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.

Sterk on Personal Jurisdiction and Choice of Law

Stewart Sterk, who is a professor of law at Cardozo Law School, has posted Personal Jurisdiction and Choice of Law on SSRN.

A New Jersey resident, injured while working in his home state, seeks relief

from the United Kingdom manufacturer of a shearing machine marketed at trade shows held at various American locations. What reason is there to prevent New Jersey from providing a forum for its injured resident? In J. McIntyre Machinery, Ltd. v. Nicastro, a plurality of the United States Supreme Court invoked both "individual liberty" and "sovereign authority" to justify its conclusion that New Jersey lacked personal jurisdiction over the British defendant. But the plurality's failure to identify the liberty and sovereignty interests at stake have left personal-jurisdiction jurisprudence even more conceptually muddled and practically confused than it was before the Court's most recent foray into the area.

When Pennoyer v. Neff controlled issues of personal jurisdiction, sovereignty's role was clear: a state could not exercise personal jurisdiction over a defendant unless the state had physical power over that defendant. Since the Court abandoned Pennoyer and replaced it with International Shoe's emphasis on "traditional notions of fair play and substantial justice," the Court has struggled to explain why state lines should be relevant at all in personal-jurisdiction cases. In World-Wide Volkswagen Corp. v. Woodson, the Court offered its best explanation to date, recognizing that "the sovereign power to try causes in their courts" was an essential attribute of state sovereignty, but emphasizing that "[t]he sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States." As abstract as it is, that explanation provides a touchstone for invocations of sovereignty in personal-jurisdiction cases: The inquiry must focus on the impact a forum state's exercise of jurisdiction will have on the sovereign interests of other states or countries, not on the connection between the defendant and the forum state. If the United Kingdom were prepared to require its corporations to submit to worldwide jurisdiction as the price for obtaining corporate status, there would be no sovereignty-based reason for the Supreme Court to limit New Jersey's power to assert jurisdiction over an entity incorporated in the United Kingdom.

Recognizing that personal jurisdiction's concern with sovereignty should focus on whether the forum state's assertion of jurisdiction impermissibly interferes with the interests of some other state also sheds light on the liberty interest emphasized in the J. McIntyre opinion. If limits on New Jersey's personal jurisdiction protect the United Kingdom's interest in regulating persons, entities, and activities within the United Kingdom's sphere of sovereign

authority, the same limits also safeguard the liberty interests of persons and entities who act in accordance with the United Kingdom's regulatory scheme. That is, jurisdictional rules protect an entity against defending itself in a forum likely to ignore the legal norms and rules the entity might reasonably expect to govern its legal affairs.

These concerns about the sovereign interests of other jurisdictions and the expectations of parties who rely on particular rules of law dominate the discussion in a closely related doctrinal area: choice of law. Not surprisingly, choice of law is the "elephant in the room" in most personal-jurisdiction cases. The Supreme Court's explicit acknowledgment that choice of law plays a role in jurisdictional determinations has been grudging at best. But the Court's holdings (and the doctrinal rules it has developed) have — with narrow exceptions — been consistent with the premise that choice of law is a critical factor in jurisdictional determinations. The cases in which the Court has held that the forum lacked personal jurisdiction have almost uniformly been cases in which application of forum law posed an unjustified threat to the regulatory scheme of another jurisdiction and a concomitant danger to defendants who assumed that their actions would be governed by that regulatory scheme. Goodyear Dunlop Tires Operations, S.A. v. Brown, decided concurrently with J. McIntyre, fits that pattern; J. McIntyre does not.

Part I explores the reasons for imposing limits on personal jurisdiction and argues that both the sovereignty and liberty bases for those limits are rooted in choice-of-law concerns: balancing the forum state's interest against the power of the defendant's home state to regulate local activity, and the right of local actors to rely on their home state's regulatory scheme. When application of forum law would not interfere with the power of the home state to regulate purely local activity and would not interfere with the reasonable reliance interests of the defendant, there is no persuasive reason to limit the forum's exercise of personal jurisdiction.

Part II explains how many of the principal features of existing personal-jurisdiction doctrine — including the decline of in rem jurisdiction, the narrow limits on general jurisdiction, and the "purposeful availment" standard for specific jurisdiction — are consistent with a primary focus on choice of law.

Part III then examines the implications of J. McIntyre for personal-jurisdiction

> *jurisprudence. The plurality opinion — if it were ever to become law — would repudiate much of the jurisdictional learning of the past forty years and would jeopardize the ability of states to protect their citizens against defective products purchased through e-commerce. The concurring opinion, however, holds out hope that J. McIntyre will prove to be a momentary aberration, and that the Court will ultimately expand the scope of personal jurisdiction to reflect the diminished incidence and significance of truly local markets.*

The paper is forthcoming in the *Iowa Law Review*.

ECJ Rules on European Order for Payment

On December 6th, 2012, the Court of Justice of the European Union delivered its first judgment on the European order for payment procedure in Case C-215/11, *Iwona Szyrocka v. SiGer Technologie GmbH.*

In 2011, Mrs Szyrocka, a Polish resident, applied to a Polish court for a European order for payment to be issued against SiGer Technologie Gmbh, a German based company. However, that application did not comply with certain formal requirements laid down by Polish law, in particular the requirement to specify the value of the subject-matter of the dispute, expressed in Polish currency, the principal amount of the claim being stated in euros. Moreover, Mrs Szyrocka claimed interest from a specified date until the date of payment of the principal claim.

Specifying the value of the claim in Polish Zloty.

As a matter of principle, the Court rules that both the wording of the Regulation and its objectives require an interpretation to the effect that Article 7 of Regulation No 1896/2006 governs exhaustively the requirements to be met by an application for a European order for payment.

However, this is different when the Regulation specifically refers to national law.

> *With regard, in particular, to the question whether the national court may, in circumstances such as those in the main proceedings, request the claimant to complete the application for a European payment order by indicating the value of the subject?matter of the dispute expressed in Polish currency, in order to enable the fee for issuing the application to be calculated, it is permissible for that court to rely, for that purpose, on Article 25(2) of Regulation No 1896/2006, which provides that the amount of the court fees is to be fixed in accordance with national law.*

Interest up to the Date of Payment

Article 4 of Regulation No 1896/2006 provides that pecuniary claims the collection of which is sought under the European order for payment procedure must be for a specific amount and have fallen, whereas Article 7(2)(c) of the regulation provides that if interest on the claim is demanded, the application for a payment order must state the interest rate and the period of time for which that interest is demanded.

The Court rules that it follows from a combined reading of these two provisions that the requirements that the claim must be for a specific amount and have fallen due do not apply to interest, and that Article 7(2)(c) should not be interpreted to the effect that it is not possible to claim interest which has accrued up to the date of payment of the principal, as it might increase the duration and complexity of the European order for payment procedure and add to the costs of such litigation, and eventually deter applicants from resorting to the European procedure.

Final ruling:

> *1.* ***Article 7 of Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure must be interpreted as governing exhaustively the requirements to be met by an application for a European order for payment.***
>
> ***Pursuant to Article 25 of that regulation and subject to the conditions***

laid down therein, the national court remains free to determine the amount of the court fees in accordance with rules laid down by domestic law, provided that those rules are no less favourable than those governing similar domestic actions and do not make it in practice impossible or excessively difficult to exercise the rights conferred by European Union law.

2. ***Articles 4 and 7(2)(c) of Regulation No 1896/2006 must be interpreted as not precluding a claimant from demanding, in an application for a European order for payment, interest for the period from the date on which it falls due until the date of payment of the principal.***

3. ***Where the defendant is ordered to pay to the claimant the interest accrued up to the date of payment of the principal, the national court is free to determine the way in which the European order for payment form, set out in Annex V to Regulation No 1896/2006, is to be completed in practice, provided that the form thus completed enables the defendant, first, to be fully aware of the decision that he is required to pay the interest accrued up to the date of payment of the principal and, second, to identify clearly the rate of interest and the date from which that interest is claimed.***

Belgian Empirical Study on Cross Border Family Law

A book version of a PhD recently defended at the University of Ghent (Belgium) has just been published. The author, Ms Jinske Verhellen, has endeavored to examine how well the Code of Private International law, adopted in Belgium in 2004, has fared in practice. More precisely, the research sought to find out

whether the objectives set out by the Belgian legislator when codifying its private international law, have been met in practice. The PhD research was supervised by Johan Erauw and Marie-Claire Foblets.

Although the PhD focuses on the practice in Belgium of cross-border family law, with scant attention to comparative law, the research carried out by Ms Verhellen is remarkable because she applied an empirical methodology : far from relying on the works of learned authors and scholars, Ms Verhellen has attempted to study the actual practice of cross-border family law in Belgium. In order to do so, she has relied mainly on a very impressive database of the KMI, a first and second line helpdesk providing advice to lawyers, courts, social workers and city authorities in the field of cross-border family law. This database bundles more than 3.000 files, going from very simple questions put to the helpdesk to more elaborate advice given by the lawyers working at the KMI. Ms Verhellen has also conducted semi-structured interviews with people in the field – mainly judges with a proven track record in cross-border family cases. Finally, she had access to a wealth of cases, many of which unpublished, which allowed her to get a very good grasp of how the rules are applied by courts and administrations alike.

The results of this research are very interesting. Ms Verhellen whose previous publications also touched upon cross-border family law, shows for example how little use has been made of the possibility offered by the Code to spouses who may select the applicable law in case of divorce. This does not bode well for the party autonomy under Rome III. Another finding is that courts and practitioners have been struggling with name issues in mixed families. Although the Garcia Avello ruling should have made it easier for dual nationals to obtain the same name in the two countries they are nationals of, the research shows that children born in Belgium out of parents with different nationalities, are still frequently treated as if they were only Belgian nationals. This may explain why the Commission recently instituted infringement proceedings against Belgium.

Building upon these findings and many other, the book concludes with an impressive list of policy recommendations. Although its focus is rather narrow, as it almost exclusively deals with conflict of laws rules adopted by the Belgian legislator, this PhD could nonetheless be inspiring as it allows the reader to sense the added value of an empirical methodology for private international law research.

Second edition of Einhorn's PIL in Israel

A few weeks ago the second edition of Talia Einhorn's Private International Law in Israel was published by Wolters Kluwer Law & Business (www.kluwerlaw.com; ISBN 9789041145888). The second edition is a wholly updated and expanded version of the first, which appeared in 2009. While the first edition comprised of 393 pages, the second edition runs to 552, as to make provision for additional topics and for the many changes in Israeli private international law since 2009. The author provides the reader with a restatement of positive conflicts law in Israel, of which the most sources are only available in Hebrew, be it case law or legislation. She not only "untangles the web of Israeli sources of law affecting foreign legal relationships" (publisher's website), but also provides guidance on the further development of the law on the basis of comparative research.

New Article on Monism and Dualism in International Commercial Arbitration

If you are in need of some holiday reading, Professor Stacie I. Strong has an interesting new piece out entitled "Monism and Dualism in International Commercial Arbitration: Overcoming Barrier to Consistent Application of Principles of Public International Law." Here is the abstract:

"Although monism and dualism are central tenets of public international law, these two principles are seldom, if ever, considered in the context of international commercial arbitration. This oversight is likely due to the longstanding assumption

that international commercial arbitration belongs primarily, if not exclusively, to the realm of private international law. However, international commercial arbitration relies heavily on the effective and consistent application of the New York Convention and other international treaties, and must therefore be considered as a type of public international law.
This chapter considers the principles of monism and dualism in international commercial arbitration and identifies a number of ways in which international commercial arbitration can overcome some of the practical and theoretical problems associated with improper or ineffective incorporation of international law into the domestic realm. In so doing, this chapter provides some useful insights not only regarding the operation of the international arbitral regime but also regarding other areas of public international law."

Happy Holidays and Happy New Year to all our readers!

A Framework for European Private International Law

Under the leadership of our co-editor Xandra Kramer a group of European experts (consisting of Michiel de Rooij, Vesna Lasic, Lisette Frohn, Richard Blauwhoff, all from the Netherlands; Paul Beaumont, United Kingdom; Agnieszka Frackowiak-Adamska, Poland; Franciso Garcimartin, Spain; Jan von Hein, Germany; Miklos Kiraly, Hungary; Ulla Liukkunen, Finland) has carried out a study for the European Parliament on "A framework for European private international law: current gaps and future perspectives".

The full study can be downloaded here. The abstract reads as follows:

> *This report identifies the gaps that exist in the current European framework of*

private international law and suggests a road map towards a more comprehensive codification of EU private international law. For the time being, legislative efforts should be directed at creating separate instruments for well-defined problems of private international law. The fruits of these efforts could in the long-term be combined in a code of EU private international law.

A short briefing note, authored by Xandra Kramer, is available here.