

Hovenkamp on U.S. Antitrust's Jurisdictional Reach Abroad

Herbert J. Hovenkamp, who is a professor of law at University of Iowa – College of Law, has posted Antitrust's "Jurisdictional" Reach Abroad on SSRN. Here is the abstract:

In its Arbaugh decision the Supreme Court insisted that a federal statute's limitation on reach be regarded as "jurisdictional" only if the legislature was clear that this is what it had in mind. The Foreign Trade Antitrust Improvement Act (FTAIA) presents a puzzle in this regard, because Congress seems to have been quite clear about what it had in mind; it simply failed to use the correct set of buzzwords in the statute itself, and well before Arbaugh assessed this requirement.

Even if the FTAIA is to be regarded as non-jurisdictional, the constitutional extraterritorial reach of the Sherman Act is hardly unlimited. It reaches only to restraints affecting commerce "with" foreign nations rather than those affecting commerce "among" the several states. At the same time, however, the canon of construction against extraterritorial application should not apply to the Sherman Act. First, the statutory language condemning restraints of trade or monopolization of commerce "among the several States, or with foreign nations" is not boilerplate and clearly extends to foreign commerce. Second, the FTAIA itself expressly recognizes or grants the Sherman Act's extraterritorial reach to "import trade or import commerce."

The implications for interpreting the FTAIA as limiting the antitrust law's subject coverage rather than the court's jurisdiction are mainly that, even if the language of the complaint states a claim, the district court will be able to conduct its own jurisdictional fact findings. Further, this inquiry may occur at any time during the proceeding, may occur on the court's own motion, and cannot be waived. A nonjurisdictional interpretation of the FTAIA will thus make it more difficult for defendants to obtain dismissals at an earlier stage. Even here, however, the Supreme Court Twombly and Iqbal decisions require greater specificity in pleading, and will thus serve to diminish the difference between the standards for a motion to dismiss for lack of jurisdiction, and a

motion to dismiss for failure to state a claim.

Third Issue of 2011's *Revue Critique de Droit International Privé*

The last issue of the *Revue critique de droit international privé* was just released. It contains two articles addressing private international law issues and several casenotes. The full table of contents can be found [here](#).



The first article is a presentation of the new French legislation on arbitration by Professor Sylvain Bollee (Paris I University).

The second article is a study of the international dimension of the liability of rating agencies by Professor Mathias Audit (Paris X University).

French Plaintiffs Drop Jewish or Not Jewish App Lawsuit

French Jewish and anti-racism organizations have dropped the proceedings  that they initiated in France against Apple.

The French plaintiffs sought an injunction enjoining Apple from selling its application “Jewish or not Jewish” anywhere in the world. Earlier this fall, at the outset of the proceedings, Apple had already stopped making available the App

not only in France, but also in Europe. The plaintiffs did not consider it to be enough and had sought a worldwide injunction.

The French press reports that the French plaintiffs have dropped the case after Apple informed them that it would stop selling the App elsewhere in the world.



From a conflict perspective, the outcome of the case is truly remarkable. The allegation that the App violated the law of one (small) market has led one of the biggest corporations in the world to withdraw the product worldwide.

New Draft Report of European Parliament on Future Choice of Law Rule for Privacy and Personality Rights

The Committee on Legal Affairs of the European Parliament has issued a new Draft Report with recommendations to the Commission on the amendment of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II). The new report takes into account the recent *E-Date Advertising* judgment of the European Court of Justice.

The Draft Report proposes to add the following provision to the Rome II Regulation:

Article 5a - Privacy and rights relating to personality

(1) Without prejudice to Article 4(2) and (3), the law applicable to a non-

contractual obligation arising out of violations of privacy and rights relating to personality, including defamation, shall be the law of the country in which the rights of the person seeking compensation for damage are, or are likely to be, directly and substantially affected.

However, the law applicable shall be the law of the country in which the person claimed to be liable is habitually resident if he or she could not reasonably have foreseen substantial consequences of his or her act occurring in the country designated by the first sentence.

(2) When the rights of the person seeking compensation for damage are, or are likely to be, affected in more than one country, and that person sues in the court of the domicile of the defendant, the claimant may instead choose to base his or her claim on the law of the court seised.

(3) The law applicable to the right of reply or equivalent measures shall be the law of the country in which the broadcaster or publisher has its habitual residence.

(4) The law applicable under this Article may be derogated from by an agreement pursuant to Article 14.

Many thanks to Jan von Hein for the tip-off.

PIL Seminar at the Universidad Complutense of Madrid, March 2012. Call for Papers

A new edition of the International Seminar on Private International Law (Universidad Complutense de Madrid) is to be held on March 2012, the 22 and 23. Venue will be the faculty of Law at the Universidad Complutense of Madrid – some sessions may take place elsewhere in Madrid.

Organizers, Prof. Fernández Rozas and Prof. de Miguel Asensio, have opted to follow last year's pattern: a mixed model which combines a general approach allowing reflection on recent developments and the future of PIL, and a special focus on highly topical issues, as well as issues in need of particular study, such as torts and successions.

As in previous editions the seminar counts with several general lectures: some of the speakers will be Fausto Pocar (University of Milan), Michael Wilderspin (European Commission), Dário Moura Vicente (University of Lisboa), Sabine Courneloup (University of Bourgogne) and Eva Inés Obergfell (Humboldt-Universität Berlin). The seminar is otherwise open to scholars, either Spanish or foreigners, willing to participate. Papers can be presented in Spanish, English or French. Proposals are to be sent by email to Patricia Orejudo Prieto (patricia.orejudo@der.ucm.es), no later than December 15, 2011, including both the title and a brief summary.

Subject to prior scientific evaluation, papers will be included in the 2011 volume of the *Anuario Español de Derecho Internacional Privado*. The written version of the papers must be sent to Patricia Orejudo before April 1, 2012; this deadline is non-extendable due to the closure requirements of the Yearbook.

For more information see [here](#).

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 (Hypoteční 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 embarrassing 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