Mills on Federalism in the EU and in the US

Alex Mills, who is a lecturer at Cambridge University, has posted Federalism in the EU and the US: Subsidiarity, Private Law and the Conflict of Laws on SSRN. Here is the abstract:

The United States has long been a source of influence and inspiration to the developing federal system in the European Union. As E.U. federalism matures, increasingly both systems may have the opportunity to profit from each others' experience in federal regulatory theory and practice. This article analyses aspects of the federal ordering in each system, comparing both historical approaches and current developments. It focuses on three legal topics, and the relationship between them: (1) the federal regulation of matters of private law; (2) rules of the conflict of laws, which play a critical role in regulating cross-border litigation in an era of global communications, travel and trade; and (3) 'subsidiarity', which is a key constitutional principle in the European Union, and arguably also plays an implicit and under-analyzed role in U.S. federalism. The central contention of this article is that the treatment of each of these areas of law is related – that they should be understood collectively as part of the range of competing regulatory strategies and techniques of each federal system. It is not suggested that 'solutions' from one system can be simply transplanted to the other, but rather that the experiences of each federal order demonstrate the interconnectedness of regulation in these three subject areas, offering important insights from which each system might benefit.

The paper is forthcoming in the *University of Pennsylvania Journal of International Law*. It can be freely downloaded here.

No Renvoi in Dallah

The United Kingdom Supreme Court delivered its judgment in *Dallah* on November 3rd, 2010.

Readers will recall that the case was concerned with an arbitral award made by an ICC tribunal in Paris. Dallah was seeking enforcement in England. The Supreme court confirmed that the award would not be declared enforceable for lack of jurisdiction of the tribunal over the defendant, the Government of Pakistan (for more details see our previous post here). The case raised a variety of issues of English international commercial arbitration law that I will leave to my learned English coeditors. But it also raised a most interesting issue of conflict of laws involving French private international law.

The issue was which law governed the validity/existence of an arbitration agreement. English law and the New York Convention provide that, in the absence of a choice by the parties, the validity of an arbitral agreement is governed by "…*the law of the country where the award was made*." In this case, that was French law. And the Supreme Court applied French law.

The problem with this view is that, if one were to ask a French court whether it would apply French law in such case, it would most certainly say no. Since the *Dalico* case in 1993, the French Supreme Court for private and criminal matters (*Cour de cassation*) has ruled that international arbitration agreements are not governed by any national law. This might look like a remarquable statement. It has shocked many French lawyers. It seems to have equally shocked quite a few Law Lords (more on this later). But however shocking it might be, it is a clear statement. According to the French *Cour de cassation*, French law does not govern the validity of arbitration agreements when the seat of the arbitration is in France. And one would think that the *Cour de cassation* knows what it is talking about when it comes to French law.

Which law governs then? Well, the two French law experts in this case had offered a reasonable interpretation. Their Joint Memorandum stated:

> *"Under French law, the existence, validity and effectiveness of an arbitration agreement in an international arbitration need not be assessed on the basis of national law, be it the law applicable to the main contract or any other law and*

can be determined according to rules of transnational law. To this extent, it is open to an international arbitral tribunal the seat of which is in Paris to find that the arbitration agreement is governed by transnational law".

After citing *Dalico*, Lord Mance also started to explain:

15. This language suggests that arbitration agreements derive their existence, validity and effect from supra-national law, without it being necessary to refer to any national law.

Indeed.

***Renvoi* or not *renvoi*?**

There was therefore an interesting issue before the English Supreme court. Its choice of law rule designated French law, but the French choice of law rule did not designate French susbtantive law. The question of *renvoi* had thus to be asked: would the English court ignore that French law did not want to be applied, or would it take it into consideration?

One possible answer could have been that, in the English conflict of laws, the scope of *renvoi* is limited to family law, and that, in all other fields, English courts do not care about foreign choice of law rules. Alternatively, the English Court could have answered that the New York Convention excludes *renvoi*. Lord Collins did suggest so. He cited one author to this effect. It is disappointing that he did not mention all the others, in particular the numerous Swiss scholars who have argued to the contrary.

But this is not the main answer that Lord Collins gave. The distinguished jugde ruled that there could be no *renvoi*, because the applicable French choice of law rule designated French law. He held:

124 … it does not follow that for an English court to test the jurisdiction of a Paris tribunal in an international commercial arbitration by reference to the transnational rule which a French court would apply is a case of renvoi. Renvoi is concerned with what happens when the English court refers an issue to a foreign system of law (here French law) and where under that country's conflict of laws rules the issue is referred to another country's law. That is not the case

> *here. What French law does is to draw a distinction between domestic arbitrations in France, and international arbitrations in France. It applies certain rules to the former, and what it describes as transnational law or rules to the latter.*

So, in a nutshell, although the *Cour de cassation* rules that transnational law applies, that is not the content of French law. French law provides for the application of rules specifically designed for international arbitration, and these rules are French.

Lord Mance would certainly not have disagreed with this. He ruled:

> *15. … the true analysis is that French law recognizes transnational principles as potentially applicable (…), such principles being part of French law.*

Lord Mance, however, might not have been absolutly sure about this. He thus found useful to state that this had to be a correct view, since both barristers appearing before the Court also agreed. Just as 60 million Frenchmen can't be wrong, how could three English lawyers get it wrong on French law (even after two senior French lawyers had concluded differently)?

Lord Collins and Lord Mance's London Lectures

Are Lord Collins and Lord Mance right when they say that what French courts mean, or are doing, is to lay down French rules of international arbitration? Maybe. Quite a few French scholars have written exactly this. It might be, as Lord Collins put it, that French courts are wrong, and that what they do is is only to "describe" that transnational law applies. Yet, none of these scholars is authoritative when it comes to laying down rules of French law. Neither are Lord Collins or Lord Mance. Only French courts are. What they "describe" *is* French law.

The Lords sitting in the English Supreme Court were acting in a judicial capacity. They were faced with a question of foreign law. Their job was therefore to assess its content, and, for that purpose, they were to look at French *authorities*. Instead, the English Supreme Court explained how French law ought to be understood despite clear judgments of France's highest court ruling otherwise. It made an interesting academic point. But one would have thought that foreign law

is a fact that ought to be assessed rather than an idea that can be endlessly discussed.

No doubt, French academics who disagree with this cases will appreciate the judgment in *Dallah*. It is less clear that the *Cour de cassation* will appreciate as much to have been lectured by Lord Collins and Lord Mance on the French conflict of laws.

Don’t Dallah … Book Now

On 3 November 2010, the UK Supreme Court issued its decision in Dallah Real Estate & Tourism Holding Company v The Ministry of Religious Affairs, Pakistan [2010] UKSC 46, with the members of the Court unanimously declining to enforce under Part III of the Arbitration Act 1996 (giving effect to the UK’s obligations under the New York Convention) an award made by an ICC Tribunal sitting in Paris.

The decision (and earlier stages of the litigation) addressed several important issues, including the scope and manner of the Court’s review under section 103(2)(b) of the 1996 Act (Article V(1)(a) New York Convention), the place of the doctrine of “competence-competence” within the Act and the application of arbitration agreements to non-signatories. The ruling and judgments of the Supreme Court on these issues will almost certainly have a significant and longstanding effect on UK arbitration practice, while influencing debate and practice in other countries.

British Institute of International and Comparative Law (through its Herbert Smith Senior Research Fellow, Dr Eva Lein) has organised a rapid response seminar to discuss the ruling and implications of Dallah case. The seminar will be held at the Institute’s headquarters from **17:15 to 18:45 0n Wednesday 24 November 2010** (followed by a drinks reception). The assembled panel of experts will include:

- David Brynmor Thomas, Herbert Smith LLP

- Dr Stavros Brekoulakis, Queen Mary, University of London
- Ali Malek QC, 3 Verulam Buildings
- Duncan Speller, Wilmer Cutler Pickering Hale and Dorr LLP

Registration and other details of the seminar are available here.

UPDATE: We mistakenly referred to September as the month for this seminar. That has now been corrected – it was, of course, meant to say November. Many thanks to those who emailed pointing out the typo. The time and list of speakers have also been updated.

Article 24 Brussels I, abuse of proceedings and Article 6 ECHR

In an interesting case concerning jurisdiction in a maintenance case, the Dutch Supreme Court – clearly doing justice in the individual case – ruled that jurisdiction may be based on Article 24 Brussels I in spite of the respondent contesting jurisdiction (LJN BL3651, Hoge Raad, 09/01115, 7 May 2010, *NJ* 2010, 556 note Th.M. de Boer). It considered that in this particular case contesting jurisdiction constituted abuse of proceedings. It upheld the decision by the Court of Appeal that considered that declining jurisdiction would constitute a violation of the right of access to justice guaranteed by Article 6 ECHR since it would make it impossible for the claimant to have the case examined on the substance.

The facts that led to this ruling are as follows. Parties, ex spouses, both have the Dutch nationality but are domiciled in Belgium. In 2001 they obtained a divorce in the Netherlands. The District court also awarded maintenance for the (ex-) wife and their three children, but in appeal this decision was reversed due to lack of resources of the husband. In 2003, the woman turns to the Justice of the Peace in Zelzate, Belgium, again requesting maintenance (€ 1000 per child and € 3.500 for herself per month). The man argues that not the Belgian, but the Dutch court has jurisdiction. The Justice of the Peace accepts jurisdiction, but does not award the maintenance. The woman lodges an appeal at the Court of First Instance (District

Court) in Ghent, Belgium. The man again contests jurisdiction of the Belgian court, this time successfully. The court in Ghent declines jurisdiction, considering that Article 6 of the Belgian-Dutch Enforcement Convention of 1925 (!) confers jurisdiction upon the Dutch court since the maintenance is connected to a divorce obtained in the Netherlands. It refers the case to the District Court in The Hague, Netherlands.

In The Hague court – meanwhile we are in 2006 – again the man invokes the exception of jurisdiction, now arguing that it is *not* the Dutch court, but the *Belgian* court that has jurisdiction pursuant to the Brussels I Regulation. The District court, however, accepts jurisdiction (incorrectly) considering that the Belgian judgment regarding jurisdiction is to be recognized, and awards part of the maintenance considering that the man does have sufficient resources after all (€ 193,31 per child and € 1.691,43 for the ex-spouse per month). The man lodges an appeal, once again contesting jurisdiction of the Dutch court. The Court of Appeal correctly concludes that the Brussels I Regulation applies (and not the Belgian-Dutch Enforcement Convention, see Art. 69). It considers that the Dutch court does not have jurisdiction pursuant to Art. 2 or 5(2) Brussels I (the ex-spouses are domiciled in Belgium and it concerns an independent maintenance claim), and that only Art. 24 on tacit submission can serve as a basis for jurisdiction.

It is under these circumstances that the Court of Appeal considers that the man contested jurisdiction of the Belgian court, arguing that the Dutch court had jurisdiction, but when the case was transferred to the Netherlands, changed his position without a valid reason, contesting jurisdiction of the Dutch court. This constitutes abuse of proceedings under Dutch law. Where the Dutch court would decline jurisdiction, the wife would not have access to court to have her claim decided on the merits. As mentioned above, the Supreme Court ruled that the Court of Appeal under these circumstances rightfully based its jurisdiction on Art. 24 Brussels I.

Though there may be a little tension (?) with the generally rigid approach of the ECJ in relation to the Brussels I Regulation, denying arguments based on abuse of proceedings (such as in the Gasser case), I believe this Dutch judgment to be the only just solution in this case.

Rome-ing Instinct?

In February this year, the English courts appeared finally to have woken up to the arrival of the Rome II Regulation, with the first published decision addressing its provisions.

In Jacobs v Motor Insurers Bureau [2010] EWHC 231 (QB), Mr Justice Owen applied Rome II's provisions to reach the conclusion that the compensation to be paid by the MIB (acting as the UK's compensation body under the Fourth Motor Insurance Directive) to the claimant as a result of an accident in a Spanish shopping centre car park in December 2007 in which the other driver was German (and uninsured) should be assessed in accordance with Spanish law, as the law of the place where the damage occurred. In the course of his judgment, the judge rejected the claimant's arguments that (1) the matter was not one involving a "conflict of laws" within Art. 1(1) of the Regulation, (2) damage was suffered in England for the purposes of Art. 4(1) by reason of the MIB's failure to compensate the claimant there, (3) the reference to the "person claimed to be liable" in the common habitual residence rule in Art. 4(2) was a reference to the named defendant (here, the MIB) not the primary tortfeasor (i.e. the uninsured driver), and (4) that the "escape clause" in Art. 4(3) should be invoked by reason of the MIB's involvement, on the basis that its compensation obligation was manifestly more closely connected to England. Owen J concluded that, insofar as the UK statutory instrument which obliged the MIB to compensate the claimant appeared to require that the compensation be assessed in accordance with English (or British) law (as to which, see below), it must be considered to have been overridden by Rome II's provisions.

That decision has now been reversed by the Court of Appeal ([2010] EWCA Civ 1208), which treated Rome II as having no material impact on the issues to be determined in the case before it and did not consider it necessary to address any of the (interesting and important) issues concerning the proper application of Art. 4. In the Court's view (para. 38 of its judgment), the relevant provision within the

UK Regulations invoked before it (reg 13 of the Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations (SI 2003/37) (the "Compensation Body Regulations")) defined the MIB's compensation obligation in such a way as to require the application of English law principles to the assessment of compensation and did not constitute a rule of applicable law which was incompatible with, and could be trumped by, the Rome II Regulation. The Court considered that its conclusion was entirely consistent with the scheme and provisions of the Fourth Motor Insurance Directive (Directive (EC) No 2000/26), which the Compensation Body Regulations were designed to implement.

Assuming that there is no further appeal, the claimant Mr Jacobs will receive compensation according to English law principles of assessment, with the result that his award will likely be higher than if the MIB had prevailed in his argument that Spanish law should be applied. That consequence, no doubt, will be of great comfort to him and may appear to many (given that the economic burden will be spread widely among those holding motor insurance policies) as a "fair result". Nevertheless, certain aspects of the decision remain troubling.

First, the Court did not consider whether and, if so, how the MIB's obligation to pay compensation fitted within the framework of the Rome II Regulation. Here, a number of very interesting questions arise (apart from those identified above concerning the proper interpretation of Art. 4):

- Did Mr Jacobs' claim against the MIB constitute a "civil and commercial" matter within Art. 1(1) of the Rome II Regulation? At first instance, Mr Jacobs' counsel had conceded that it did (and Owen J agreed with that concession – see para. 19 of his judgment), but it is not entirely clear that the concession was correct, given that the MIB was acting as the UK's compensation body under the Fourth Motor Insurance Directive and its (putative) obligation was subject to a special regime established pursuant to the Directive and the Compensation Body Regulations.
- Did any obligation owed by the MIB constitute a "non-contractual" obligation falling within the scope of the Rome Regulation? If so, did it constitute a "non-contractual obligation arising out of a tort/delict" within Art. 4? Owen J found that it did (see para. 30 of his judgment), but it may be doubted whether a scheme of this kind for compensating victims of

anti-social conduct from public funds was intended to fall within the ambit of the Regulation.

- If the Rome II Regulation does apply, what is its effect in terms of defining the applicable law and its relationship with the Compensation Body Regulations? In principle, the Rome II Regulation applies to determine the law applicable to a non-contractual obligation in its entirety and not only to a specific issue, for example the assessment of damages. If the MIB's (putative) obligation fell, therefore, within the scope of the Rome II Regulation then the starting point would be that not only the amount of compensation payable but also the basis and extent of the MIB's liability would fall to be determined in accordance with the law applicable in accordance with its provisions. This leads to the following conundrum: if Art. 4 points in this case to Spanish law (as Owen J concluded), how can the MIB be under any obligation at all as no provision of Spanish law will impose any compensation obligation on the MIB (as opposed to its Spanish counterpart)? The answer, it is submitted, may be found in Art. 16 (overriding mandatory provisions) whereby provisions of the law of the forum may be given overriding effect in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation. The Compensation Body Regulations, being intended to fulfil the United Kingdom's obligations under the Fourth Motor Insurance Directive, may well be of this character, although the Court of Appeal did not explicitly seek to explain their application in these terms.

Against this background, it is disappointing that the Court of Appeal did not consider it necessary to address any of these issues in concluding (para. 38) that:

> *Rome II has no application to the assessment of the compensation payable by the MIB under regulation 13 [of the Compensation Body Regulations] and it is therefore unnecessary to consider the issues relating to the construction of Article 4 that would arise if it did so.*

(Earlier in his judgment, although not necessary for the decision in Jacobs as liability was not in issue, Moore-Bick LJ did appear to accept that the law applicable under Rome II should govern the question whether the driver of the uninsured/untraced vehicle was "liable" to the claimant, being (as the Court held

– para. 32) an implicit pre-condition to a compensation claim under regulation 13. If correct, this would involve a partial, statutory incorporation of the Regulation's rules with respect to the driver's non-contractual obligation, without applying them in their full vigour to the MIB's compensation obligation. It may, however, be questioned whether this approach can be supported, given that its effect is to distort the Regulation's scheme by applying its rules only to the question of liability and not questions concerning the assessment of damages.)

Secondly, the Court of Appeal's explanation of the legal effect of the relevant provision in the UK Regulations appears incomplete. Regulation 13(2) of the Compensation Body Regulations provides as follows:

> *(2) Where this regulation applies—*
>
> *(a) the injured party may make a claim for compensation from the compensation body, and*
>
> *(b) the compensation body shall compensate the injured party in accordance with the provisions of Article 1 of the [Second Motor Insurance Directive] as if it were the body authorised under paragraph 4 of that Article and the accident had occurred in Great Britain.*

The Court of Appeal accepted (para 34) a submission on the part of the MIB that the intention underlying the closing words in sub-para. (b) ("as if it were the body authorised *[under Art. 1(4) of the Second Motor Insurance Directive*] and the accident had occurred in Great Britain") was to require the MIB to respond to Mr Jacobs claim on the basis of a legal fiction that the accident had occurred in Great Britain. In such cases, it must be noted, the MIB is also the body responsible for providing compensation to the victim of an accident involving an uninsured or untraced driver under the extra-statutory scheme established by the Uninsured and Untraced Drivers Agreements between the MIB and the UK Secretary of State for Transport. These Agreements, in their current form, seek to implement the UK's obligations to establish a compensation mechanism under the Second Motor Insurance Directive.

Taking this submission to its logical conclusion (although it does not appear that the MIB sought to press it this far), it would follow that the content of the MIB's statutory obligation under regulation 13 ought to have be determined by

reference to the terms of either the Uninsured or the Untraced Drivers Agreement (as applicable), on the premise that the accident had occurred in Great Britain and not abroad. The Court, however, proceeded to the conclusion that the MIB was under an obligation to compensate Mr Jacobs in accordance with English law principles, without any further analysis of the Agreements to determine (for example) (a) which of the Agreements applied to the facts of the case, (b) whether any pre-conditions for obtaining compensation under the applicable Agreement (for example, in the case of the Uninsured Drivers Agreement, the obtaining of an unsatisfied judgment) had been or were capable of being met, or (c) whether the applicable Agreement provided any guidance for the assessment of compensation by the MIB.

Instead of undertaking this exercise, and without citing any supporting authority, the Court concluded (para. 35) that:

> *The mechanism by which the MIB's obligation to compensate persons injured in accidents occurring abroad involving uninsured or unidentified drivers is established is to treat the accident as having occurred in Great Britain, but in the absence of any provision limiting its scope it is difficult to see why it should not also affect the principles governing the assessment of damages, particularly in the absence at the time of complete harmonisation throughout the EEA of the conflicts of laws rules governing that issue. Nonetheless, the matter is not free from difficulty. As I have already observed, at the time the Regulations were made damages recoverable as a result of an accident occurring in Great Britain would normally have been assessed by reference to the lex fori, yet regulation 13(2)(b) does not make any provision for the application of English or Scots law as such, presumably leaving it to the court seised of any claim to apply its own law.*

This reasoning is unconvincing. In short, it does not appear to be tied to the wording of regulation 13 or to be consistent with the Court's explanation of why it was so worded. A further examination of the Agreements may have found them to be impossible or excessively difficult to apply to foreign accident cases such as Jacobs or of being incompatible with the Fourth Motor Insurance Directive and this analysis, in turn, might have led the Court to doubt its approach to statutory construction. The short-cut taken by the Court, however, appears to leave a sizeable gap in its reasoning.

Third, the Court comforted itself (para 37) with the fact that (on the interpretation that it favoured) regulation 13 of the Compensation Body Regulations (dealing with untraced or uninsured drivers) would produce the same outcome for a claimant in Mr Jacobs' position as for a claimant relying on the apparently clear wording of regulation 12 (dealing with the situation where an insurer's representative has not responded within the prescribed time, in which case the Regulations refer to "the amount of loss and damage … properly recoverable … under the laws applying in that part of the United Kingdom in which the injured party resided at the date of the accident"). In each case, English law principles would normally be applied to the assessment of compensation (a result which would also accord with English private international law at the time that the Compensation Body Regulations were adopted: Harding v Wealands [2006] UKHL 32). As the Court also recognised, however, this understanding of the Compensation Body Regulations produces two apparent anomalies (see paras. 29 and 30):

- *In many cases, the claimant will receive more compensation from the MIB in cases of "insurance delinquency" than if it had sued the driver or made a direct claim against its insurer, being claims to which the rules of applicable law in the Rome II Regulation would undoubtedly apply.*
- *The MIB, having paid that compensation, will be unable to pass the full burden to the compensation body in the Member State where the vehicle is based or the accident occurred, pursuant to the provisions of the Fourth Motor Insurance Directive. Under the 2002 Agreement between the Member States' compensation bodies, the MIB's recovery will be limited to the amount payable under the law of the country in which the accident occurred. Nor will the MIB have any express right of subrogation under the Directive for the balance against the driver or its insurer, such right being limited to the reimbursing compensation body.*

Powerless as the Court of Appeal may have been to address these anomalies, they deserve the attention of the UK legislator (and – dare I say it – the European legislator) at the earliest opportunity. In the meantime, it remains to be seen whether there will be a further appeal to the Supreme Court in Jacobs.

New Edition of Bureau & Muir Watt's Droit Int'l Privé

The second edition of Dominique Bureau and Horatia Muir Watt's treatise on private international law was released a few weeks ago.

The first edition of this two volume book was highly praised in France when published three years ago. One of its many advantages is that it discusses extensively non French sources.

More details can be found here.

Issue 2010/2 Nederlands Internationaal Privaatrecht

The second issue of the Dutch journal on Private International Law, *Nederlands Internationaal Privaatrecht (www.nipr-online.eu)* includes the following contributions on Party autonomy in Rome I and II; Art. 5(3) Brussels I (Zuid-Chemie case); Scope of the Service Regulation; Enforcement in the Netherlands; and Implementation of the European Order for Payment Procedure in the Netherlands:

- Symeon C. Symeonides, Party autonomy in Rome I and II: an outsider's perspective, p. 191-205. The introduction reads:

The principle that contracting parties should be allowed, within certain limits, to pre-select the law governing their contract (party autonomy) is almost as ancient as private international law itself, dating back at least to Hellenistic times. Although this principle has had a somewhat checkered history in the United States, it has been a gravamen of continental conflicts doctrine and practice, at

least since the days of Charles Dumoulin (1500-1566). The latest codified expression of party autonomy in European private international law is found in the European Union's Rome I Regulation of 2008 on the Law Applicable to Contractual Obligations, which replaced the 1980 Rome Convention, as well as in the Rome II Regulation of 2007 on the Law Applicable to Non-Contractual Obligations. In the meantime, most other legal systems have recognized the principle of party autonomy, making it 'perhaps the most widely accepted private international rule of our time'. Nonetheless, disagreements remain in defining the modalities, parameters, and limitations of this principle. These disagreements include questions such as: (1) the required or permissible mode of expression of the contractual choice of law; (2) whether the chosen state must have a specified factual connection with the parties or the transaction; (3) which state's law should define the substantive limits of party autonomy; (4) whether the choice must be limited to the law of a state or whether it can also include non-state norms; and (5) whether the choice may encompass non-contractual issues. This essay offers an outsider's limited textual assessment of some of the modalities and limitations of party autonomy under the Rome I and Rome II Regulations and a comparison with the prevailing practice in the United States.

- H. Duintjer Tebbens, Het '*forum delicti*' voor professionele productaansprakelijkheid en het Europese Hof van Justitie: een initieel antwoord over initiële schade, Hof van Justitie EG 16 juli 2009, zaak C-189/08 (*Zuid-Chemie/Philippo's Mineralenfabriek*), p. 206-209. The English abstract reads:

The author offers a critical analysis of the latest judgment of the European Court of Justice in a line of cases concerning the proper interpretation of 'the place where the harmful event occurred' (here: the initial damage) for the purposes of the allocation of jurisdiction in tort under Article 5(3) of the Brussels Convention and its successor, the Brussels I Regulation. In Zuid-Chemie v. Philippo's Mineralenfabriek*, C-189/08, on a reference by the Dutch* Hoge Raad*, the Court had to answer the principal question whether, in a dispute between commercial parties concerning liability arising out of a contaminated chemical product used for the production of fertilizer, the place where the initial damage occurred was where the product was delivered or the place where, as a result of the normal use of the product, (material) damage was caused to the fertilizer. The referring court further asked whether, if the second alternative was correct, this would also extend to the hypothesis that the initial damage consisted of pure economic loss. As to the procedural treatment of this reference the Note questions the wisdom of having resort in the present case to the accelerated procedure for preliminary rulings, which implies that the Advocate General does not deliver an Opinion. On the principal question concerning interpretation of Article 5(3), the author agrees with the decision of the European Court which further develops earlier case law, in particular its ruling in Marinari,*

C-364/93. Nevertheless, he criticizes some parts of the reasoning of the Court as well as certain points of terminology. He notes that the European Court made its own assessment of what kind of damage was at issue in the case, i.e. material damage to the fertilizer produced by the claimant, which did not completely match the findings of fact by the Hoge Raad*. This explains why the European Court did not deal with the second question referred by the Dutch court whose point of departure was that the initial damage consisted of pure economic loss. The author concludes that it is still an open question whether Article 5(3) offers a forum if the initial damage is purely of a pecuniary nature, for example in the case of losses from financial transactions.*

- Chr.F. Kroes, Kantoorbetekening zet de Bet.-Vo. buiten spel oordeelt de Hoge Raad, Enige kanttekeningen bij Hoge Raad 18 december 2009, nr. 09/03464 (*Demerara/Karl Heinz Haus*), p. 210-214. The English abstract reads:

On December 18, 2009, the Supreme Court handed down a decision that will be dear to the hearts of pragmatists. The Supreme Court found that the possibility of service pursuant to Article 63(1) of the Code of Civil Procedure renders the Service Regulation (EC 1393/2007) inapplicable. The Supreme Court's decision is based on one of the recitals of the Service Regulation and information in the parliamentary papers that accompanied the proposal for the Dutch Execution Act on the new Service Regulation. Therefore, its judgment seems to fail to take into account the case law of the ECJ. Pursuant to that case law, the Service Regulation should be interpreted autonomously. Statements of the Council may not be used to interpret the Service Regulation, if they are not reflected in the provisions of the Regulation itself. The recitals may not be used to arrive at a restrictive interpretation of the scope of application of the Regulation. Therefore, it is difficult to see how information in the Dutch parliamentary papers supports an interpretation that restricts the application of the Service Regulation.

- Niek Peters, Bevoegdheid van de Nederlandse rechter bij een exequaturprocedure en een *actio iudicati*, p. 215-222. The English abstract reads:

In the Netherlands it is not possible for a creditor to simply enforce a foreign monetary judgment against a debtor. A creditor must first of all obtain a Dutch enforcement order For this purpose, he must either file an application for leave for enforcement (exequatur) – pursuant to Articles 38 et seq. Brussels I Regulation and Articles 985 et seq. DCCP respectively – or alternatively file a claim pursuant to Article 431 paragraph 2 DCCP. However, the jurisdiction of the Dutch courts over such an application or claim is not necessarily ensued, when a debtor has his place of domicile outside of the Netherlands. This is essentially due to the fact that a Dutch court may not assume jurisdiction if

a creditor merely states that the enforcement will (or could) be required in his district. For instance, in a procedure for ordering enforcement (exequatur procedure), a creditor must make a plausible argument that a debtor has, or could have, assets in said district. In case of a claim pursuant to Article 431 paragraph 2 DCCP, a Dutch court may not have jurisdiction until after a prejudgment attachment has been (successfully) levied. As a consequence, it is possible that a creditor cannot obtain an enforcement order in the Netherlands, even though he may have a justifiable interest in obtaining such order. Therefore, it would be recommendable if there is at least a court that has jurisdiction over an application for leave of enforcement or, respectively, a claim pursuant to Article 431 paragraph 2 DCCP.

- Mirjam Freudenthal, Perikelen rond de uitvoering van de Verordening van een Europees betalingsbevel, p. 223-225. The English abstract reads:

The Netherlands 2009 Act adapting Dutch civil procedure to the Regulation for a European Order for Payment did not include an effective provision on the referral of the order for payment procedure to a regular court procedure once the order for payment was objected to by the defendant. Recently the government published a Bill with adjustments to the 2009 Act, in which it proposed to concentrate all order for payment procedures in the The Hague court and a new provision was introduced regulating all aspects of this referral of the ex parte order for payment procedure to the regular court. In this article the consequences of the Bill's proposals are discussed and measures to improve the referral procedure are suggested.

If you are interested in contributing to this journal, please contact the editing assistant Wilma van Sas-Wildeman, w.van.sas-wildeman@asser.nl, or the editor-in-chief Xandra Kramer, kramer@frg.eur.nl

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The Battle Between Oklahoma and Foreign Law

Yesterday was election day in the United States, when the entire House of Representative and one third of the US Senate stood for reelection. It was also a day when ballot measures were taken up in several states. Strangely, choice of law was on the ballot in one state. Voters in Oklahoma were given the option to

approve the following measure:

> *"The Courts . . . when exercising their judicial authority, shall uphold and adhere to the law as provided in the United States Code, federal regulations promulgated pursuant thereto, established common law, the Oklahoma Statutes and rules promulgated pursuant thereto, and if necessary the law of another state of the United States provided the law of the other state does not include Sharia Law, in making judicial decisions. The courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international or Sharia Law."*

Nearly 70% of those voting approved the measure to ban the use of international law and Sharia law in Oklahoma state courts. While this bears some resemblance to initiatives in the 1800s that sought to prevent US courts from relying on the common law, I am fairly comfortable in stating that this may very well be the first time the US electorate (or the electorate of one US state) has voted on a choice of law initiative and has voted to close a state's doors to foreign, non-U.S. law. I have no doubt that the courts will be asked to step in to reivew this. It may be the case that such a ban is unconstitutional under the First Amendment, as my colleague Michael Helfand has recently explained. And to think that most Americans thought this election was about the economy!

Anuario Español de Derecho Internacional Privado 2009

A new number of the AEDIPr has been released. These are the doctrinal studies included in the volume:

ESTUDIOS

Nerina Boschiero, "Las reglas de competencia judicial de la unión europea en el espacio jurídico internacional"

Haimo Schack, “La (indebida) abolición de los procedimientos de exequátur en la unión europea”

Alegría Borrás, “La celebracion de convenios internacionales de derecho internacional privado entre estados miembros de la union europea y terceros estados”

Angel Espiniella Menéndez, “Dimensión externa del derecho procesal europeo”

Manuel Desantes y José Luis Iglesias Buhigues, “Hacia un sistema de derecho internacional privado de la unión europea”

Paul Beaumont y Burcu Yürsel, “La reforma del reglamento de Bruselas I sobre acuerdos de sumisión y la preparación para la ratificación por la UE del Convenio de la Haya sobre acuerdos de elección de foro”

Paul L.C. Torremans, “El EPLA y la patente comunitaria o el acuerdo sobre el tribunal europeo y de la UE y la patente de la UE: ¿una oportunidad para deshacerse de Gat / Luk y de la competencia exclusiva?”

Sylvaine Poillot Peruzzett, “La incidencia de las modalidades del reconocimiento de decisiones en el espacio judicial europeo en la dualidad orden público nacional / orden público europeo”

Crístian Oró Martínez, “Control del orden público y supresión del exequátur en el espacio de libertad, seguridad y justicia: perspectivas de futuro”

Pilar Jiménez Blanco, “Acciones de resarcimiento por incumplimiento de los acuerdos de elección de foro”

Gilles Cuniberti y Marta Requejo Isidro, “Cláusulas de elección de foro: fórmulas de protección”

Patricia Orejudo Prieto de los Mozos, “La incompatibilidad de decisiones como motivo de denegación de la ejecución de los títulos ejecutivos europeos”

Beatriz Añoveros Terradas, “Extensión de los foros de protección del consumidor a demandados domiciliados en terceros estados”

Julio Antonio García López, “Repercusiones de la sentencia del tribunal de justicia europeo en el asunto Sundelind López: ámbito de aplicación espacial de las

normas de competencia judicial internacional de la unión europea en materia de separación y divorcio”

Benedetta Ubertazzi, “Licencias de derechos de propiedad intelectual y reglamento comunitario sobre la competencia judicial”

José Ignacio Paredes Pérez, “Licencias de derechos de propiedad y las acciones colectivas en el reglamento “Bruselas I”: una aproximación desde la perspectiva de los intereses de los consumidores”

Vésela Andreeva Andreeva, “Licencias de derechos de propiedad y protección de los consumidores en el reglamento Bruselas I y su articulación con el reglamento Roma I”

Mònica Vinaixa Miquel, “La aplicación extracomunitaria de los foros especiales del art. 5 del Reglamento Bruselas I”

Clara I. Cordero Alvarez, “Algunos problemas de aplicación del art. 5.3º del reglamento 44/2001”

María López de Tejada Ruiz, “La incompatibilidad de decisiones en los nuevos reglamentos comunitarios”

María Jesús Elvira Benayas, “Una visión transversal del reglamento 1206/2001 sobre obtención de pruebas en materia civil y mercantil”

Marta Casado Abarquero, “La investigación del patrimonio del deudor ejecutado en el extranjero”

Alberto Muñoz Fernández, “La obtención de pruebas en EEUU para su empleo en procesos españoles”

Nicolás Zambrana Tévar, “La práctica del discovery entre los EEUU de América y España. especial atención al caso Prestige”

Toshiyuki Kono, “La reforma de la ley relativa al procedimiento civil en Japón “

Aurelio López–Tarruella Martínez, “La regulación en Japón de la competencia judicial internacional en materia de propiedad industrial e intelectual: una visión desde Europa”

Gilberto Boutin “La concurrencia de foros en el derecho procesal internacional panameño y en la Convención de Bustamante: forum non conviniens y litispendencia internacional”

Amalia Uriondo de Martinoli, “Reclamaciones litigiosas de alimentos entre convivientes desde una perspectiva latinoamericana”

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ANUARIO 2009 I

P.R. China’s First Statute on Choice of Law

I am grateful to XIAO Fang, Post-doctoral fellow and lecturer at Remnin University Law School, for contributing this report.

The Statute on the Application of Laws over Foreign-Related Civil Relations of the People’s Republic of China was adopted at the 17th Session of the Permanent Committee of the 11th National People’s Congress of the People’s Republic of China on October 28, 2010. It has been promulgated and shall come into force as of April 1, 2011. This is the P.R. China’s first statute on conflict rules.

The Statute comprises 52 articles which are divided into 8 chapters (general rules, civil subjects, succession, real rights, obligations, intellectual property, and supplementary provisions). It will be applied over the civil affairs with elements relating foreign countries and China’s special administrative regions of Hong Kong and Macao as well.

According to the legislators, during the process of drafting, the conflict law statutes of some countries, principally Germany, Switzerland and Japan, and the conventions of the Hague Conference of Private International Law and some Europe Union’s regulations have been referred to.

As most of Chinese civil and commercial statutes already include some conflict rules, for the areas that are not covered by this new statute, such as maritime law, civil aviation law and negotiable instrument law, the conflict rules in the related statutes should still be applied .

In the Chapter of General Rules, the Statute provides for the "application immédiate" of Chinese mandatory rules (Article 4), the defense of public policy against the application of foreign law (Article 5) and excludes *renvoi* in Chinese courts (Article 9). Pursuant to the new Statute, the limitation of action is governed by the law applicable to the civil relation (Article 7); characterization is governed by the lex fori (Article 8); the applicable foreign law should be ascertained by judges, while the parties should provide for the content of foreign law if they chose to apply it by agreement (Article 10).

During the process of drafting, the principle of most significant relationship has ever been stipulated as the principle of application of laws, like the provision of Article 1 of the 1978 Austrian Statute on Private International Law, which provided for: "The law applicable to foreign-related civil relation should have the most significant relationship with the relation." Nevertheless, in the final draft of the Statute, the article was deleted, and it was provided for in Article 2(2) that the most significant relationship principle will be supplementally applied in absence of conflict rules in the Statute.

Party autonomy got significant development in the new Statute. Besides contracts and family law, its application was extended to torts and real rights: in the cases of real rights in movables (Articles 37, 38) and tort (Article 44), the parties may choose freely the applicable law.

The new Statute also attaches importance to the protection of weaker parties in international civil relations. In the cases of relations between children and parents (Article 25), maintenance (Article 29), Guardianship (Article 30), consumption contract (Article 42), and product liabilities (Article 45) and so on, the lex personalis i.e. law of the nationality or the habitual residence of the weaker parties or the law which is favorable to the protection of the interests of the weaker party should be applied.