Green on Erie

Michael Steven Green (William and Mary Law School) has posted Horizontal Erie and the Presumption of Forum Law on SSRN.

> *According to Erie Railroad v. Tompkins and its progeny, a federal court interpreting state law must decide as the state's supreme court would. In this Article, I argue that a state court interpreting the law of a sister state is subject to the same obligation. It must decide as the sister state's supreme court would.*
>
> *Horizontal Erie is such a plausible idea that one might think it is already established law. But the Supreme Court has in fact given state courts significant freedom to misinterpret sister-state law. And state courts have taken advantage of this freedom, by routinely presuming that the law of a sister state is the same as their own—often in the face of substantial evidence that the sister state's supreme court would decide differently. This presumption of similarity to forum law is particularly significant in nationwide class actions. A class will be certified, despite the fact that many states' laws apply to the plaintiffs' actions, on the ground that the defendant has failed to provide enough evidence to overcome the presumption that sister states' laws are the same as the forum's. I argue that this vestige of Swift v. Tyson needs to end.*
>
> *Applying horizontal Erie to state courts is also essential to preserving federal courts' obligations under vertical Erie. If New York state courts presume that unsettled Pennsylvania law is the same as their own while federal courts in New York do their best to decide as the Pennsylvania Supreme Court would, the result will be the forum shopping and inequitable administration of the laws that are forbidden under Erie and its progeny. As a result, federal courts have often held that they too must employ the presumption of similarity to forum-state law, despite its conflict with their obligations under vertical Erie. Applying horizontal Erie to state courts solves this puzzle.*

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

He had posted few weeks before Erie's Suppressed Premise .

> *The Erie doctrine is usually understood as a limitation on federal courts' power.*

This Article concerns the unexplored role that the Erie doctrine has in limiting the power of state courts.

According to Erie Railroad Co. v. Tompkins, a federal court must follow state supreme court decisions when interpreting state law. But at the time that Erie was decided, some state supreme courts were still committed to Swift v. Tyson. They considered the content of their common law to be a factual matter, concerning which federal (and sister state) courts could make an independent judgment. Indeed, the Georgia Supreme Court still views its common law this way. In order to explain Brandeis's conclusion in Erie that state supreme court decisions bind federal courts, even when the state supreme court does not want them to be binding, a premise must be added to his argument – one that limits state supreme court power in this area.

The missing premise is a non-discrimination principle that is a hitherto unrecognized – but essential – part of the Erie doctrine. A state supreme court can free federal courts of the duty to follow its decisions only if it is willing to free domestic courts of the same duty. It cannot discriminate concerning the binding effect of its decisions on the basis of whether the effect is in domestic or federal court.

A similar puzzle arises when a federal court interprets unsettled state law. The Supreme Court has suggested that a federal court should predict how the relevant state supreme court would decide. But many state supreme courts – including the New York Court of Appeals – have indicated that they do not care if federal (or sister state) courts use the predictive method concerning their unsettled law. Here, too, the non-discrimination principle latent in Erie explains how the Supreme Court can demand that federal courts adopt the predictive method, whatever a state supreme court has said about the matter.

The Article ends by briefly discussing the transformative effect that Erie's non-discrimination principle should have for choice of law, where Swift v. Tyson remains ubiquitous.

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

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 Internationales Privatrecht*.

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 it 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.