Wasserman on Transnational Class Actions

Rhonda Wasserman, who teaches at the University of Pittsburgh School of Law, has posted Transnational Class Actions and Interjurisdictional Preclusion on SSRN. Here is the abstract:

> *As global markets expand and trans-border disputes multiply, American courts are pressed to certify transnational class actions – i.e., class actions brought on behalf of large numbers of foreign citizens or against foreign defendants. Defendants typically oppose certification by arguing that European courts will not recognize or accord preclusive effect to a judgment in the defendant's favor. Thus, defendants fear repetitive litigation on the same claim in foreign courts even if they prevail in an American court.In addressing defendants' arguments, American courts carefully consider the likelihood that an American judgment will be recognized abroad. But they virtually never consider the preclusive effects, if any, that the judgment or court-approved settlement will receive or which country's preclusion law will determine those effects. The Article identifies and analyzes significant differences between American preclusion law and the preclusion laws of Europe. In light of these important differences, the Article strongly recommends that courts analyze recognition and preclusion issues separately, rather than conflating them.*

UK's Ministry of Justice Publishes Guidance on the Rome I Regulation

Yes, there are already at least two specialist works on the Rome I Regulation, but that has not stopped the UK's Ministry of Justice from producing guidance on the main provisions anyway. Here's their reasoning:

> *The purpose of this guidance is to provide a brief summary of the most important provisions in the Regulation. The Regulation is a substantial and complex instrument in a technical area of law and the contents of this guidance is only intended to be a brief outline of some of the most significant provisions. This outline is not comprehensive in nature. For a more comprehensive view of the Regulation, and the many issues to which it will inevitably give rise to, reference should be made to specialist literature on private international law.*
>
> *The Regulation provides uniform choice of law rules applicable in contractual obligations. These rules will enable courts throughout the European Union to select the national laws appropriate for the determination of proceedings where the case has a cross-border dimension. Issues concerning the interpretation of the rules in the Regulation can only be conclusively resolved by the European Court of Justice. As a result, any interpretative indications given in this guidance should not be regarded as conclusive in this sense.*

So, brief, incomplete and (once the European Court has started 'interpreting') probably wrong. But still, it's worth a read. Download the PDF here.

French Conference on Private Military Contractors

The Faculty of law of the University of Clermont-Ferrand will host a conference on *Private Military and Security Companies* on 4 and 5 March 2010.

Speakers will include legal scholars, political scientists and a variety of actors of international humanitarian law. Professors Bérangère Taxil (University of Angers) and Mathias Audit (University of Paris Ouest – formerly Nanterre) will more specifically discuss issues of private international law.

The full program and more details about the conference can be found here. It is free of charge. Interventions will be in French.

International Antitrust Litigation – Brussels Conference

A full-day conference, entitled "International Antitrust Litigation – Conflict of Laws and Coordination" has been organised by Jürgen Basedow (Max Planck Institut, Hamburg), Stéphanie Francq (Chair of European Law, UC Louvain) and Laurence Idot (Paris II, collège européen). It will take place on 26 March 2010 at the Hilton Hotel in Brussels.

The organisers explain the theme of the conference as follows:

> *With the decentralization of competition law enforcement and the development of private damages actions in the European Union as well as with the increasingly international character of antitrust proceedings, there is a growing need for clear and workable rules to coordinate cross-border actions of both a judicial and administrative nature. These include not only rules on jurisdiction, the applicable law and recognition of judgments, but also on sharing of evidence, protection of business secrets and interplay between administrative and judicial procedures. Those issues, which have been overlooked for so long, have been reflected upon by a group of international experts from across Europe and the United States who will identify current pitfalls and formulate concrete proposals for improving coordination of cross-border antitrust litigations.*

The topics covered include "Jurisdiction in Cross-Border Litigation – Brussels I" (Chair: Dr Karen Vanderkerckhove, European Commission), "The Applicable Law – Rome I and Rome II" (Chair Prof Jürgen Basedow), "Public Enforcement in the

EU – Coordination between Authorities" (Chair: Sir Christopher Bellamy QC) and "Antitrust Litigation in the Era of Gloabalisation" (Chair: Prof Horatia Muir Watt). A full programme is available here, with the possibility of online registration here.

Fourth Complutense Seminar on Private International Law

On 11 and 12 March, 2010, a new edition (the fourth) of the Private International Law Seminar organized by Prof. Fernández Rozas and De Miguel Asensio will take place in Madrid . This Seminar, which has proven to be one of the most important and successful in the area of Private International Law in Spain both by the extent of the audience and the quality of the speakers, will be held this time under the name "Litigación civil internacional: nuevas perspectivas europeas y de terceros Estados". As in previous editions, the meeting will bring together numerous experts, academics and lawyers from both Spain and abroad, covering different areas of Private International Law. This edition will gather representatives from Spain, several European countries (Spain, Portugal, France, Italy, Germany, United Kingdom, Luxembourg, Romania) and also from other continents (Panama, Argentina, Cuba and Japan). Spanish, English and French will be spoken -though no translation is provided.

The Congress shall have four sessions, called respectively International jurisdiction in the European Union; Cross-border effectiveness of resolutions and documents in the European Union; Third States and comparative point of view; and International commercial arbitration and State jurisdiction. Each of them involves several lectures, followed by the reading of papers and a final debate. The program and the registration form (registration is free) can be found here.

As in previous editions, most of the contents of the Seminar will be later published in the Anuario Español de Derecho Internacional Privado.

Foreign Law and Public Policy in Australia

A recent case in the Supreme Court of Victoria provides a good opportunity to point out the new statutory provisions in the State of Victoria for the proof of foreign law, and to discuss the public policy reasons for the non-enforcement of foreign law.

Paradise Enterprises Inc v Kakavas [2010] VSC 25 (16 February 2010) concerned a loan for gambling entered into in the Bahamas which the creditor (a Bahamas casino operator) then sought to enforce in Victoria as a debt claim against the Australian-resident debtor. Both parties agreed that the claim was governed by the law of the Bahamas, and expert evidence was received on that law.

Since the hearing of that case, the *Evidence Act 2008* (Vic) has come into force, which contains the same fairly liberal provisions for the proof of foreign law as apply in New South Wales, Tasmania and Commonwealth courts (ss 174-6 of the respective uniform Evidence Acts). Previously, Victoria was alone among Australian jurisdictions in not having any statutory provisions for the proof of foreign law, apart from a curious provision enabling judicial notice to be taken of the statutes of the United Kingdom, New Zealand and Fiji: *Evidence Act 1958* (Vic) ss 59–61, 77.

The Australian defendant unsuccessfully sought to resist the claim on a number of bases. The first was that the gambling contract was the product of unconscionable conduct (namely, the alleged exploitation of the debtor's pathological gambling). Two curiosities arise from the evidence taken on that point: first, in an equitable claim of that kind it is not clear whether foreign law would generally apply at all; and second, there was in any event a false conflict (Australian law being identical to Bahamas/English law on point).

A second defence concerned the lawfulness under Bahamas law of gaming and the enforceability of gambling loans.

A final defence to the claim was that the enforcement of the debt would be contrary to the public policy of the forum. That received short shrift from the judge:

> *The short answer is that the agreement was governed by the laws of the Bahamas. Reference to the law in Victoria governing the conduct of gambling here is not apposite to determining whether a gaming loan made in another country in which it is lawful and recoverable would be unenforceable as being against public policy in Victoria. (at [93])*

This reasoning seems unsatisfactory. Whatever the proper law of the gaming loan contract (or of the debt), the law of the forum can nevertheless intervene in the case of a mandatory rule or a public policy reason for non-enforcement of foreign law. Indeed, a public policy claim presupposes that foreign law would otherwise govern the matter. Of course, this is not to say that the judge should ultimately have reached a different conclusion about the enforceability of the debt, but a few more steps of reasoning were needed before one could reach that view.

Paradise Enterprises Inc v Kakavas [2010] VSC 25 (16 February 2010)

Publication: Intellectual Property in the Conflict of Laws

There is a new book on intellectual property and conflict of laws, written by *Sierd J. Schaafsma:*

Here is the summary:

> *The interface between intellectual property and conflict of laws is a notorious difficult subject.*

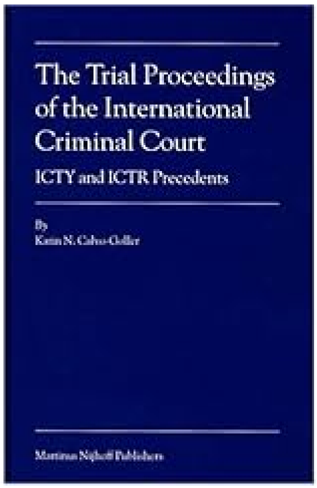
A recent study puts the subject in a new light. In his recently published book, Sierd J. Schaafsma deals with the fundamental and controversial question whether the two most important intellectual property treaties (the Berne Convention 1886 and the Paris Convention 1883) contain a conflict-of-law rule.

The study reveals that the principle of national treatment in these treaties does indeed contain a conflict-of-law rule: an exclusive lex loci protectionis-rule, covering all aspects of the protection of IP-rights. The explanation given for this seems to be new. It provides a comprehensive and consistent interpretation of the respective provisions in the treaties, and it explains why we no longer understand this conflict-of-law rule today. The study provides, in addition, several new insights into the conflict of laws, aliens law, and the relationship between these two fields of law.

S.J. Schaafsma, Intellectual Property in the Conflict of Laws; the hidden conflict-of-law rule in the principle of national treatment. Kluwer Publishers 2009, 564 pages, Hardcover 59 EUR, ISBN 9789013065916. See Kluwer and Leiden University. The book is written in Dutch, with summaries in English and French. The possibilities for a translation of the book are currently being examined.

Book Reviews, Criminal Libel, and the Jurisdiction of French Courts

What are the risks of facing a criminal trial in France after writing an academic book review in English? You may think that if the book was written in English by a scholar who neither lives nor works in France, and if the reviewer is himself neither French, nor living or working in France, that could not happen.



Well, ask Joseph Weiler.

Calvo-Goller v. Weiler

A variety of blogs of public international law have reported how Joseph Weiler, the Joseph Straus Professor of Law and European Union Jean Monnet Chair at NYU law school, has been sued in France in his capacity of editor-in-chief of a book review website, www.globallawbooks.org. The plaintiff is a scholar teaching in Israel, Dr. Karin N. Calvo-Goller, who has authored a book on international criminal procedure. Weiler asked a German scholar of criminal law and Dean of Cologne law school, Thomas Weigend, to review the book for the site. The plaintiff did not like the review. She wrote to Weiler to ask him to remove the review from the site. Weiler answered that, for a variety of reasons, he would not. Further letters were exchanged between Weiler and the plaintiff. Weiler offered to, and actually did ask Weigend whether he wanted to change anything in his review. Weigend answered that he would not (the letters exchanged by Calvo-Goller and Weiler are available here).

More than a year later, on September 26th, 2008, Weiler was summoned to appear before a French investigating judge. Criminal proceedings had been initiated in France for libel. Weiler appeared before the judge who explained that the hearing would be merely formal. This is because alleged victims of criminal offences may, under French law, initiate criminal proceedings, but a full investigation by an investigating judge (*juge d'instruction*) will only follow if the case is complex. If it is not, it will be for the court to rule directly on the accusation. In this case, that is what was happening, and Weiler would thus have to face trial in June 2010. I understand that Weigend has not been made a party to the proceedings.

I am no expert in criminal law, so I cannot say whether the offence of libel is constituted under French criminal law. But from a conflict perspective, the case also raises an interesting issue of international jurisdiction.

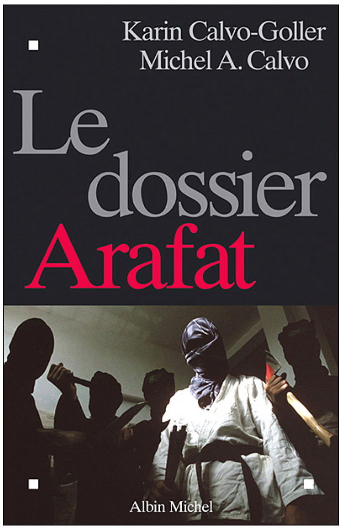
Criminal forum shopping?

Why would French courts have jurisdiction over this ~~dispute~~ offence? I understand that Weigend lives and works in Germany, and is a German national. I also understand that Weiler lives and works in New York. Dr. Calvo-Goller is a senior lecturer at the Academic Center of Law & Business in Israel, so I would think she lives in Israel. What is the connection with France, then? There are arguably two.

First, according to her website, Dr. Calvo-Goller was fully educated in Paris, and worked there for some time. This should not matter. But it might be that the reason why she studied in France is that she was born there. She might then be a French national. That would matter, as Article 113-7 of the French Criminal Code provides that French criminal law governs (and thus French courts have jurisdiction over) offences hurting French nationals. But in such cases, alleged victims cannot freely sue before French courts. The Criminal Code requires that the public prosecution service grants leave to do so.

Then, French law governs offences committed in France, wholly or partially (French Criminal Code, art. 113-2), irrespective of the nationality of the persons involved. The issue here is of course whether a website accessible in France entails that alleged libel on the site is committed in France for the sole reason that the site is accessible there. Actually, recent case law of French superior courts, although it does not directly address the issue, suggests that the answer is probably no. The most relevant case concerned an article published on its website by an Italian newspaper. It was alleged that the article had violated French intellectual property law. The Court held that French law did not apply because the site was written in Italian, and targeted an Italian audience. It further held that whether the site was accessible from France was irrelevant for the purpose of establishing French criminal jurisdiction. It was necessary to establish a "sufficient, material or significant connection" with French law, and none could be found in this case. The Court concluded that the offence had therefore been (wholly) committed in Italy.

Now, requiring such a connection with France seems most sensible. Otherwise, French courts might become available for protecting the reputation of all victims of libel (by French standards). In the *Calvo* case, is there such connection? Obviously, the review and the book were written in English. They did not specifically target a French audience, but it would probably be too much to say that they excluded it. An additional question is this: should it be relevant whether the alleged victim has a reputation in France? In this respect, it should be noted that Dr. Calvo-Goller has written at least two books in French. So, she does have a reputation which is more specifically French to defend. But would that reputation be a significant connection? And would it be enough if it was found that it is merely based on French publications?



I am grateful to Marie-Elodie Ancel for pointing out to me the most recent cases on the relevance of accessibility in France of foreign websites for international jurisdiction of French courts in criminal matters.

International Conference in Verona

The Verona University School of Law will host a conference titled

Conflict of Laws in International Commercial Arbitration

The conference will take place from 18-20 March 2010 in Verona and will cover in particular the following topics:

- conflict of law questions concerning arbitration agreements
- jurisdiction of arbitral tribunals
- the law applicable to the merits
- arbitration procedure

There is no registration fee, however, registration is required. For further information and registration please contact Dr. Francesca Ragno (francesca.ragno@univr.it) and see the detailed conference programme which can be found here.

Reformulating a Real and Substantial Connection

In Canada, the test for taking jurisdiction over an out-of-province defendant requires that there be "a real and substantial connection" between the dispute and the forum. In 2002 the Court of Appeal for Ontario created a framework for analyzing a real and substantial connection, setting out, in *Muscutt v. Courcelles*, eight factors to consider. This framework became the standard in Ontario and was adopted by appellate courts in some other Canadian provinces. However, in 2009, in preparing to hear two appeals of decisions on motions challenging the court's jurisdiction, the Court of Appeal for Ontario indicated that it was willing to consider whether any changes were required to the *Muscutt* framework. The two cases, consolidated on appeal as *Van Breda v. Village Resorts Limited*, 2010 ONCA 84 (available here), each concerned serious injuries that were suffered outside of Ontario.

Rule 17.02 of the Ontario Rules of Civil Procedure provides that a plaintiff may serve a defendant outside Ontario with an originating process in certain defined categories of cases. Prior to *Morguard Investments Ltd. v. De Savoye*, the analysis of jurisdiction centered on whether the plaintiff's claim fell within one or more of the enumerated categories. However, *Morguard* established, and *Muscutt* confirmed, that rule 17.02 did not in itself create jurisdiction. Separate and apart from whether the claim fell inside the categories, the plaintiff had to establish that there was a real and substantial connection between the dispute and the forum.

In *Van Breda* the court made a significant change to the relationship between the categories in rule 17.02 and the real and substantial connection requirement. It has now held that if a case falls within the categories in rule 17.02, other than rules 17.02(h) and (o), a real and substantial connection with Ontario shall be presumed to exist. The central catalyst for this change is section 10 of the model *Civil Jurisdiction and Proceedings Transfer Act*. Section 3 of that statute provides in quite general terms that a court has jurisdiction when there is a real and substantial connection between the dispute and the forum. However, section 10 contains a list of specific situations in which a real and substantial connection is presumed to exist. Ontario has not adopted the *CJPTA*, but in *Van Breda* the court has adopted the *CJPTA*'s basic approach.

Even with this presumption, a framework for analyzing whether there is a real and substantial connection is still required in any case where a defendant seeks to refute the presumption, any case in which a plaintiff is relying on rule 17.02(h) or (o) so that no presumption arises, and any case in which a plaintiff does not rely on 17.02 at all and instead seeks leave of the court to serve a defendant outside Ontario under rule 17.03. Prior to *Van Breda* the courts used the *Muscutt* framework, which considered the following eight factors to determine whether there was a real and substantial connection to Ontario: (1) the connection between the forum and the plaintiff's claim, (2) the connection between the forum and the defendant, (3) unfairness to the defendant in taking jurisdiction, (4) unfairness to the plaintiff in not taking jurisdiction, (5) the involvement of other parties, (6) the court's willingness to enforce a foreign judgment rendered on the same jurisdictional basis, (7) whether the dispute is international or interprovincial, and (8) comity and the standards of jurisdiction used by other courts.

In *Van Breda* the court determined that it was necessary to "simplify the test and to provide for more clarity and ease in its application". It held that "the core of the real and substantial connection test" is factors (1) and (2), and held that factors (3) to (8) will now "serve as analytic tools to assist the court in assessing the significance of the connections between the forum, the claim and the defendant". The court affirms that factors (3) to (8) remain relevant to the issue of jurisdiction, but the court nevertheless reworks the framework, ostensibly so that no one factor from factors (3) to (8) could be analyzed separately from the other factors and could be independently determinative of the outcome. It is not clear that this change was necessary or that it makes the framework clearer and easier to apply.

For many, *Van Breda* violates the idiom "if it ain't broke, don't fix it". The *Muscutt* framework was well-known and was working effectively. It was relatively easy to explain and to apply. In time we will know if as much can be said for the use of presumptions and the *Van Breda* framework, but for the moment there are questions about how the presumption will operate when challenged by a defendant and about the ongoing role of the factors the court now calls analytic tools.