Hague Academy Sixth Newsletter

The sixth Newsletter of the Hague Academy of International Law can be found here.

Bermann on the Gateway Problem in International Commercial Arbitration

George A. Bermann, who is the Gellhorn Professor of Law & Jean Monnet Professor of European Union Law at Columbia University School of Law, has published The "Gateway" Problem in International Commercial Arbitration in the last issue of the *Yale Journal of International Law*.

> *Participants in international commercial arbitration have long recognized the need to maintain arbitration as an effective and therefore attractive alternative to litigation, while still ensuring that its use is predicated on the consent of the parties and that the resulting awards command respect. A priori, at least, all participants—parties, counsel, arbitrators, arbitral institutions—have an interest in ensuring that arbitration delivers the various advantages associated with it, notably speed, economy, informality, technical expertise, and avoidance of national fora, while producing awards that withstand judicial challenge and otherwise enjoy legitimacy.*
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> *National courts play a potentially important policing role in this regard. Most jurisdictions have committed their courts to do all that is reasonably necessary to support the arbitral process. Among the ways courts do so is by ensuring that arbitral proceedings are initiated and pursued in a timely and effective manner. But those same courts are commonly asked by a party resisting arbitration to intervene at the very outset to declare that a prospective arbitration lacks an adequate basis in party consent. No legal system that permits the arbitration of*

at least some disputes (and most do) is immune to the possibility that its courts will become engaged in an inquiry of that sort at the very threshold of arbitration. Each must decide how, at this early stage, to promote arbitration as an effective alternative to litigation, while at the same time ensuring that any order issued by a court compelling arbitration is supported by a valid and enforceable agreement to arbitrate. The challenge consists of identifying those issues that courts—in the interest of striking the proper balance between these two objectives—properly address at what is increasingly known, in common U.S. parlance, as the "gateway" of arbitration. This "gateway" problem is the focus of the present Article.

For purposes of this Article, I consider an arbitral regime to be effective to the extent that it operates to promote the procedural advantages I posited earlier—speed, economy, informality, technical expertise, and avoidance of national fora. While legitimacy might be defined in many different ways, I consider an arbitral regime to be legitimate (or to enjoy legitimacy) to the extent that the parties who were compelled to arbitrate rather than litigate, and will be bound by the resulting arbitral award, consented to step outside the ordinary court system in favor of an arbitral tribunal as their dispute resolution forum.

Legal systems differ in their responses to the challenge of reconciling efficacy and legitimacy in arbitration, and even in the extent to which they acknowledge that the challenge exists and try to articulate a framework of analysis for addressing it. This Article proceeds on the premise that legal systems have a serious enough interest in properly reconciling the values of efficacy and legitimacy to warrant their developing an adequate framework of analysis, as well as articulating that framework in a clear, coherent, and workable fashion.

In the United States, Congress has largely ignored the challenge of reconciling efficacy and legitimacy in arbitration, as have the states even when establishing statutory regimes to govern arbitration conducted in their territory. The matter has accordingly fallen to the courts. In this Article, I reexamine the jurisprudence that American courts have developed, increasingly under the leadership of the U.S. Supreme Court, to address the fundamental tension between arbitration's efficacy and legitimacy interests that exists at the very threshold of arbitration. The exercise has come to consist largely of demarcating "gateway" issues (i.e., issues that a court entertains at the

threshold to ensure that the entire process has a foundation in party consent) from "non-gateway" issues (i.e., issues that arbitral tribunals, not courts, must be allowed to address initially, if arbitration is to be an effective mode of dispute resolution).

This Article proceeds as follows. Part II briefly sketches the settings in which courts may be asked to conduct the early policing with which this Article is concerned. Part III identifies the terminological confusion that has hampered clear thinking on the subject, and proposes a coherent vocabulary for overcoming it. Part IV then explores critically the conceptual devices that courts and commentators have traditionally employed in sorting through the issues. In so doing, it demonstrates that the two notions most widely relied upon for this purpose—Kompetenz-Kompetenz and separability—are unequal to the task, and explains why. A critical understanding of U.S. law in this regard is aided by comparing it to models—the French and German—that claim to have devised simple and workable formulae for reconciling efficacy and legitimacy interests at the outset of the arbitral process. That discussion will show how the often proclaimed universality of Kompetenz-Kompetenz and separability is in fact misleading.

Against this background, Part V traces how recent U.S. case law has progressively pursued a more nuanced balance between efficacy and legitimacy than the traditional conceptual tools tended to yield. The courts have achieved this result, not by erecting a single comprehensive framework of analysis, but rather through a series of pragmatic adjustments to the received wisdom associated with Kompetenz-Kompetenz and separability. I conclude that they have developed a suitably complex body of case law that ordinarily reaches sound results. But I am equally certain that, in doing so, they have failed adequately to rationalize the case law. The disparate strands of analysis—each of which is basically sound—have combined to produce a needlessly confusing case law to the detriment of clarity, coherence, and workability. I suggest that the case law can and should be recast, and that the central feature of that recasting must be a serious and frank confrontation of the underlying tradeoff between arbitration's efficacy and legitimacy interests. This Article is thus both descriptive and normative in outlook.

Swiss Institute of Comparative Law: 24e Journée de DIP on International Family Law

On Friday, 16th March 2012, the Swiss Institute of Comparative Law (ISDC) will host the **24th *Journée de droit international privé***, organised in collaboration with the University of Lausanne (Center of Comparative Law, European Law and International Law – CDCEI). The conference will analyse the latest developments in international family law, under a Swiss and an EU perspective : "**Derniers développements suisses et européens en droit international privé de la famille**". Here's the programme:

Mot de bienvenue par les organisateurs (09h00 – 09h10):

- *Christina Schmid* (Directrice à l'Institut suisse de droit comparé);
- *Andrea Bonomi* (Directeur CDCEI de l'Université de Lausanne).

Première Session (09h10 – 11h00)
Le divorce et ses conséquences:

- La révision du droit international privé du divorce et de la prévoyance professionnelle, *Gian Paolo Romano* (Professeur, Université de Genève);
- Le droit applicable en matière de divorce selon le règlement européen Rome III, *Cristina Gonzalez Beilfuss* (Professeure, Université de Barcelone);
- Le droit applicable aux conséquences patrimoniales du divorce dans les Etats de l'Union européenne, *Andrea Bonomi* (Professeur, Université de Lausanne)
- Discussion et questions.

11h00 – 11h30 Café offert par l'Association des Alumni et Amis de l'ISDC (AiSDC)

Deuxième Session (11h30 – 13h00)
Le mariage et les actes d'état civil:

- IPR Aspekte der Zwangsheiraten, *Lukas Bopp* (Dr. iur., Avocat à Bâle);
- Le droit du nom entre réformes législatives et évolution du contexte européen, *Michel Montini* (Avocat à Neuchâtel, Maître de conférence à l'Université de Fribourg);
- Discussion et questions.

13h00 – 14h30 Déjeuner

Troisième Session (14h30 – 16h30)
La protection des mineurs:

- Nouvelles de La Haye : la Sixième réunion de la Commission spéciale sur les Conventions de 1980 et 1996, *Joëlle Küng* (Collaboratrice juridique, Conférence de La Haye de droit international privé);
- La jurisprudence relative au règlement européen Bruxelles II bis, *Bea Verschraegen* (Professeure, Université de Vienne);
- La réforme du règlement européen Bruxelles II bis, *Daria Solenik* (Collaboratrice scientifique à l'ISDC);
- Discussion et questions.

The conference will be held in French and German (no translation is provided). For further information (including fees) see the conference's programme and the registration form.

(Many thanks to Prof. Andrea Bonomi)

New Italian Private International Law Blog

A new blog on private international law was recently launched in Italy. It is called Aldricus, after the name of a glossator who explored private international law issues in the middle of the 12th century.

The general editor of the blog is Pietro Franzina, who teaches at the university of Ferrara. The posts are written in Italian.

Conflictoflaws.net wishes all the best to this new blog.

Van Den Eeckhout on Choice of Law in Employment Contracts

Veerle Van Den Eeckhout, who is professor of private international law at Leiden university (the Netherlands) and the University of Antwerp (Belgium), has posted Some Reflections on Recent European and Dutch Case-Law in Issues of International Labour Law (Koelzsch, Voogsgeerd, Vicoplus, Nuon-Case and Case FNV/De Mooij). Which (New) Possibilities for Argumentation for Employees to Claim (a Higher Level of) Labour Protection in International Situations? on SSRN.

The article, which is written in Dutch, offers an analysis of recent European and Dutch case-law dealing with issues of applicable law of international labour contracts.

The Dutch asbtract reads:

> *Recent hebben zowel het Hof van Justitie als meerdere Nederlandse rechters zich in enkele opmerkelijke zaken uitgesproken over het op een internationale arbeidsovereenkomst toepasselijke arbeidsrecht: in de zaken Koelzsch en Voogsgeerd heeft het Hof van Justitie voor het eerst artikel 6 EVO-verdrag uitgelegd en door Nederlandse rechters zijn ophefmakende uitspraken gedaan inzake toepasselijkheid van artikel 6 Buitengewoon Besluit Arbeidsverhoudingen enerzijds, inzake een door FNV tegen ” de Mooij” ingespannen zaak anderzijds. Bovendien heeft het Hof van Justitie zich in de zaak Vicoplus uitgesproken over een zaak die zich afspeelde in een context van internationale detachering en die mogelijk consequenties inhoudt voor het internationaal arbeidsecht. In deze bijdrage worden deze onderscheiden uitspraken geanalysee rd vanuit volgende invalshoek: welke*

argumentatiemogelijkheden kunnen deze uitspraken bieden aan werknemers die pogen (meer) arbeidsbescherming op te eisen indien hun rechtsverhouding zich in internationale context afspeelt? In deze analyse wordt ook aanda cht gegeven aan de mate waarin de uitspraken kunnen worden begrepen als zouden zij iets hebben veranderd aan de vermeende ” status quo” van het internationaal arbeidsrecht na de ophefmakende zaken Viking, Laval, Rü ffert en C./Luxemburg.

Common European Sales Law and Third State Sellers

In October 2011, the European Commission published its 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.

Choosing CESL when a Third State Law Governs

The problem with this regime, and more specifically with the doctrine that CESL may not apply autonomously is that it is easy to conceive many situations in which parties may want to provide for the application of CESL while the contract is otherwise governed by the law of a third state. In the European conflict of laws, the law of the seller governs (Rome I Regulation, art. 4, 1955 Hague Convention, art. 4). This means that each time the sale will involve a third state seller, the applicable law will, in all likelihood, be the law of that third state. And Europe does buy alot from third states. The factory of the world is China, not Greece.

Of course, in theory, the parties could, and indeed should, choose the law of a Member state as the governing law. Let's face it, however: there are many reasons to believe that they often will not. CESL is designed for small and medium businesses. For many, if not the majority, of these commercial people, it will be very hard to understand why choosing the CESL is not enough, and why the law of a member state must also be chosen. Indeed, at first sight, this does not look quite logical to choose the law of a particular member state after choosing European law.

If I am correct that expecting a high level of legal sophistication from small and medium businesses is unrealistic, then the result will often be a contract governed by Chinese law, with a clause providing for the application of European law.

Implicit Choice of Law?

What will happen in such cases? In theory, the answer is clear: if the law of a member state does not apply, choosing CESL is not permissible. Thus, the law of the third state will govern. Quite clearly, this will come as a big surprise for the parties.

Is there a way out of this absurd outcome? One could argue that the choice of CESL is an implicit choice for the law of a EU state. But which one? And would it be satisfactory for the Regulation to be silent on the issue?

A more responsible answer to the problem would be to provide an express solution. It could be designed either as an objective subsidiary choice of law rule, or as a presumption of the will of the parties. If the European lawmaker wanted to remain consistent with its claim that the CESL Regulation leaves the Rome I Regulation untouched, I guess that the latter solution would appear as more appealing.

The problem that I have identified will occur when the seller will have its habitual residence outside of the EU. By definition, one of the parties must have its habitual residence in the EU for the CESL to be available. The Regulation could thus provide that parties providing for the application of CESL will be presumed to have implicitly chosen the law of the habitual residence of the buyer.

An additional paragraph could be added to Article 11 of the draft Regulation

along the following lines:

> *(a) 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.*
>
> *(b) This law shall be the law designated by Article 4 of the Rome I Regulation or any other applicable choice of law rule.*
>
> *(c) If the law referred to in (b) is not the law of a Member state, this law shall be the law of the habitual residence of the buyer.*

~~This proposal does not distinguish between B2B and B2C contracts, but I am not sure that's necessary.~~ I am limiting for the timebeing my analysis to B2B contracts and will discuss B2C contracts in a later post.

In any case, all comments welcome !

De Brabandere on P.R.I.M.E. Finance

Eric De Brabandere, who is an associate professor of law at Leiden University, has written an Insight at the American Society of International Law website on P.R.I.M.E. Finance: The Role and Function of the New Arbitral Institution for the Settlement of Financial Disputes in The Hague.

Fallon – Lagarde – Poillot Peruzzetto (Eds.), Quelle architecture pour un code européen de droit international privé?

On 17 and 18 March 2011 **the University of Toulouse (IRDEIC) hosted a colloquium on the codification of European PIL** ("Quelle architecture pour un code européen de droit international privé?"), follow-up to the conference organised in 2008 on "La matière civile et commerciale, socle d'un code européen de droit international privé?" (see the related volume). On the 2011 colloquium, see the report by *Jurgen Basedow* published in *RabelsZ*, 2011/3, p. 671 ff., and the one by *Pedro de Miguel Asensio* on his blog.

In his closing remarks, *Paul Lagarde* offered as a starting point for discussion **a preliminary draft of 24 articles dealing with the general provisions of a future European PIL code** ("Embryon de Règlement portant Code europeén de droit international privé"): the draft is published in *RabelsZ*, 2011/3, p. 673 ff.

The papers presented at the 2011 colloquium have now been published by Peter Lang, under the editorship of *Marc Fallon*, *Paul Lagarde* and *Sylvaine Poillot Peruzzetto*: "Quelle architecture pour un code européen de droit international privé?".

Here's the table of contents (.pdf):

- Avant-propos;
- *Marc Fallon* : Rapport introductif;

Première Partie. La forme et l'instrument de la codification.

- *Aude Mac Eleavy Fiorini* : Qu'y a-t-il en un nom ? Un vrai code pour le droit international privé européen;

Deuxième Partie. Les fondements de la codification.

- *Sylvaine Poillot-Peruzzetto* : La priorité de l'Espace de Liberté, de Sécurité et de Justice et l'élaboration d'un code européen de droit international privé;
- *Johan Meeusen* : La priorité de l'Espace de Liberté, de Sécurité et de Justice et l'élaboration d'un code européen de droit international privé. Réponse à la contribution du professeur Sylvaine Poillot-Peruzzetto;
- *Miguel Gardeñes Santiago* : Les exigences du marché intérieur dans la construction d'un code européen de droit international privé, en particulier la place de la confiance et de la reconnaissance mutuelle;
- *Catherine Kessedjian* : Un code européen au regard des objectifs du droit international privé;

Troisième Partie. Le domaine de la codification.

- *Laurence Idot* : Introduction;
- *Marc Fallon* : Le domaine spatial d'un code européen de droit international privé. Émergence et modalités de règles de caractère universel;
- *Pedro A. de Miguel Asensio/Jean-Sylvestre Bergé*: The Place of International Agreements and European Law in a European Code of Private International Law;
- *Horatia Muir Watt* : La nécessité de la division tripartite. Conflit de lois, de juridiction, règles de reconnaissance et d'exécution ?;
- *Isabelle Rueda* : La place de la matière administrative et des immunités au sein d'un code européen de droit international privé;
- *Blanca Vilà/Michel Attal* : La place de la procédure et de la coopération entre juges et acteurs nationaux. Le périmètre de la codification;

Quatrième Partie. La structure et la teneur d'une codification.

- *Michael Bogdan*: Some Nordic Reflections on the Desirability of an EU Code of Private International Law;
- *Sabine Corneloup/Cyril Nourissat* : Quelle structure pour un code européen de droit international privé ?;
- *Marie-Laure Niboyet* : Les règles de procédure : l'acquis et les propositions. Les interactions entre les règles nationales de procédure et les « règles judiciaires européennes »;
- *Michael Wilderspin* : Règles de compétence et de reconnaissance et

d’exécution. L’acquis et les propositions;
- *Anne Marmisse-d’Abbadie d’Arrast/Marc-Philippe Weller* : Définitions autonomes et rattachements. Propos introductifs;
- *Anne Marmisse-d’Abbadie d’Arrast* : Qualification et concepts autonomes dans l’élaboration d’un code européen de droit international privé;
- *Marc-Philippe Weller* : Les rattachements dans les conflits des lois;

Cinquième Partie. Les éléments d’une partie générale.

- *Stefania Bariatti/Étienne Pataut* : Codification et théorie générale du droit international privé;

En guise de synthèse

- *Paul Lagarde* : En guise de synthèse;

Annexe

- *Eugénie Fabriès-Lecea* : Quelle codification pour le droit international privé européen des procédures d’insolvabilité ?

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Title: Quelle architecture pour un code européen de droit international privé?, edited by *M. Fallon, P. Lagarde* and *S. Poillot Peruzzetto*, Peter Lang (Series: Euroclio – Volume 62), Bruxelles – Bern – Berlin – Frankfurt am Main – New York – Oxford – Wien, 2011, 388 pages.

ISBN 978-90-5201-823-2 br. Price: EUR 38.

Fukuoka conference: Regulatory Hybridization in the Transnational

Sphere

Professor Toshiyuki Kono of the Kyushu University is organising a two-day international conference titled "**Regulatory Hybridization in the Transnational Sphere**". Motivation for choosing this particular topic and the features of the conference are described by the organiser as follows:

> *[N]ational laws and public international law are no longer the exclusive regulatory authorities today. Instead, regulatory initiatives are shared by a complex network of nation States, international organizations and transnational private communities as a result of processes such as globalization, privatization, outsourcing, and self-regulation. Accordingly, national domestic laws, public international norms, and the newly proliferating private regulations co-exist in the current condition of transnational law. Furthermore, indirect connections between these three regulatory forms have increasingly developed, resulting in the proliferation of innovative hybrid forms of regulation. […]*
>
> *The purpose of this conference is to explore various issues relating to hybrid normative structures in the transnational sphere. For this purpose, the conference underscores inter alia the following questions:*
>
> *1. If regulatory hybridization does not simply consist of a reintegration of norms, and if it is not simply the delegation of the rule-making authority to self-regulatory institutions, what precisely does the contemporary hybridization of norms refer to?*
> *2. What are the primary merits & de-merits of hybrid forms of governance?*
> *3. Can the proliferation of hybrid forms of governance be explained solely by reference to efficiency or is it being driven by other factors?*
> *4. What conceptual tools are most helpful in clarifying the precise form of regulatory hybridization?*

The conference will take place on 11 and 12 February 2012 at the Kyushu University, Nishijin Plaza, Fukuoka (Japan). Additional information is available at the conference website, including the program.

Multiple defendants and territorial intellectual property rights: Painer revisits Roche through Freeport

Our colleague Dr. Mireille van Eechoud, currently of double affiliation as an Associate Professor at the Institute for Information Law, Universiteit van Amsterdam and a Visiting Scholar at the University of Cambridge Centre for Intellectual Property and Information Law, was kind to share with us her views on the Painer case (Case C-145/10) and its relation to the preceding EU Court of Justice case law on the matter. Here is her full opinion:

> *Could the CJEU's new stance on art. 6(1) Brussels Regulation 44/2001 be explained by the fact that the Court is very activist of late in shaping areas of copyright law which were not considered harmonized – of which the Painer case is itself an example? Or has the Court taken to heart the criticism unleashed by its Roche judgment on multiple defendants jurisdiction? The Advocate General certainly seemed to, citing among others the position of the European Max Planck Group on Conflict of Laws in Intellectual Property (CLIP). Whatever the reason, the Painer judgment from 1 December 2011 (Case C-145/10) signals a departure from the strict formalist-territorial approach to jurisdiction in intellectual property matters. The Court says that joining defendants under art. 6(1) Brussels Regulation is not precluded 'solely because actions against several defendants for substantially identical copyright infringements are brought on national legal grounds which vary according to the Member States concerned'.*
>
> *In the case at hand, a freelance photographer from Austria claimed infringement of her copyright in portrait photos. She had made a series of portrait photos of a 6 year old girl at a nursery. The girl was later abducted and spent 8 unspeakably horrible years in captivity. The photographer gave prints of the portrait photos to the parents and police. Some of them were subsequently released by Austrian authorities in the context of the search. The*

girl's eventual escape was a major news item across Europe. Lacking current photos, the defendant newspapers published the old portrait photos. The photographer had not been asked for permission, nor credited.

The photographer brought various actions in Austrian courts. In these disputes the question whether there was copyright in the photos, or some other right, and what the scope of such protection is under German and Austrian law was hotly debated. The proceedings which led to a preliminary reference were against five newspapers: one established in Austria, the other four in Germany. The Austrian newspaper was only distributed in Austria; the German newspapers had primary distribution in Germany with additional distribution in Austria.

So could the Austrian court assume jurisdiction for the infringements in Germany and Austria, with the Austrian newspaper as anchor-defendant under article 6 Brussels Regulation? The provision allows a plaintiff to consolidate actions against different defendants resident in the EU in one domestic court, 'provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings'. Previously, in the much criticized case C-539/03 – Roche Nederland v. Primus, the Court ruled that a close connection requires a same situation of law and of fact. When claims concern the infringement of territorially distinct patent rights (as granted under the European Patent Convention), for that reason alone there can be no risk of irreconcilable judgments because there is no 'same situation of law'.

In Painer, the Court seems to abandon that reading. The fact that the claims against the defendants concern infringement of the territorially distinct copyrights for Germany and Austria does not of itself preclude the possibility of consolidating them on the basis of article 6 Brussels Regulation. This is the more so, the Court adds, if the applicable laws in question are very similar. The referring Austrian court had concluded that was the case: German and Austrian copyright and related rights law share essentially the regimes for photographs (which is partly due to EU harmonization).

Oddly enough, and unlike the Advocate General, the Court does not refer to its Roche judgment. Rather, it builds its reasoning primarily on Freeport (case C 98/06). There the Court stated that the fact that claims against defendants have

different legal bases (e.g. in contract and tort) does not preclude application of art. 6 per se. The more obvious parallel in intellectual property matters isof course in situations where say the claim against one defendant is based in copyright infringement, and the claim against the co-defendant in contract (breach of a distribution agreement for example). I am not so sure that Freeport is easily applied to cases where infringement of copyright in different countries is at stake.

In Roche, A European Patent had been granted through the European Patent Office, which resulted in a bundle of patents for the plaintiff, each equivalent to a national patent for each of the countries applied for. The subsistence and scope of these national patents is very similar across European Patent Convention states. The criticism of (among others) CLIP is that in cases where national intellectual property rights have been unified or harmonized to a great degree, it is artificial to bar a plaintiff from joining claims merely because formally speaking different territorial rights are involved (see the CLIP position).

The defendants in Roche were all part of the same parent company, and basically sold the same allegedly infringing products in their respective local markets. Yet because each defendant acted locally (albeit under the direction of the parent), allegedly infringing the local patent, the Court did not accept there was a same situation of law and fact. In Painer, it is not clear whether there is any connection between the defendants. They may have acted similarly from the perspective of the plaintiff: each published photographs she made, over a similar period and as illustration of news about roughly the same matter. But I don't see how that qualifies as a 'same situation of fact' for art. 6 purposes. Surely, the fact that persons behave in similar ways with respect to a (potentially) copyrighted image does not make the claims closely connected?

The answer to that question is in the Court's observation that 'It is, in addition, for the referring court to assess, in the light of all the elements of the case, whether there is a connection between the different claims brought before it, that is to say a risk of irreconcilable judgments if those claims were determined separately. For that purpose, the fact that defendants against whom a copyright holder alleges substantially identical infringements of his copyright did or did not act independently may be relevant [my italics].' I would argue that whether or not the co-defendants acted independently is in cases like these not a

potentially relevant factor, but a crucial factor. If not, in this case our Austrian photographer could sue before Austrian courts any of the German publishers for distributing newspapers with the photos in Germany, because a completely different unrelated paper based in Austria happened to have printed the same photo. There has to be some relationship between the defendants, or at least between the anchor-defendant and the co-defendants. If not, all that is left is the foreseeability escape the Court articulated in Freeport.