Vacancy at the University of Trier

Professor Jan von Hein from the Faculty of Law at the University of Trier is seeking to fill the position of a Research Assistant at his Chair for Civil Law, Conflict of Laws and Comparative Law as of 1 May 2012. Candidates should be interested in the Chair's main research areas and should have a thorough knowledge of German civil as well as either conflict of laws and international procedural law or companies and securities law. The successful candidate will be expected to work on his or her doctorate (Ph.D.), to teach a few hours per week and to contribute to the Chair's research projects. The contract is for 2 years.

Trier is not only Germany's oldest city, a world cultural heritage and a favourite tourist destination, but also a hot spot for research in private international law: it is the seat of the Academy of European Law and very close to Luxembourg, the seat of both the Court of Justice of the European Union and the recently founded Max Planck Institute for International Procedural Law which will start its work in 2012.

More information is available on Professor von Hein's website. Deadline for application is 23 March 2012.

Quebec Court Refuses Jurisdiction on Forum of Necessity Basis

There has not been much to report from Canada for the past few months. The Supreme Court of Canada's jurisdiction decision in the Van Breda quartet of cases is still eagerly awaited. There was some thought these decisions would be released by the end of February but it now appears that will not happen. These cases were argued in March 2011.

Fortunately, Professor Genevieve Saumier of McGill University has written the following analysis of a recent Quebec Court of Appeal decision which might be of

interest in other parts of the world. The case is *ACCI v. Anvil Mining Ltd.*, 2012 QCCA 117 and it is available here (though only in French, so I appreciate my colleague's summary). I am grateful to Professor Saumier for allowing me to post her analysis.

> *In April 2011, a Quebec court concluded that it had jurisdiction to hear a civil liability claim against Anvil Mining Ltd. for faults committed and damages inflicted in the Democratic Republic of Congo where the defendant exploits a copper mine.*
>
> *The facts behind the claim related to actions alleged to have been taken by the defendant mining company in the course of a violent uprising in Kilwa in the Democratic Republic of Congo in October 2004 that caused the deaths of several Congolese (the number is disputed). In essence, the plaintiff alleges that the defendant collaborated with the army by providing them with trucks and logistical assistance.*
>
> *The defendant, Anvil Mining Ltd, is a Canadian company with its head office in Perth, Australia. Its principal if not its only activity is the extraction of copper and silver from a mine in Congo. Since 2005, the company has rented office space in Montreal for its VP (Corporate Affairs) and his secretary. It is on the basis of this connection to the province of Quebec that the plaintiff launched the suit there. The plaintiff is an NGO that was constituted for the very purpose of instituting a class action against the defendant, for the benefit of the victims of the 2004 insurgency in Congo.*
>
> *The defendant contested both the Quebec court's jurisdiction and, in the alternative, invoked forum non conveniens to avoid the exercise of jurisdiction. At first instance, the court held that it had jurisdiction over the defendant on the basis of its establishment in Quebec (the office in Montreal) and that the claim was related to the activities of the defendant in Montreal (the two conditions for jurisdiction under 3148(2) Civil Code of Quebec given the foreign domicile of the defendant). Interpreting this second conditions broadly, the court held that the VP's frequent visits to Congo and his activities to attract investors in Quebec were linked to the defendant's activities in Congo and therefore to the claims based on those activities.*
>
> *In rejecting the alternative forum non conveniens defense to the exercise of*

jurisdiction, the court considered the other fora allegedly available to the plaintiffs, namely Congo and Australia. A claim had already been made before a Congolese military court but it had been rejected. The plaintiff claimed that the process before the Congolese court, competent to hear the claim, was in breach of fundamental justice for a number of reasons. As to the Australian court, the plaintiff claimed that an attempt to secure legal representation in that country had failed because of threats made by the Congolese regime against both the victims and the lawyers they were seeking to hire in Australia. The Quebec court accepted this evidence and held that the defendants had failed to show that another forum was more appropriate to hear the case, a requirement under art. 3135 C.C.Q. It appears that the plaintiffs had also presented an argument based on art. 3136 C.C.Q. ("forum of necessity"), but since jurisdiction was established under art. 3148 and forum non conveniens was denied, the court decided not to respond to the argument based on forum of necessity. Still, the court did state that "at this stage of the proceedings, it does appear that if the tribunal declined jurisdiction on the basis of art. 3135 C.C.Q., there would be no other forum available to the victims," suggesting that Quebec may well be a "forum of necessity" in this case.

Leave to appeal was granted and the Quebec Court of Appeal reversed, in a judgment published on 24 January 2012. The Court of Appeal held that the conditions to establish jurisdiction under art. 3148(2) C.C.Q. had not been met. As a result of that conclusion, it did not need to deal with the forum non conveniens aspect of the first instance decision. This made it necessary to deal with the "forum of necessity" option, available under art. 3136 C.C.Q. The Court found that the plaintiff had failed to show that it was impossible to pursue the claim elsewhere and that there existed a sufficient connection to Quebec to meet the requirements of article 3136 C.C.Q. In other words, the plaintiff had the burden to prove that Quebec was a forum of necessity and was unable to meet that burden.

The reasons for denying the Quebec court's jurisdiction under art. 3148(2) C.C.Q. are interesting from the perspective of judicial interpretation of that provision but are not particular to human rights litigation. Essentially the Court of Appeal found that the provision did not apply because the defendant's Montreal office was open after the events forming the basis of the claim. This holding on the timing component was sufficient to deny jurisdiction under

3148(2) C.C.Q. The Court also held that even if the timing had been different, it did not accept that there was a sufficient connection between the activities of the vice president in Montreal and the actions underlying the claim to satisfy the requirements of the provision.

The reasoning on art. 3136 C.C.Q. and the forum of necessity, however, are directly relevant to human rights litigation in an international context. Indeed, one of the challenges of this type of litigation is precisely the difficulty of finding a forum willing to hear the claim and able to adjudicate it according to basic principles of fundamental justice. In the Anvil case, the victims had initially sought to bring a claim in the country where the injuries were inflicted and suffered. While the first instance court had accepted evidence from a public source according to which that process was tainted, the Court of Appeal appeared to give preference to the defendant's expert evidence (see para. 100).

The Court of Appeal does not quote from that expert's evidence whereas the trial judge's reasons contain a long extract of the affidavit. And while the extract does not include the statement referred to by the Court of Appeal, it does include a statement according to which an acquittal in a penal court is res judicata on the issue of fault in a civil proceeding based on the same facts.

The obvious alternative forum was in Perth, Australia, where the defendant company had its headquarters (and therefore its domicile under Quebec law). There too the victims had sought to bring a claim but were apparently unable to secure legal representation or pursue that avenue due to allegedly unlawful interference by the defendant and government parties in the Republic of Congo. While the first instance judge had accepted the plaintiff's evidence that Australia was not an available forum, the Court of Appeal quickly dismissed this finding, without much discussion.

Finally, the Court of Appeal returned to its initial findings regarding the interpretation of art. 3148 C.C.Q. to conclude that there was, in any event, an insufficient connection between Anvil and Quebec to meet that condition for the exercise of the forum on necessity jurisdiction. The court did not consider that under art. 3136 C.C.Q. it is unlikely that the timing of the connection should be the same as under 3148(2) C.C.Q. given the exceptional nature of the former basis for jurisdiction and the likelihood that the connections to the forum of necessity could arise after the facts giving rise to the claim.

The decision of the Court of Appeal in Quebec is disappointing in so far as its interpretation of the forum of necessity provision in the Civil Code of Quebec is quite narrow, particularly as regards the condition of a connection with Quebec; moreover, its application of the provision to the facts of the case deals rather summarily and dismissively with findings of fact made by the first instance judge without sufficient justification for its rejection of the evidence provided by the plaintiff and relied upon by the trial judge. Given the nature of the claims and of the jurisdictional basis invoked, it was incumbent on the Court of Appeal to provide better guidance for future plaintiffs as to what type of evidence will be required to support an article 3136 C.C.Q. jurisdictional claim and to what extent trial court findings in relation to such evidence will be deferred to in the absence of an error of law.

ICLQ at 60

International & Comparative Law Quarterly celebrates 60 years of international and comparative law scholarship.

The first issue for 2012 not only offers two articles exploring international private law issues, but also a susbtantial editorial reviewing 60 Years of Legal Scholarship in the International & Comparative Law Quarterly, with a special section on the Contribution to Private International Law by James Fawcett.

The first of the two PIL articles is one by Mihail Danov (Brunel University) on EU Competition Law Enforcement: Is Brussels I Suited To Dealing with All the Challenges?

There are arguments indicating that Brussels I could be applicable to cross-border competition law proceedings before a National Competition Authority located in one Member State and private EU competition law proceedings before another Member State court. However, an analysis of the current private international law framework appears to indicate that Brussels I is not well suited to deal with the difficulties that could arise in this context. Given the fact

that, in the new proposal for a regulation on jurisdiction and the recognition and enforcement of judgments there is no indication that special jurisdictional bases for competition law actions in the successor to Brussels I are on anyone's agenda, an option for a reform may be setting up a new and special regulation to be applicable with regard to EU competition law claims only.

The second article is authored by Uglješa Grušic (PhD Candidate, LSE) on Jurisdiction in Employment Matters under Brussels I: A Reassessment.

This article examines the rules of jurisdiction in employment matters of Brussels I. It focuses on a paradox in that these rules aim to protect employees jurisdictionally, but in fact fail to accord employees a more favourable treatment when they need it most, namely when they appear as claimants. The article argues that the current rules fail to achieve the objective of employee protection, examines the reasons for this, proposes certain amendments that would improve the existing rules, and thereby engages in the debate surrounding the forthcoming review of Brussels I.

Happy birthday !

Latest Issue of ZEuP: No. 1, 2012

The latest issue of the "Zeitschrift für Europäisches Privatrecht (ZEuP)", No. 1, 2012, has been released. The table of contents reads as follows (in brackets: pages in the issue):

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russischen Zivilprozessrecht: Wechselwirkung verschiedener Bestandteile einer Transformationsrechtsordnung (7-22)
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Internationales Prospekthaftungsrecht – Kollisionsrechtlicher Anlegerschutz nach der Rom II-Verordnung (23-46)
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Nutzungs- und Aufwendungsersatz nach Vertragsaufhebung wegen nachträglicher Erfüllungsstörungen: Die Regelungen des DCFR in rechtsvergleichender Perspektive (47-71)
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Entwicklungen (Developments)

Entwicklungslinien des italienischen Gesellschaftsrechts seit Beginn dieses Jahrhunderts (72-98)
Peter Kindler

Keine Effektivität einer Europäischen class action ohne "amerikanische Verhältnisse" bei deren Finanzierung (99-116)
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Bilingual legal education across cultural borders in Fribourg: A useful experience for Europe (117-127)
Pascal Pichonnaz

"Asset Partitioning" beyond corporate law – Eine Studie zur Handlungsform des Einzelunternehmers mit beschränkter Haftung (128-148),
Julien Dubarry & Johannes W. Flume

Entscheidungen (Case Notes)

Prozesskostensicherheit vor nationalen Gerichten: Auslegung des Artikel 4 EWRA (Diskriminierungsverbot), Entscheidung des EFTA-Gerichtshofs vom 17. Dezember 2010, (149-157)
Philipp Lennert & Daniel Heilmann

Anwendbares Recht auf Ansprüche gegen den britischen Entschädigungsfonds bei Auslandsunfällen, Entscheidung des Court of

Appeal vom 27. Oktober 2010 (158-170)
Christian Armbrüster

Zum Wegfall des Staatsangehörigkeitsvorbehalts für Notare, Entscheidungen des Europäischen Gerichtshofes vom 24. Mai 2011 (171-188)
Jürgen Bredthauer

Vorfragen begründen keine ausschliessliche Zuständigkeit, Entscheidungen des Europäisehen Gerichtshofs vom 12. Mai 2011 und des Court of Appeal vom 28. April 2010 (189 – 201)
Haimo Schack

Dokumentation (Documentation)

Vorschläge für Rechtsakte und sonstige Verlautbarungen der Europäischen Kommission mit privatrechtlichem Bezug (Juli 2009-Juli 2011) (202 – 207)

Tage des Europäischen Rechts 2011, Osnabrück: Das geplante Optionale Instrument auf dem Prüfstand (208-212)
Eike Götz Hosemann

Am Vorabend eines Europäischen Vertragsrechts? Wien, 28. und 29. Juni 2011 (213-215)
Stefan Perner

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Bibliothek (Book Reviews)

Stefano Cherti: L'obbligazione alternativa: Nozione e realtà applicativa, G. Giappichelli Editore, Turin (217-218)
Jakob Fortunat Stagl

Sabine Corneloup/Natalie Joubert (Ed.): Le règlement communautaire Rome I et le choix de la loi dans les contrats internationaux. Paris (2011) (218-220)
Marc-Philippe Weller

Reiner Schulze/Jules Stuyck (Hg.): Towards a European Contract Law. München (2011) (221-222)
Christoph Busch

Zu guter Letzt (Closing Remarks)

Mit Klapprechner und Lederhose (223-224)
Jens Kleinschmidt

A Case of Renvoi (or Something Akin to Renvoi)

Last Thursday R. Alford (Opinio Iuris) published a very interesting post on choice-of-law rules as applied to torts in Iraq. The question to be decided in *McGee v. Arkel Int'l* was what substantive law governs when a National Guardsman is electrocuted in Iraq while cleaning a Humvee due to faulty wiring of an electric generator maintained by a Defense Department contractor. Applying Louisiana choice-of-law principles, the Fifth Circuit concluded that Iraqi substantive law applied: the wrongful conduct and resulting injury occurred in Iraq, therefore Iraqi law should apply. This outcome was reached notwithstanding and in perfect awareness of Iraqi law: Order 17, passed by the Coalition Provisional Authority, tries to avoid the application of Iraqi tort and contract law to contractors working in Iraq for the U.S. Defense Department.

A couple of comments following the post are worth reading. C. Vanleenhove, PhD candidate from Belgium, has kindly sent me his own opinion, which reads as follows:

> *For me personally this decision is not so surprising. The Louisiana Court applies its own conflict of laws rules to determine the applicable law. It – in my view correctly – asserts that Iraqi law governs this tort. It then looks into Iraqi law to find an immunity rule but cannot find one for torts (there is only for contracts in section 4 of CPA Order 17). So it concludes that Iraqi*

law applies to this dispute. On a side note, the court also looks at the Iraqi conflict of laws rule in section 18 of CPA Order 17 which it interprets (literally) as referring to U.S. law as a whole (thus including the U.S. conflict of laws rules). This is in my opinion caused by the lack of a rule analog to art. 20 of the Rome I Regulation excluding a renvoi. The problem here is one of a lack of precision and conflict of laws knowledge on the part of the drafters.

What the majority in McGee seems to indicate is that if they would have been an Iraqi court interpreting the rule of section 18 of CPA Order 17, they would have read it as a reference to the law of the Sending State, including the conflict of laws rules. This is the U.S. court's opinion and there is no guarantee that an Iraqi court will take the same view if the case was brought before them. I think it's highly likely an Iraqi court would interpret it consistent with the intent to apply the (substantive) law of the sending state.

I agree with the dissenting opinion by chief judge Jones where she says: "To say that the tort claims shall be handled "consistent with the Sending State's laws" need not include the Sending State's conflict of laws reference back to Iraq. Such an interpretation preserves the evident intent to apply the domestic law of Sending States to their contractors operating in Iraq".

ERA Conference on New Legislative Proposals on Cross-Border Civil Litigation

On March 8-9, 2012, the Academy of European Law will host a conference on New Legislative Proposals on Cross-Border Litigation in Trier.

The conference will analyse the most important recent EU initiatives in the field

of civil procedure: Brussels I, ADR & ODR, Collective Redress and Freezing of Bank Accounts.

Brussels I

Recast of the Brussels I Regulation: state of play
European Commission: Karen Vandekerckhove
Danish EU Presidency: Jens Kruse Mikkelsen

Analysis of the most topical issues
Stefania Bariatti

Collective Redress

Brussels I and collective redress
Mihail Danov

Hands-on experience with mass claims
Alexander Layton

A coherent approach to European collective redress
Ianika Tzankova

ADR and ODR

What member states, consumers and business need to do to establish effective ADR systems
Christopher Hodges

What changes does the Directive on ADR bring? How will the new EU-wide ODR platform work in practice?
Sebastian Bohr

ADR & ODR: a win-win solution for consumers and business alike?
Fatma Sahin

ADR and the rule of law: a critical approach
Joachim Zekoll

EU Wide Freezing of Bank Accounts

The Draft Regulation Creating a European Account Preservation Order (EAPO)
Marieke van Hooijdonk

What protection does the debtor receive?
Gilles Cuniberti

Assessment of the proposal
Burkhard Hess

The Common Law Perspective
Helen McCarty

Panel discussion: Who pays the costs? What will be the next steps?
Introduction by Jérôme Carriat

The full programme can be found here.

Service of Process through Facebook or Twitter???

A curious piece of news published yesterday in Opinio Iuris by Julian Ku:

> ***Legal claims can now be served via Facebook in Britain, after a landmark ruling in the English High Court.***
>
> *Mr Justice Teare gave the go-ahead for the social networking site to be used in a commercial case where there were difficulties locating one of the parties.*
>
> *Facebook is routinely used to serve claims in Australia and New Zealand, and has been used a handful of times in Britain. However, this is the first time it has been approved at such a high level.*
>
> *Jenni Jenkins, a lawyer at Memery Crystal, which is representing one of the parties in the case said the ruling set a precedent and made it likely that*

service-via-Facebook would become routine.

> *"It's a fairly natural progression. A High Court judges has already ruled that an injunction can be served via Twitter, so it's a hop, skip and a jump away from that to allow claims to be served via Facebook," she said.*

In 2009, Mr Justice Lewison allowed an injunction to be served via Twitter in a case where the defendant was only known by his Twitter-handle and could not easily be identified another way.

Amendment of Annexes to Brussels I

Commission Regulation (EU) No 156/2012 of 22 February 2012 amending Annexes I to IV to Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters has been published today (see OJ L 50).

Common European Sales Law, Third States and Consumers

This is the second post of a series discussing conflict issues raised by the European Commission's Proposal for a Regulation on a Common European Sales Law.

From a choice of law perspective, two important features of the Proposal are that

the Common European Sales Law (CESL) would be optional, and that it would not be a 28th regime, but rather a second regime in the substantive law of each Member State. As a consequence, the CESL would only apply if the parties agree on its application, and if the law of a Member state is otherwise applicable. The CESL will, as such, never govern a contract; the law of a Member state will and, as the case may be, within this law, the CESL.

In the first post, I discussed the issues that the Proposal would raise for B2B contracts. Specifically, I argued that it was unrealistic to expect small and medium businesses to appreciate the difference between choosing CESL and choosing the law governing their contract, and that many contracts providing for CESL might thus fail to provide for the applicable law. I thus concluded that CESL should provide a rule ensuring that the law of a member state would govern in such cases.

In this post, I focus on B2C contracts.

The Impact of CESL on the Operation of Article 6, Rome I Regulation

The Proposal claims that the CESL does not affect applicable choice of law rules. For B2C contracts, this means that the applicable law should be determined by application of either Article 6 of the Rome I Regulation for contracts falling within its scope, or else by Articles 3 and 4.

Recital 14 of the Preamble to the Draft Regulation states:

> *The use of the Common European Sales Law should not be limited to cross-border situations involving only Member States, but should also be available to facilitate trade between Member States and third countries. Where consumers from third countries are involved, the agreement to use the Common European Sales Law, which would imply the choice of a foreign law for them, should be subject to the applicable conflict-of-law rules.*

Despite the claim that the operation of the Rome I Regulation is unaffected, however, the European lawmaker does not want to apply article 6(2) of the Regulation. The Preamble further states that there is no need to compare the protection afforded to the consumer by the law chosen by the parties with CESL, because this law will not, it is argued, afford a higher protection than CESL.

Situation one: Article 6 does not apply

Some B2C contracts do not fall within the scope of Article 6 of the Rome I Regulation, for instance because the consumer was active rather than passive (see also Article 6(4)). In such cases, Article 4 will determine the applicable law absent a choice by the parties, and the law of the habitual residence of the seller will typically govern.

The analysis for B2B contracts is thus valid.

Situation two: Article 6 applies

For B2C contracts falling within the scope of Article 6, the law of the habitual residence of the consumer will govern the contract absent a choice by the parties.

If the parties choose CESL, but fail to choose the applicable law, a problem will arise when the consumer will be based outside of the European Union. The law of a third state will govern the contract, and it will thus be impossible to elect CESL within a legal system which does not include it.

As argued in my previous post, one way out of this would be to include a rule of interpretation in the CESL Regulation providing that the choice of CESL is an implicit presumption that the parties chose the law of a Member state. In contracts falling within the scope of Article 6, the problem will arise when the consumer will have his residence outside of the EU. As CESL is only available when one of the parties has its habituel residence in the EU, this would mean that the seller would have its habitual residence there. The rule should thus provide a presumption that the parties wanted this law to govern.

Conclusion

There is a need for opposite presumptions for B2B contracts and for B2C contracts falling within the scope of Article 6. Alternatively, a single presumption providing for the application of the law of the most closely connected Member state could be envisaged.

Possible New Provision

Article 11 of the Draft CESL Regulation could be amended to address these issues

in several possible ways.

Single Presumption

Article 11
Consequences of the use of the Common European Sales Law

(1) Where the parties have validly agreed to use the Common European Sales Law for a contract, only the Common European Sales Law shall govern the matters addressed in its rules. Provided that the contract was actually concluded, the Common European Sales Law shall also govern the compliance with and remedies for failure to comply with the pre-contractual information duties.

(2)Where the parties have validly agreed to use the Common European Sales Law for a contract, but have not chosen the applicable law, they are presumed to have chosen the law of a Member state.

(a) This law shall be the law designated by Article 4 or Article 6 of the Rome I Regulation, or any other applicable choice of law rule.

(b) If the law referred to in (a) is not the law of a Member state, this law shall be the law of the Member state which is the most closely connected with the contract.

Several Presumptions

Article 11
Consequences of the use of the Common European Sales Law

(1) Where the parties have validly agreed to use the Common European Sales Law for a contract, only the Common European Sales Law shall govern the matters addressed in its rules. Provided that the contract was actually concluded, the Common European Sales Law shall also govern the compliance with and remedies for failure to comply with the pre-contractual information duties.

(2)Where the parties have validly agreed to use the Common European Sales Law for a contract, but have not chosen the applicable law, they are presumed

to have chosen the law of a Member state.

(a) This law shall be the law designated by Article 4 or Article 6 of the Rome I Regulation, or any other applicable choice of law rule.

(b) If the law referred to in (a) is not the law of a Member state, this law shall be the law of the habitual residence of the buyer, or the law of the habitual residence of the seller for contracts falling within the scope of Article 6 of the Rome I Regulation.

Brand and Fish on Choice of Law Rules in Contract and Tort Cases in the PIL Japanese Act

Ronald Brand (University of Pittsburgh – School of Law) and Tabitha Fish (Saxon, Gilmore, Carraway & Gibbons, P.A.) have posted An American Perspective on the New Japanese Act on General Rules for Application of Laws on SSRN.

Any changes in rules of applicable law in one state are necessarily of interest to those concerned with the outcome of potential cross-border disputes. This makes the new Japanese Act on Application of Laws of interest beyond the borders of Japan. In this article, we focus on the new rules governing applicable law in contract and tort cases. The primary point of comparison is U.S. law, but there is also reference to the other major recent civil law developments brought about by the European Union's Rome I and II Regulations. Specific attention is given to how each of the sets of rules deals with the concept of party autonomy, taking into account the recent retreat in the United States from proposed changes to the party autonomy rule in Article 1 of the Uniform Commercial Code.

The paper was published in the *Japanese Yearbook of International Law* in 2009.