Rome II and Defamation: Online Symposium

The focus of this online symposium, following the publication of the comparative study on the state of the laws of the Member States regarding the law applicable to non-contractual obligations arising out of violations to privacy and rights relating to personality, will be on whether the Rome II Regulation should be amended so as to cover the law applicable to such obligations. In other words, this symposium will ask whether, and to what extent, Rome II should cover choice of law in defamation.

This page will link to all of the contributions to the symposium over the next couple of weeks (newest posts at the top of the list, so start from the bottom).

- **EPC on The Link between Brussels I and Rome II in Cases Affecting the Media (Mills Wade)**
- **Perreau-Saussine on Rome II and Defamation**
- ***Magallón on* Country of Origin Versus Country of Destination and the Need for Minimum Substantive Harmonisation**
- **Heiderhoff on Privacy and Personality Rights in the Rome II Regime – Yes, Lex Fori, Please!**
- **Boskovic on Rome II and Defamation**

Dickinson on Privacy and Personality Rights in the Rome II Regime – Not Again?

- **Hartley on The Problem of "Libel Tourism"**
- **Von Hein on Rome II and Defamation**
- **Diana Wallis MEP and the Working Paper**

Rome II and Defamation: Online Symposium Beginning Monday 19th July

On Monday 19th July, **Conflict of Laws .net** will launch an online symposium on **Rome II and Defamation**.

The focus of the debate, following the publication of the comparative study on the state of the laws of the Member States regarding the law applicable to non-contractual obligations arising out of violations to privacy and rights relating to personality, will be on whether the Rome II Regulation should be amended so as to cover the applicable law for such obligations. A hearing was held earlier this year in the Legal Affairs Committee of the European Parliament (JURI), and a Working Paper has been produced by Mrs Diana Wallis MEP, Vice-President of the European Parliament, which provides a background to the debate and offers a number of potential solutions.

The symposium will be launched by Mrs Wallis MEP on Monday 19th July, together with a link to the Working Paper. We will then have responses and contributions from eminent scholars, practitioners and members of the press, including:

- Prof Louis Perreau Saussine (Nancy II)
- Prof Horatia Muir-Watt (Sciences Po)
- Mr Oliver Parker (Ministry of Justice, UK)
- Mr Andrew Dickinson (Clifford Chance; BIICL; Sydney)
- Prof Trevor Hartley (LSE)
- Prof Thomas Kadner Graziano (Geneva)
- Prof Jan von Hein (Trier)
- Ms Angela Mills (European Publishers Council)
- Prof Bettina Heiderhoff (Hamburg)

We would also like to encourage visitors to the site to comment on the Working Paper, or one of the responses; you can either leave a comment directly on the website, or email me at martin.george@conflictoflaws.net.

Vacant Chair in Private International Law or Transnational Law in Geneva

A message from *The Graduate Institute of International and Development Studies, Geneva, Switzerland*:

Applications are invited for a full-time position of Professor | Associate Professor in Private International Law and/or Transnational Law starting on the 1st September 2011 or on a mutually agreed-upon date.

Candidates – women or men – must have a grounding in general international law and a specialisation in private international law and/or transnational law (in particular, the law crossing the traditional divides between public and private international law as well domestic and international law especially as it applies to cross-border economic transactions). Such specialisation must be demonstrated by a substantial publication record. Applicants must hold a Ph.D. (or, for candidates without a Ph.D., have held a senior academic position). The capacity to

work with colleagues from other disciplines is an asset.

The language of instruction is either English or French, but candidates will be expected to soon acquire, if not already possess, a working knowledge of the other language. Applications, including a detailed curriculum vitae and a list of publications – but excluding letters of recommendation and samples of publications – must reach the Director, Graduate Institute of International and Development Studies, P.O. Box 136, 1211 Geneva 21, Switzerland, email: director@graduateinstitute.ch, by 1st October 2010. Information on employment conditions may be obtained at the same address.

The Institute reserves the right to fill this position by invitation at any time. For more information, candidates are encouraged to consult the Institute's website.

Rome III Reg.: Council Adopts Decision Authorising Enhanced Cooperation on the Law Applicable to Divorce

On Monday, 12 July 2010, the Council adopted a decision authorising 14 Member States (Spain, Italy, Hungary, Luxembourg, Austria, Romania, Slovenia, Bulgaria, France, Germany, Belgium, Latvia, Malta and Portugal) **to participate in the first enhanced cooperation** in the history of the European Union, **on the law applicable to divorce and legal separation** (see the provisional version of the Council's press release, doc. no. 12077/10, at p. 15).

As we reported in our previous posts, the initiative for an enhanced cooperation in the field originated in 2008, when the Council noted that there were insurmountable difficulties in reaching the required unanimity in order to adopt the Commission's proposal amending the Brussels IIa Regulation and introducing rules concerning applicable law in matrimonial matters (Rome III reg.).

The first formal steps of the procedure are summarised as follows in Council document no. 10288/10 of 1 June 2010:

> *[…] Greece, Spain, Italy, Hungary, Luxembourg, Austria, Romania and Slovenia addressed a request to the Commission by letters dated 28 July 2008 indicating that they wished to establish enhanced cooperation between them in the area of applicable law in matrimonial matters and that they expected the Commission to submit a proposal to the Council to that end. Bulgaria addressed an identical request to the Commission by a letter dated 12 August 2008 and France by a letter dated 12 January 2009. On 3 March 2010, Greece withdrew its request. Germany, Belgium, Latvia and Malta joined the request by letters dated respectively 15 April 2010, 22 April 2010, 17 May 2010 and 31 May 2010. In total, thirteen Member States have thus requested enhanced cooperation.*
>
> *On 31 March 2010 the Commission presented to the Council:*
>
> *(a) a proposal for a Council Decision authorising enhanced cooperation in the area of the law applicable to divorce and legal separation [COM(2010)104 fin./2 of 30 March 2010]; and*
>
> *(b) a proposal for a Council Regulation (EU) implementing enhanced cooperation in the area of the law applicable to divorce and legal separation [COM(2010)105 fin./2 of 30 March 2010: the proposed "Rome III" reg.].*
>
> *The Commission assessed the legal conditions for enhanced cooperation in the explanatory memorandum to the proposal for a Council Decision authorising enhanced cooperation in the area of the law applicable to divorce and legal separation.*
>
> *On 1 June 2010 the Legal Affairs (JURI) Committee of the European Parliament voted unanimously for the proposal for a Council Decision authorising enhanced cooperation in the area of the law applicable to divorce and legal separation.*

The JHA Council, on 3-4 June 2010, reached a political agreement on the matter, and transmitted the draft decision to the Parliament, in order to obtain its consent to the enhanced cooperation, pursuant to Art. 329(1) of the Treaty on the Functioning of the European Union (see JHA Council's press release, doc. no. 10630/10).

On 16 June 2010 the plenary session of the European Parliament approved a legislative resolution giving its consent to the draft decision, that was finally adopted by the Council on 12 July 2010.

It is interesting to note that the Parliament in its resolution has called on the Council to adopt a decision pursuant to Article 333(2) of the Treaty on the Functioning of the European Union stipulating that, when it comes to the proposal for a Council Regulation implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, it will act under the ordinary legislative procedure (formerly known as codecision), and not under the special legislative procedure provided for in Article 81(3) of the TFEU, under which EP is merely consulted.

As regards the text of the Rome III reg., it is currently under discussion in the Council, on the basis of the Commission's March proposal. The latest available text is contained in Council document no. 10153/10 of 1 June 2010: at their latest meeting on 4 June 2010, Justice ministers agreed on a general approach on key elements (see Council Secretariat's factsheet of 4 June 2010).

Transnational Securities Class Actions – A Private International Law Perspective

The focus of the debate on this website and elsewhere following the US Supreme Court's *Morrison* judgment has been upon the extra-territorial reach of US securities law before a US court, involving a process of statutory interpretation to identify the existence of a "mandatory rule" without regard to potentially applicable foreign laws. Those who were fortunate enough to have attended Professor Linda Silberman's presentation on Transnational Securities Class Actions last week at the British Institute of International and Comparative Law heard not only a full account of the *Morrison* litigation and the legislative

background and fall out, but also Professor Silberman's thoughts as to the wider private international law implications of the decision and of securities class actions in the United States and elsewhere.

From a private international law perspective, although Professor Muir-Watt has questioned the suitability of existing techniques to deal with the problems arising from the regulation of securities by private law, it does not seem inappropriate to use traditional terminology in identifying the questions that will likely arise in the coming years. As least from an English law perspective, there are still more questions than there are definitive answers.

The following is a (non-exhaustive) attempt to list certain key questions:

Applicable law (Choice of law)

- Putting to one side the potentially mandatory application of a country's own securities law as regulating issues of civil liability, what rules of applicable law (choice of law rules) should apply to claims made in transnational securities class actions?
- In particular:
    - How is the particular claim advanced in an individual case (or the particular issue) to be characterised (contract, tort, company law, other)?
    - Should the standard rules of applicable law for the relevant general category of obligation (or issue) be applied or are special rules needed for securities claims or class actions in a cross-border context (i.e. are there, or should there be, characterisations specific to claims arising from trading in securities)?
    - If the standard rules apply, how are they to be applied to the individual case? For example, depending on the nature of the relevant rule, where is the *lex loci delicti* or country of damage to be located?
    - What is the impact, if any, of any rule of the *lex fori* excluding or limiting the enforcement of claims based on a foreign penal or other public law? On this last point, Professor Silberman suggested that a private law right of action under securities legislation may be so closely intertwined with the regulatory

regime that it may not be possible to disentangle them, but the recent trend in England and Australia seems to be towards facilitating the enforcement of foreign securities law where the action is taken for the benefit of private individuals (see Robb Evans v European Bank Limited [2004] NSWCA 82; US SEC v Manterfield [2009] EWCA Civ 27).

Jurisdiction

- How should the court approach the question of jurisdiction, in particular with respect to foreign members of an "opt out" claimant class? Should those claimants be considered to have "submitted" to the jurisdiction as a result of certification of the class in accordance with local law requirements, or must they be treated in the first instance as persons joined to proceedings against whom a basis of jurisdiction must be shown to exist (in the same way as for a defendant, or on some modified basis)?

Recognition and Enforcement of Judgments

- Can a judgment in a securities class action (whether following trial or approving a settlement) be recognised as having a preclusive effect, in favour of the defendant, as against foreign members of an "opt-out" claimant class who subsequently bring proceedings in another jurisdiction based on a cause of action which has been adjudicated by the foreign court or falls within the scope of the settlement? Here, Professor Silberman noted that U.S. courts certifying classes including foreign claimants have reached varying and inconsistent conclusions (reflecting, no doubt, differences in the expert evidence received by them) as to whether U.S. "opt-out" class action judgments would be recognised in particular foreign jurisdictions. In particular, she pointed to the class action certification in the *Vivendi* case (241 F.R.D. 213 [S.D. N.Y. 2007] – see comment, e.g., here and here) – in which the District Court had certified a class including U.K., French and Dutch investors (but excluding German and Austrian investors) having regard to the perceived likelihood that a U.S. judgment would be recognised and enforced in

those jurisdictions against non-participating class members – and contrasted this to the clearly stated position of the French Republic in its Amicus Brief in *Morrison* (p. 26) that:

> *French courts would almost certainly refuse to enforce a court judgment in a U.S. 'opt-out' class action because … specifically, the 'opt-out' mechanism violates French constitutional principles and public policy.*

Equally, despite submissions to the contrary (see, e.g., A Pinna, "Recognition and Res Judicata of US Class Action Judgments in European Legal Systems" (2008) Erasmus Law Review, vol 1, issue 2, pp. 43-44), there appears presently to be no realistic prospect of a U.S. class action judgment being recognised by an English court as precluding the claims of an absent claimant who was not present in the U.S. at the time that the class was certified or the relevant notice published, and who did not actively opt-in to the class or otherwise participate in the proceedings or agree to submit to the jurisdiction of the U.S. court. In short, as a matter of English law, the U.S. court would not be considered as jurisdictionally competent to determine the rights and obligations of these absent class members and, although it would be considered to have competence to determine the rights and obligations of present class members and those who have opted in, the judgment with respect to those persons is unlikely to have any wider *res judicata* effect against absent class members. The fact that the U.S. court may consider the named claimant and/or its lawyers to be authorised to represent absent class members is neither here nor there, as this is not an authority that is recognised under English private international law rules.

Even if the "competence" hurdle could be overcome, a successful class action defendant would undoubtedly face other obstacles in establishing the preclusive effect of a U.S. class action judgment in England. The English court may well conclude that the method of giving notice to the absent claimants of the existence of proceedings and requiring them to opt-out was insufficient and contrary to "principles of natural justice", so as to bar recognition of the judgment. More generally, the nature of the opt-out mechanism or other aspects of the class action procedure may be argued to be such as to make it contrary to public policy (for opposing opinions on this point, see the references in Pinna, above, fn. 69 and 70). Finally, in the case

of a U.S. judgment approving a class action settlement, it seems doubtful whether the judgment meets the requirement that the judgment be "on the merits2 (*The Sennar (No. 2)* [1985] 1 WLR 490, 494 (Lord Diplock)) or, even if it were to meet that test and the other requirements for its recognition, whether recognition of the judgment would have the effect of binding the absent claimant contractually as if it, or its duly authorised legal representative, had concluded the settlement.

Questions of a different kind would, of course, arise if the class action judgment had been delivered, not by a U.S. court, but by a court of a State within the Brussels/Lugano Regime. Here, the opportunity for a review of the basis of jurisidiction is much more limited, and the most interesting questions relate to (1) the extent to which the absent claimant can oppose recognition through the public policy (Art. 34(1)) and default of appearance (Art. 27(2)) exceptions, (2) whether a court approved settlement must be recognised (cf. Case C-414/92, Solo Kleinmotoren v Boch [1994] ECR I-2237), and (3) identification of the law(s) to be applied in determining the preclusive effect of the class action judgment or court approved settlement (cf. Case C-420/07, Apostolides v Orams [2009] ECR I-0000, para. 66).

Against the background of the rapid growth internationally of collective redress regimes in this and other subject matter areas, and growing political and economic pressures to promote private regulatory enforcement, it appears not unlikely that U.S. and European courts will become increasingly familiar with these private international law issues in the coming years as cross-border collective redress becomes an accepted part of the trans-national legal landscape. Legislative intervention, at least within the European Union, can also be foreseen (why have a button if you cannot press it?). For the time being, all we can say is "watch this space".

European Parliament Committee on Arbitration and Brussels I

On June 28th, the Committee on Legal Affairs of the European Parliament issued a report on the Implementation and Review of Regulation 44/2001.

On the exclusion of arbitration from the scope of the Regulation, the Committee expressed the following view:

> *Whereas the various national procedural devices developed to protect arbitral jurisdiction (anti-suit injunctions so long as they are in conformity with free movement of persons and fundamental rights,….) must continue to be available and the effect of such procedures … must be left to the law of those Member States as was the position prior to the judgment in West Tankers.*

On the proposal to grant exclusive jurisdiction to the court of the seat of the arbitration, the report provides:

> *Exclusive jurisdiction could give rise to considerable perturbations It appears from the intense debate raised by the proposal to create an exclusive head of jurisdiction for court proceedings supporting arbitration in the civil courts of the Member States that the Member States have not reached a common position thereon and that it would be counterproductive, having regard to world competition in this area, to try to force their hand.*

See the report of Hans Van Houtte over at the Kluwer Arbitration Blog.

New Dissertation: European

Private International Law on Legal Parentage?

A new dissertation on legal parentage has recently been published: *Kees Saarloos* (Maastricht University), **European private international law on legal parentage? – Thoughts on a European instrument implementing the principle of mutual recognition in legal parentage.**

A summary has kindly been provided by the author:

> *The first part of the dissertation is a comparative analysis of the law on legal parentage in England & Wales, France, Germany, the Netherlands and Sweden. The second part examines the private international law on legal parentage in these countries. Special attention has been paid to the question to what extent legal parentage that has been established abroad, is recognised in the legal systems involved. In the third part, the influence of EU law on the free movement of persons on the recognition of civil status (Garcia Avello, Grunkin and Paul) has been analysed.*
>
> *The conclusion is that at this point in time, the case law of the ECJ only obliges Member States to recognise a civil status that has been established in another Member State, if the civil status does not violate the public policy of the recognising state and if there is no conflict of interest between the persons involved. Further implementation of the principle of mutual recognition in legal parentage requires action by the European legislator. In the final chapter, some suggestions have been made to work out the principle of mutual recognition in legal parentage. The starting point is that the law of the child's habitual residence should govern the registration of parentage at birth and the validity of the acknowledgment of parenthood; in court proceedings on parentage however, the grounds for jurisdiction should be limited and the courts should apply the lex fori.*

The electronic version, including an English and a French summary, is available free of charge at the website of the library of the University of Maastricht: http://dissertaties.ub.unimaas.nl/default.asp?lang=eng

French Supreme Court Breaks Land Taboo

On June 23rd, 2010, the French Supreme court for private and criminal matters (*Cour de cassation*) held that French courts had jurisdiction to determine the succession to a property situated in a foreign country.

The deceased person was a French national domiciled in Madrid. He owned two apartments, one in Spain and one in France, and monies on bank accounts. As his wife and his two children (one legitimate, one illegitimate) could not reach an agreement with respect to the succession, the wife sued the children before a French court. One of the children challenged the jurisdiction of the court on the ground that one of the properties was situated abroad.

The Court of appeal of Montpellier had retained jurisdiction over the Spanish immoveable. Remarkably, the *Cour de cassation* dismissed the appeal lodged against this decision and held that French courts did have jurisdiction.

The *Cour de cassation* offered a most innovative reasoning to justify that outcome.

First, it underlined that French courts had jurisdiction to determine the succession to part of the estate of the deceased person. It had jurisdiction over the moveables because the plaintiff was a French national (Civil code, art. 14), and it had jurisdiction over the immoveable situated in France because, well, it was situated in France.

But the best was still to come. The *Cour de cassation* ruled that, with regard to the Spanish immoveable, Spanish **law** operated a *renvoi* to French **law,** and that such *renvoi* was **granting jurisdiction** to the French court to decide the entire dispute and determine the succession to the whole estate. The court held that jurisdiction was only granted "to the exception of legal and physical operations flowing from the lex situs", but it did not find that such operations were involved in the case and thus ruled that French courts had jurisdiction over the Spanish immoveable.

The most important part of the judgement reads:

> *Mais attendu qu'ayant retenu, par motifs adoptés, que les juridictions françaises étaient compétentes pour connaître partiellement des opérations de liquidation et partage de la succession, tant mobilière en vertu de l'article 14 du code civil, qu'immobilière en raison de la situation d'un immeuble en France, la cour d'appel, constatant que la loi espagnole applicable aux dites opérations relatives aux meubles et à l'immeuble situés en Espagne, renvoyait à la loi française, loi nationale du défunt, en a exactement déduit que les juridictions françaises étaient, par l'effet de ce renvoi, compétentes pour régler l'ensemble de la succession à l'exception des opérations juridiques et matérielles découlant de la loi réelle de situation de l'immeuble en Espagne.*

Publication: Black on Foreign Currency Claims in the Conflict of Laws

The second book in Hart Publishing's new Studies in Private International Law is out, and it is Vaughan Black's ***Foreign Currency Claims in the Conflict of Laws***. From the blurb:

> *Problems in assessment of damages remain among the most contentious aspects of private law disputes. The assessment exercise becomes particularly difficult when one of the parties asks that damages be assessed in some foreign currency or claims that, even though damages should be assessed in the currency of the forum, foreign exchange losses should form a head of loss.*
>
> *The 1975 decision of the House of Lords in Miliangos v George Frank (Textiles) Ltd was revolutionary in that it permitted English courts to award judgment in a foreign currency. Miliangos has been influential throughout the common law world and courts in the commonwealth and the United States now contemplate*

awarding damages in currencies other than their own. However, that modernisation has hardly eliminated the problems in this area. When may a judge assess damages in a currency other than that of the forum? If a court elects to assess damages in its own currency, what conversion date should it select in converting from a foreign currency that was relevant to the obligations between the parties? In an age of fluctuating currencies questions of this nature present judges with choices involving significant financial implications.

This book takes a comparative look at how common law courts have addressed damages claims when foreign currencies are involved, and at statutory responses to that issue. It describes the practices of UK, Commonwealth and American courts in this field and draws both on principles of private international law and of damages assessment to analyse current practice.

It is £55 on the Hart website.

New South Wales and Singapore Supreme Courts Enter Into a Memorandum of Understanding on Questions of Foreign Law

From the press release:

The Supreme Courts of New South Wales and Singapore have entered into a Memorandum of Understanding (MOU) to work closely and expeditiously on issues arising under foreign law.

It is the first time a formal agreement has been forged between an Australian and foreign court on a legal issue, as distinct from one related to education or mutual assistance.

NSW Chief Justice James Spigelman and Singapore Chief Justice Chan Sek Keong jointly made the announcement today.

Chief Justice Spigelman said the MOU and supporting amended Uniform Civil Procedure Rules would prove valuable in determining complex cross-border commercial and family disputes.

"Money and people are more mobile today and courts are increasingly being asked to adjudicate on matters spanning multiple jurisdictions," he said.

"This MOU reflects both the fluid and complicated nature of some modern legal proceedings, and the growing need for closer cooperation between courts and judges."

Chief Justice Chan added: "The written agreement recognises the importance of facilitating legal cooperation in a way that has never been done before," he said.

"I look forward to its more widespread adoption in the future as a new means of determining complex questions of foreign law."

Usually, when an issue of foreign law arises in a case before the Supreme Court, each party to the proceedings engages an expert to provide advice and to attend court – often travelling from overseas – for cross-examination.

In effect, the presiding judge is asked to adjudicate between conflicting expert witnesses.

In a speech to commercial judges in Asia in Hong Kong earlier this year, Chief Justice Spigelman said this practice was "a costly process and leads to significant 'lost in translation' problems, with a real prospect that an incorrect understanding of the foreign law will be adopted and applied".

In the same speech, he raised the possibility of courts directly referring questions of foreign law for determination to the court of the governing law. Now, consenting parties will have the option to seek a ruling directly from the foreign court about its own laws.

Chief Justices Spigelman and Chan agreed a judgment by a foreign court would be more authoritative, accurate and expedient than opinions by conflicting

expert witnesses.

The Supreme Court of Singapore was the first to refer a question of foreign law to a foreign court (Westacre Investments Inc v The State-Owned Company Yugoimport SDPR (also known as Jugoimport-SDPR) [2009] 2 SLR (R) 166), when it sought a determination of a question of English law. The Commercial Court in London answered the question (Westacre Investments Inc v Yugoimport SDPR [2008] EWHC 801 (Comm.)).

Earlier this year, the NSW Court of Appeal delivered judgment in Murakami v Wiryadi & Ors, which involved the Courts of Australia, Indonesia and Singapore.

Under the new Rules, parties involved in NSW cases will have another option to have questions of foreign law answered by a single referee. This process is expected to be highly cost-effective. The Supreme Court has a long established system of referees. However, it has not previously been used to determine an issue of foreign law.

Many thanks to Adrian Briggs for the tip-off.