

Sherry on Erie

Suzanna Sherry (Vanderbilt Law School) has posted *Wrong, Out of Step, and Pernicious: Erie as the Worst Decision of All Time* on SSRN.

This essay was written for “Supreme Mistakes: Exploring the Most Maligned Decisions in Supreme Court History.” A symposium on the worst Supreme Court decision of all time risks becoming an exercise best described by Claude Rains’s memorable line in Casablanca: “Round up the usual suspects.” Two things saved this symposium from that fate. First, each of the usual suspects was appointed defense counsel, which made things more interesting. Second, a new face found its way into the line-up: Erie Railroad v. Tompkins. My goal in this essay is to explain why Erie is in fact guiltier than all of the usual suspects.

I begin, in Part I, by setting out the three criteria that I believe must be satisfied for a decision to qualify as the worst of all time. I also explain briefly why each of the usual suspects fails to meet one or more of those criteria. The heart of the essay is Part II, examining in detail how Erie satisfies each of the three criteria. I close with some concluding thoughts on the surprising relationship between Erie’s flaws and those of the other suspects.

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

News and a Query (Recovery of Child Support, Recital 26 - Matrimonial Property Regimes)

Just a word to recall that Council’s Decision of 31 March 2011, on the signing, on behalf of the European Union, of the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance, has been published in the OJ of April, 7th.

And, a query: does anybody know what the exact meaning of Recital 26 of the Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes is?

Recital 26: "Since there are States in which two or more systems of law or sets of rules concerning matters governed by this Regulation coexist, there should be a provision governing the extent to which this Regulation applies in the different territorial units of those States"

Weber on Universal Jurisdiction in Brussels I Reform

Johannes Weber (Max Planck Institute for Comparative and PIL) has posted Universal Jurisdiction and Third States in the Reform of the Brussels I Regulation on SSRN. The abstract reads:

In December 2010, the European Commission published a Proposal for a reform of the Brussels I Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. One of the cornerstones of the Proposal is the operation of the Regulation in the international legal order, a subject which has proven to be one of the most intricate issues in European international civil procedure. The following paper will give a first assessment of the Commission Proposal as regards third State scenarios. After a brief discussion of the Union's competence and the Union's interest to legislate in this field, it will turn to the extension of special heads of jurisdiction to third State defendants, the decline of jurisdiction in favour of third States and the proposal for new subsidiary grounds of jurisdiction, before briefly concluding on recognition and enforcement of third State judgments.

The paper is forthcoming in the *Rabels Zeitschrift für Ausländisches und*

Illmer on Arbitration and Brussels I Revisited

Martin Illmer (Max Planck Institute for Comparative and PIL) has posted Brussels I and Arbitration Revisited – The European Commission’s Proposal COM(2010) 748 final on SSRN. The abstract reads:

In December 2010, the European Commission presented its long-awaited proposal for a reformed Brussels I Regulation. One of the cornerstones of the proposal is the interface between the Regulation and arbitration. In the first part, the article sets out the development of the exclusion of arbitration from the Regulation’s scope up to the West Tankers and National Navigation cases. In the second, main part, the author, who is a member of the Commission’s Expert Group on the arbitration interface, provides a detailed account and evaluation of the new lis pendens-mechanism established by the Commission proposal in order to effectively prevent parallel proceedings in the arbitration context. In the third, final part, the author scrutinizes the Commission proposal against the background of the Commission’s Impact Assessment before concluding with a short resumé.

The paper is forthcoming in the *Rabels Zeitschrift für Ausländisches und Internationales Privatrecht*.

Kessedjian on the Brussels I Review

Catherine Kessedjian (Paris II University) will publish a comment (in French) on the Brussels I review proposal in the next issue of the *Revue trimestrielle de droit européen*.

It is already available here.

Heinze on Choice of Court Agreements, Coordination of Proceedings and Provisional Measures

Christian Heinze (Max Planck Institute for Comparative and PIL) has posted *Choice of Court Agreements, Coordination of Proceedings and Provisional Measures in the Reform of the Brussels I Regulation* on SSRN. The abstract reads:

In December 2010, the European Commission published a Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, the Brussels I Regulation. The Commission proposes significant amendments which would considerably change the structure of the Brussels Regulation. In view of these developments in an area which is central for European cooperation in civil matters and the development of European private international law in general, the following paper will give a first assessment of the Commission Proposal. It will focus on the changes proposed for choice of court agreements (II), for coordination of legal proceedings (III), and for

provisional measures (IV).

The paper is forthcoming in the *Rabels Zeitschrift für Ausländisches und Internationales Privatrecht*.

Pilich on Recognition in Poland of Same Sex Relationships

Mateusz Jozef Pilich (University of Warsaw) has posted a paper on the Problem of Recognition of the Same-Sex Relationships in Poland in the Light of the EU Law and the New Polish Act on Private International Law on SSRN (*Das Problem der Anerkennung von gleichgeschlechtlichen Verhältnissen in Polen im Lichte des Europarechts und des neuen polnischen IPR-Gesetzes*). The English abstract reads:

On February 4th, 2011 Polish Parliament (Sejm) has voted on the new Act on the Private International Law, replacing the old instrument of 1965. At the final stage of the parliamentary debate the question of the constitutionality of the new Law arose; according to some deputies, the PIL would open the “backdoor” to the acknowledgment of foreign homosexual relationships, so far legally unrecognized on the constitutional level.

The main task of the article is to cast some light on the problem of the non-marital relationships under the EU and Polish law of conflict. The European law itself abstains from taking a clear position as to cross-border legal effects of the non-marital or quasi-marital couples. Under these circumstances, it is the law of each Member State of the UE which regulates the issue.

It is quite obvious that Art. 18 of Polish Constitution, which states that marriage is the union between the man and the woman only, forbids at the moment any material regulation of registered partnerships or homosexual marital unions in Poland. It is, however, not an argument against the application of conflict rules

to such situations with the international element. It is welcomed that the new Law does not contain a 'special clause of public policy' put forward by the group of deputies just before the final parliamentary reading. The best regulation protecting Polish legal order is a general order public clause in Art. 7 of Polish Law. Some reflections on the choice-of-law characterization are also contained in the text.

The other problem touched is the question of the so-called "recognition" of foreign legal relationships. The sense of the notion may be twofold: either it is the concurring method in the Private International Law replacing traditional conflict rules as a whole (at least as the intra-European conflicts of laws are concerned), or it only supplements the latter. Polish PIL contains no rules on the recognition of any type of the foreign legal relationships and the same is true also as to the homosexual unions.

According to the author's views, due to Art. 81(3) of the Treaty on the Functioning of the European Union, the EU law does not guarantee any automatic and general recognition of foreign registered partnerships or other gay or lesbian legal unions in Poland. Nonetheless, the careful application of the public policy rule makes it possible that certain legal consequences of these relationships do appear. Any general rule forbidding the application of foreign law only because of its content would infringe the sense of justice in the individual case.

Second Issue of 2011's ERA Forum

The first issue of Volume 12 of *ERA Forum* was just released.

It contains several articles of interest for conflicts specialists.

The first is authored by Jean-Philippe Lhernould, who is a professor of law at the university of Poitiers, and discusses *New rules on conflicts: regulations 883/2004 and 987/2009*. The abstract reads:

Regulations 883/2004 and 987/2009 fixed new rules on coordination of social security systems. In particular, they rearranged rules on conflicts of law, even if the core principles (one set of legislation only to be applicable and priority of workplace legislation) remain the same. Nevertheless, there are significant changes. The rules on conflicts have been simplified and several specific rules which were included in Regulation 1408/71 have been removed. The new rules also take into account the extension of regulations to all citizens and clarify the status of non-active persons. They adapt rules on conflicts for posting and for simultaneous activities in two member states.

The second, which is freely available here, is authored by our own Xandra Kramer and discusses the implementation of the Small Claims Procedure Regulation in Member states. The abstract reads:

The European Small Claims Procedure is in general an instrument welcome for the enhancement it brings about to cross-border enforcement in the European Union. However, the regulation has several flaws, relating, inter alia, to its lack of consumer friendliness, and the lack of uniform rules regarding appeal and enforcement. It is further submitted that more attention should be paid to proper implementation and interpretation in the member states in order to facilitate the uniform application and the cross-border enforcement of small claims at the European level.

Hague Conference to Work on Surrogacy

In a press release issued last week, the Hague Conference has announced that it intends to add cross frontier surrogacy issues to its work programme.

Cross-Frontier Surrogacy Issues Added to Hague Conference Work Programme

On Thursday, 7 April 2011, the Hague Conference on Private International

Law's Council on General Affairs and Policy invited its Permanent Bureau to intensify its work on the broad range of issues arising from international surrogacy arrangements.

International surrogacy cases often involve problems concerning the establishment or recognition of the child's legal parentage and the legal consequences which flow from such a determination (e.g., the child's nationality, immigration status, who has parental responsibility for the child, who is under a duty to maintain the child, etc.). Problems also arise because the parties involved in such an arrangement can often be vulnerable or put themselves at risk.

A brief Internet search on "international surrogacy" and, in today's world, one is a click away from hundreds of websites promising to solve the problems of infertility through in vitro fertilisation techniques (IVF) and surrogacy. It is now a simple fact that surrogacy is a booming, global business which has created a host of problems, particularly when surrogacy arrangements involve parties in different countries throughout the world.

The new mandate issued by the Hague Conference's Council requires the Permanent Bureau to gather information on the practical legal needs in the area, comparative developments in domestic and private international law, and the prospects of achieving consensus on a global approach to addressing international surrogacy issues.

Call for Papers for a Conference Entitled "Border Skirmishes: The Intersection Between Litigation

and International Commercial Arbitration”

I am pleased to pass on the following call for papers for an excellent conference to be held October 21, 2011 at the University of Missouri School of Law. Please contact Professor Strong at the information below with any questions.

CALL FOR PAPERS AND PROPOSALS

Gary Born will give the keynote address at a symposium entitled “Border Skirmishes: The Intersection Between Litigation and International Commercial Arbitration,” to be convened at the University of Missouri School of Law on October 21, 2011. A works-in-progress conference and a student writing competition is being organized in association with this event, and the University of Missouri School of Law is issuing a call for papers and proposals.

- Proposals for the works-in-progress conference are due by May 20, 2011, with responses anticipated in mid-June. The works-in-progress conference will be held at the University of Missouri on October 20, 2011, the day before the symposium itself.
- Papers for the student writing competition are due August 15, 2011, with the winning paper announced at the symposium. The winner will receive a \$300 prize sponsored by the Chartered Institute of Arbitrators (CIArb) North American Branch and may have his or her paper published in the *Journal of Dispute Resolution* as part of the symposium edition.

The symposium brings speakers from Canada, Austria, Switzerland, the United Kingdom and the United States together to discuss complex issues relating to international dispute resolution. Submissions for the works-in-progress conference and student writing competition should therefore bear some relationship to international commercial arbitration, transnational litigation or the connection between the two.

More information about the works-in-progress conference, the student writing competition and the submission process is available at the symposium website,

located at: <http://www.law.missouri.edu/csdr/symposium/2011/>. Submissions and questions should be directed to Professor S.I. Strong at strongsi@missouri.edu. Registration for the symposium itself will open shortly.

The University of Missouri's award-winning program in dispute resolution consistently ranks as one of the best in the nation. The University of Missouri is the only law school in the United States to have received Recognized Course Provider status from CIArb for courses offered during the regular academic year. London-based CIArb was founded in 1915 and offers training courses and competency assessment courses in international commercial arbitration all over the world.

Keynote speaker Gary Born was awarded *Global Arbitration Review's* inaugural "Advocate of the Year" prize on 3 March 2011 at the annual *GAR* awards dinner in Seoul, Korea. Mr. Born is the author of a number of leading publications on international arbitration and litigation, including *International Commercial Arbitration* (Kluwer 2009), *International Forum Selection and Arbitration Agreements: Drafting and Enforcing* (Kluwer 2010), *International Arbitration: Cases and Materials* (Aspen 2011), and *International Civil Litigation in US Courts* (Aspen 2007).