Dickinson on Territory in Rome I and II

On Monday, November 28, Andrew Dickinson will give a presentation on "Territory in the Rome I and II Regulations" at the Max Planck Institute for Comparative and Private International Law in Hamburg. More information is available on the institute's website.

PILAGG Website

The Private International Law as Global Governance project (PILAGG) of Sciences Po Law School has now its own website where the programme of the workshops and the papers can be found.

Tick Tock: CJEU rules on temporal application of the Rome II Regulation

On 17 November 2011, the Court of Justice of the European Union delivered its ruling in Case C-412/10, *Homawoo v GMF Assurances* on the temporal effect of the Rome II Regulation (Regulation (EC) No 864/2007) . In line with the earlier opinion (if not all of the reasoning) of Advocate General Mengozzi, the Court rules that the date of application of the Rome II Regulation is fixed by Art. 32 of the Regulation at 11 January 2009, with the consequence that the Regulation will apply only to events giving rise to damage occurring from that date (Art. 31).

The terms of the Court's ruling are as follows:

> *Articles 31 and 32 of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ('Rome II'), read in conjunction with Article 297 TFEU, must be interpreted as requiring a national court to apply the Regulation only to events giving rise to damage occurring after 11 January 2009 and that the date on which the proceedings seeking compensation for damage were brought or the date on which the applicable law was determined by the court seised have no bearing on determining the scope ratione temporis of the Regulation.*

Although differing from my own view, influenced by the legislative history of Arts 31 and 32, the Court's reasoning is quite convincing. The swift and decisive settlement of this point of controversy, just over a year after the reference, is to be welcomed.

Special leave granted in PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission

The High Court has recently granted special leave to appeal from the decision of the Full Court of Federal Court in *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* [2011] FCAFC 52; (2011) 192 FCR 393; 277 ALR 67, on which James McComish has previously posted. The case concerns the applicability of foreign state immunity to government-owned airlines in the context of civil proceedings for breach of competition laws.

ECJ Rules on Jurisdiction over Defendants whose Domicile is Unknown

In a judgment of November 17, 2011, the first chamber of the European Court of Justice ruled in *Hypotecní banka a.s. v Lindner* (case C-327/10) that defendants with unknown domicile are domiciled at their last known domicile for the purpose of the Brussels I Regulation.

The case was concerned with a consumer (Lindner) who had borrowed money from a Czech bank (Hypotecní banka a.s.). The consumer was a German national living in the Czech Republic. The loan contract contained a jurisdiction clause in favour of "the local court of the bank", ie Prague courts. Lindner lived 150 km away from Prague. Yet, it seems that when the bank initiated proceedings against Lindner, it brought them before the court of its former domicile. Lindner, however, had changed addresses, and the court was unable to assess where he had moved to.

This of course raised great difficulties. The applicability of the Brussels I Regulation is conditional upon the defendant being domiciled in the European Union (art. 2). Consumers must be sued at the place of their domicile (art. 16).

Last Known Domicile

The Court held that the last known domicile had to be used for the purpose of each provision of the Regulation. It explained that it struck a fair balance between the rights of the plaintiff, who must be able to identify easily the competent court, and of the consumer.

> *44 It is, above all, in accordance with the objective, pursued by Regulation No 44/2001, of strengthening the legal protection of persons established in the European Union, by enabling the applicant to identify easily the court in which he may sue and the defendant reasonably to foresee before which court he may*

be sued (see, inter alia, Joined Cases C-509/09 and C-161/10 eDate Advertising and Others [2011] ECR I-0000, paragraph 50).

45 (…)

46 Lastly, for the purpose of applying Article 16(2) of Regulation No 44/2001, the criterion of the consumer's last known domicile ensures a fair balance between the rights of the applicant and those of the defendant precisely in a case such as that in the main proceedings, in which the defendant was under an obligation to inform the other party to the contract of any change of address occurring after the long-term mortgage loan contract had been signed.

The court, however, insisted to an embarassing degree on some particular facts , and thus casted a doubt on the scope of the rule it was laying down. Its final holding is:

2. Regulation No 44/2001 must be interpreted as meaning that:

– in a situation such as that in the main proceedings, in which a consumer who is a party to a long-term mortgage loan contract, which includes the obligation to inform the other party to the contract of any change of address, renounces his domicile before proceedings against him for breach of his contractual obligations are brought, the courts of the Member State in which the consumer had his last known domicile have jurisdiction, pursuant to Article 16(2) of that regulation, to deal with proceedings in the case where they have been unable to determine, pursuant to Article 59 of that regulation, the defendant's current domicile and also have no firm evidence allowing them to conclude that the defendant is in fact domiciled outside the European Union;

– that regulation does not preclude the application of a provision of national procedural law of a Member State which, with a view to avoiding situations of denial of justice, enables proceedings to be brought against, and in the absence of, a person whose domicile is unknown, if the court seised of the matter is satisfied, before giving a ruling in those proceedings, that all investigations required by the principles of diligence and good faith have been undertaken with a view to tracing the defendant.

So, is the last known domicile rule applicable to, say, consumer sale contracts? in

cases where the defendant has not “renounced his domicile”? Indeed, what does renouncing one’s domicile mean in this case? Changing addresses? Subscribing to a jurisdiction clause (irrespective of its validity)?

International Jurisdiction

The court also addressed the issue of the application of the Regulation to a case which was only international because of the nationality of the consumer. It held:

> *1. Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that the application of the rules of jurisdiction laid down by that regulation requires that the situation at issue in the proceedings of which the court of a Member State is seised is such as to raise questions relating to determination of the international jurisdiction of that court. Such a situation arises in a case such as that in the main proceedings, in which an action is brought before a court of a Member State against a national of another Member State whose domicile is unknown to that court.*

Many thanks to Maja Brkan for the tip-off

3rd International Moot Competition on Maritime Arbitration

The Center for International Law and Justice (Odessa, Ukraine) is pleased to invite law schools to compete in the 3rd International Moot Competition on Maritime Arbitration.

This year the moot case concerns number of issues at the forefront of economy affairs. Prominent Ukrainian Law Firm “International Law Offices” have kindly

provided the Center with Moot Case which was developed as close to the real dispute as it is possible. The teams are challenged to present positions of Owners and Charterers according to the LMAA rules. The core problem lays in refusal to pay demurrage charges, arguing that the existing situation has been an exclusion from the GENCON charter uniform. Participants should analyze factual background, legal reasoning of both sides, documents (Notice of Readiness, Ukrainian Chamber of Commerce and Industry references, Charter, Arbitral Clause), correspondence, actual Rules of procedure, etc.

Deadline for registration is 31 of December. Participation fee is 200 euro per team and includes meals and lodging (from March 16 to 18, 2012), at the Ukrainian style wooden hotel "Kolyba".

For further information concerning the event please look at the web-site:

www.cilj.org.ua

Sciences Po PILAGG Workshop Series, Spring 2012

The workshop on Private International Law as Global Governance (PILAGG) at the Law School of the Paris Institute of Political Science (*Sciences Po*) will take place on Thursdays or Fridays at 12:30 pm, at the Law School.

The speakers for the Spring 2012 will be:

• 20th January: Mads ANDENAS ("*External effects of national ECHR judgments*")
• 26th January (doctoral workshop): Shotaro HAMAMOTO
• 27th January: Ingo VENZKE ("*On words and deeds*")
• 9th February (doctoral workshop): Benoit FRYDMAN
• 10th and 11th February (Saturday, full-day doctoral workshop): David KENNEDY
• 16th February: Michael WEIBEL

• 8th March: Michael KARAYANNI
• 9th March: George A. BERMANN
• 22nd March: Jeremy HEYMANN
• 23rd March: Alex MILLS
• 12th April (doctoral workshop): Diego P. FERNÁNDEZ ARROYO
• 13th April: Michael HELLNER
• 11th May, Final Meeting (full day, see Program)

Where: unless otherwise announced, Law School, 13 rue de l'Université 75007 Paris, Room J210 (2nd floor).
When: 12:30 to 14:30 pm

More information is available here.

Aussie Analysis

The Commonwealth Attorney General's Department, joining with Monash University's Faculty of Law and the Supreme Court of Victoria, has organised a conference at Monash Law Chambers, Melbourne on 29 November 2011 (5-7pm) on the subject of "Tackling the legal challenges in cross-border transactions". The panel of five speakers includes Professor Marta Pertegás (Hague Conference on Private International Law), Professor Mary Keyes (Griffith University), Professor Richard Garnett (Melbourne University), Rosehana Amin (Lander & Rogers) and Thomas John of the A-G's Department. Justice Clyde Croft will chair, and topics for discussion include the Hague Conference's project on party autonomy in international contracts, and the application of mandatory rules by Australian courts.

Pre-registration by e-mail (pil@ag.gov.au) is required, but free. Further details are available here.

Rain or shine (or both), an excellent way to pass a couple of hours in Melbourne.

Baude on Choice of State Law in U.S. Federal Statutes

William Baude, who is a fellow at Stanford Law School, has posted Beyond DOMA: Choice of State Law in Federal Statutes on SSRN. The abstract reads:

> *The Defense of Marriage Act has been abandoned by the executive and held unconstitutional by courts, so it is time to think about what will be left in its place. Federal law frequently asks whether a couple is married. But marriage is primarily a creature of state law, and states differ as to who may marry. The federal government has no system for deciding what state's law governs a marriage, though more than a thousand legal provisions look to marital status, more than a hundred thousand same-sex couples report being married, and many of those marriages ultimately cross state lines. Unless a federal choice of law system is designed, DOMA's demise will lead to chaos.*
>
> *This paper argues that such a system can and should be designed: Because the underlying choice-of-law problem is ultimately a problem of statutory interpretation, Congress can and should replace it with a clear choice-of-law rule. Failing that, federal courts can and should develop a common law rule of their own – they are not (and should not be) bound by the Supreme Court's decision in Klaxon v. Stentor Electric. The paper further argues that different institutions should solve the problem differently: If Congress acts, it should recognize all marriages that were valid in the state where they took place. If, instead, the courts create a common-law rule, they should recognize all marriages that are valid in the couple's domicile.*
>
> *The implications of this argument run far beyond the demise of DOMA. In all areas of what is here called "interstitial law," federal interpretive institutions can and should devise a set of choice-of-law rules for federal law that draws upon state law, and what set of rules is proper may well depend on who adopts them.*

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

BP Wins Case in Siberian Court

Last Friday was November 11th, 2011. Quite a few readers may have wondered whether something extraordinary would happen on such a remarkable date.

It has. On Friday, a foreigner won a case against a Russian party in a Russian court.

Several newspapers have reported that a Siberian court ruled in favour of BP in a dispute against a Russian party on Friday. The proceedings had been initiated by Andrei Prokhorov, a minority shareholder in the Russian joint venture of BP, TNK-BP. Among other claims, Mr Prokhorov sought USD 13 billion in damages against BP. He argued that a failed deal between BP and another Russian company, Rosneft, would cost the joint venture billions in profit.

After the Siberian court had authorized the search of BP's offices at the end of August by Russian commandos armed with assault rifles, BP might have been pessimistic about the outcome of the case. But it seems it was nothing else than the local way of conducting pre-trial discovery.

The Russian party has announced that it will appeal the judgment. If the court of appeal rules in December next year, BP may well win again.