and declares intra-EU-BITs in full conformity with EU law.

- ***Johannes Weber***: "Actions against Company Directors from the Perspective of European Rules on Jurisdiction"

The interaction of European and International Company Law has until now been primarily viewed in the context of conflict of laws. The practice of national and European courts, however, indicates that issues of international jurisdiction are getting more and more important. Focusing on the Brussels I Regulation, this paper deals with jurisdiction on actions against company directors for breach of their duties. It argues that these actions fall within the scope of Art. 5 (1)(b) BR and that the courts both in the state of the company's statutory and administrative seat may claim competence.

- ***Bernd Reinmüller/Alexander Bücken:*** "The scope of an arbitration clause in the event of a "brutal termination of an existing business relationship" under French Law"

The contribution deals with a decision by the Cour de Cassation (1ère civ. of 8 July 2010 – Case no. 09-67.013) on the scope of an arbitration clause in respect of damage claims on grounds of a "brutal breach" of a trade relation- ship.

Art. L 442-6 I 5 of the French Commercial Code stipulates that persons engaged in a trade or business who "brutally" breach an established trade relationship

are obliged to compensate the ensuing damages. This provision serves for the upholding of law and order (ordre public) and as part of the French law of torts it is not subject to the disposition of the parties.

The Cour de cassation held that an action based on this legal norm can be covered by a contractual arbitration clause regardless of its tortious nature and its coercive character, because it has a sufficient contractual reference. This presupposes a sufficiently broad formulation of the arbitration clause.

- ***Wilfried Meyer-Laucke***: "Zur Frage der Anerkennung russischer Urteile auf dem Gebiet des Wirtschaftsrechts" – the English abstract reads as follows:

Up to now no Russian judgments have been admitted in the Republic of Germany and declared enforceable due to the rule that this can only be done in case reciprocity is ensured. The same rule is applied in the Russian Federation. It let into a dead end.

However, things have changed. Since 2006 Russian arbitrage-courts handling commercial matters have admitted foreign judgments to be enforced in Russia despite the lack of international agreements. Following this line the arbitrage-court of St. Petersburg has applied this practice to an order of the local court of Frankfurt a.M. by which a bankruptcy procedure has been opened, and has based its grounds on general rules in particular on Art. 244 of the Arbitrage Procedure Rules. These grounds are given in accordance with the jurisdiction of the High Arbitrage Court of Russia. Thus, it can be taken as granted for the German jurisdiction that reciprocity is ensured from now on as far as judgments of arbitrage-courts are concerned.

- ***Francis Limbach***: "About the End of the "Witholding Right" in French International Law of Succession"

The "withholding right" ("droit de prélèvement") has been a singular instrument in French international private law for nearly 200 years. In succession cases where foreign (i.e. non-French) law of succession applied and a French citizen was to inherit as a legal heir, the withholding right aimed to protect the latter from disadvantages related to applicable foreign provisions.

Thus, if it occurred that his share determined by foreign law was less than what he would have received under French law, his withholding right entitled him to seek adequate compensation by "withholding" assets of the estate located on French territory. Criticized for decades in scholarly literature as a "nationalist rule", the provision pertaining to the withholding right has eventually been declared unconstitutional by the French Constitutional Council on August 5th, 2011 on the grounds of un- equal treatment of French and foreign nationals. The present article aims to determine the impact of this decision on French international law of succession, especially on French-German cross-border cases.

- ***Erik Jayme/Carl Zimmer*** on the question whether there is a need for a Rome Regulation on the general part of the European PIL:"Brauchen wir eine Rom 0-Verordnung? – Überlegungen zu einem Allgemeinen Teil des Europäischen IPR"
- ***Erik Jayme*** on methodical questions of European PIL: "Systemfragen des Europäischen Kollisionsrechts"
- ***Jan Jakob Bornheim*** on the conference on the European law on the sale of goods held in Tübingen on 15./16.6.2012: "GPR-Tagung zum Gemeinsamen Europäischen Kaufrecht und Kollisionsrecht in Tübingen, 15./16.6.2012"

Reminder: Journal of Private International Law Conference 2013 (Madrid) Call for Papers

The organisers of the conference are delighted that many people have already submitted their abstracts for the next Journal of Private International Law

Conference in Madrid (announced here) but more abstracts are still very welcome. You are politely reminded that you have until the end of Friday 25 January 2013 to email your abstract if you would like to be considered as a speaker at the conference either at the plenary or the panel sessions.

Heidelberg-Vienna Report on the Application of the Insolvency Regulation

Today the EU-Commission published on its website the study on the application of the Insolvency Regulation in the 27 Member States (JUST/2011/JCIV/PR/0049/A4). This Report features the evaluation and the proposals for reforming the Insolvency Regulation which were presented by the EU-Commission in December 2012. It can be downloaded here.

The Report was elaborated and is presented by Prof. Burkhard Hess (Max Planck Institute for Procedural Law, Luxembourg), UnivProf. Paul Oberhammer (University of Vienna) and Prof. Thomas Pfeiffer (University of Heidelberg). The Report consists of several parts: It is based on 27 national reports drafted by a network of academics and practitioners on the basis of a questionnaire. The findings of the national reports were presented and discussed in a conference which took place in Heidelberg in July 2012. They are summarized in the synopsis annexed to the General Report which was elaborated by the Heidelberg team. . In addition, the Vienna Team comprehensively compiled the case-law available in pertinent databases. Overall, the General Report provides for an evaluation of the findings of the national reports and of several proposals for reforming the Regulation. These findings have been constantly discussed with the EU-Commission in the course of the last year. The Report and its Annexes (Annex I: National Reports in tabular form, Annex II: National Reports, Annex III: Compilation of Case-law) are also available here.

As the EU-Commission is envisaging further reforms in the area of insolvency, the network shall continue its cooperation in the next years – additional stakeholders are invited to join the discussion group. This continuing cooperation will be organized by the new Max Planck Institute for Procedural Law in Luxembourg. Further information will be available soon at the Institute's website.

Comparing Rome II

The Rome II Regulation returns to the spotlight in a seminar to be held at the British Institute of International and Comparative Law's London fortress on Thursday 31 January 2012 (5:30-7:30pm).

The seminar, entitled "Comparative Torts before the Courts: The Impact of Rome II", is part of the Herbert Smith Freehils Private International Law Seminar Series and comes at a time when the Regulation is under review by the European Commission. It will focus, in particular, on aspects relating to the application of foreign law rules under the Regulation.

The panel, chaired by Lady Justice Arden, will include Avvocato Marco Bona (Turin), Marie Louise Kinsler and Robert Weir QC (London) and Maître Carole Sportes (Paris) (as well as the author of this post).

Further details and online registration are available here.

Zhu on Harmonization of PIL in East Asia

Weidong Zhu, who is a professor of law at Xiangtan University, has posted A Plea for Unifying or Harmonizing Private International Law in East Asia: Experiences

from Europe, America and Africa on SSRN.

> *The unification and harmonization of laws in East Asia is widely discussed in recent years with the development of regional integration in this area. The author proposes that private international law in East Asia should first be unified and harmonized based on the experiences from Europe, America and Africa and taking into account the conflicts of private international law in the region. A unified and harmonized private international law will in turn help enhance the regional integration and create an internal market. Then the author discusses the possibility and approach of unifying and harmonizing private international law in East Asia.*

Brussels I Recast No 1215/2012 published in OJ

The Brussels I Regulation Recast has been published in the Official Journal, OJ 20 December 2012, L 351/1. The Brussels I Regulation Recast will apply from 10 January 2015 (see Article 81). The full name of this new born is: Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

See also our previous post.

ECJ Rules on Deemed Service and

Mandatory Appointment of Representative

On December 19th, 2012, the Court of Justice of the European Union delivered its judgment in case C-325/11 *Alder v. Orlowska.*

The issue was whether national provisions providing that defendants residing abroad are obliged to appoint a local representative for service purposes, and that will be deemed to have been served if they fail to do so, comport with EU law.

At issue was Article Article 1135^5 of the Polish Code of Civil Procedure, which provides:

> *1. A party whose place of residence or habitual abode or registered office is outside the Republic of Poland and who has not appointed, for purposes of the conduct of proceedings, an authorised representative resident in the Republic of Poland must appoint a representative who is authorised to accept service of documents in the Republic of Poland.*
>
> *2. If no representative authorised to accept service is appointed, court documents addressed to that party shall be placed in the case file and shall be deemed to have been effectively served. The party must be notified to that effect at the time of the first service. That party must also be informed of the possibility of submitting a response to the document initiating the proceedings and written statements of position, and must also be informed of those persons who can be appointed as an authorised representative.*

Following Advocate General Bot's Opinion, the Court ruled that such provisions were incompatible with Regulation No 1393/2007 of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents).

When the Regulation applies, service must be carried out by one of the means of transmission provided by the Regulation. Other means existing in national laws are precluded.

32 (…) as those means of transmission of the judicial documents were the only ones laid down in an exhaustive manner in the scheme established by that regulation, it is clear that it does not provide any place for, and therefore precludes, a procedure for notional service such as that in force in Poland by virtue of Article 1135[5] of the Code of Civil Procedure.

Furthermore, the Polish provision simply does not comport with fundamental rights:

40 (…) it is clear that a system for notional service, such as that laid down in Article 1135[5] of the Code of Civil Procedure, is incompatible with the objective of protecting the rights of the defence envisaged in Regulation No 1393/2007.

41 Indeed, as the Advocate General has noted in points 52 to 54 of his Opinion, that system deprives of all practical effect the right of the person to be served, whose place of residence or habitual abode is not in the Member State in which the proceedings take place, to benefit from actual and effective receipt of that document because it does not guarantee for that addressee, inter alia, either knowledge of the judicial act in sufficient time to prepare a defence or a translation of that document.

Final ruling:

Article 1(1) of Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) and repealing Council Regulation (EC) No 1348/2000 must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which provides that judicial documents addressed to a party whose place of residence or habitual abode is in another Member State are placed in the case file, and deemed to have been effectively served, if that party has failed to appoint a representative who is authorised to accept service and is resident in the first Member State, in which the judicial proceedings are taking place.