Publication on Oregon's New Choice-of-Law Codification for Torts

Professor Symeon Symeonides, principal draftsman of Oregon's new choice-of-law codification for torts and other non-contractual claims, which went into effect on January 1, 2010, published an article on these rules. This is the first codification of this interesting but difficult subject in a common-law state of the United States, and the second one after the 1991 codification of the civil-law state of Louisiana. The article is entitled *Choice-of-Law. Codification for Torts Conflicts: An Exegesis* (Oregon Law Review 2010) and can be downloaded on SSRN.

Issue 2010/1 Nederlands Internationaal Privaatrecht

The first issue of 2010 of the Dutch PIL journal *Nederlands Internationaal Privaatrecht* includes the following contributions:

Xandra Kramer – Editorial (Lissabon, Stockholm, Boek 10 BW en andere IPR-beloften voor 2010), p. 1-2

J-G Knot – Europees internationaal erfrecht op komst: het voorstel voor een Europese Erfrechtverordening nader belicht (on the Proposal for a European Regulation on Succession and Wills), p. 3-13; here is the English abstract:

> *On 14 October 2009 the European Commission published a proposal for a regulation on succession. This new instrument will harmonise all private international law rules regarding succession, viz. jurisdiction, applicable law and recognition and enforcement, on a European Union level. Furthermore, the Regulation creates a European Certificate of Succession. The rules of this*

Regulation will, after its entry into force, replace the current Dutch private international rules on succession. The Regulation grants general jurisdiction to the courts (a term which entails judicial as well as non-judicial authorities, such as notaries) of the Member State in which the deceased had his or her last habitual residence. Under certain circumstances it is possible to refer to courts of a Member State whose law has been chosen and who are better placed to hear the case. Courts may also have jurisdiction based on the fact that property of the deceased is located in that Member State, if the last habitual residence of the deceased was not in a Member State. The law applicable to the whole of the succession is that of the Member State of the last habitual residence of the deceased. A testator can also expressly choose the application of the law of his or her nationality to the succession of the estate. In this article the rules of the proposal are examined extensively. Differences between the proposal and the existing Dutch rules on private international law of succession are commented upon. One of the biggest changes will be that the different approach with regard to the devolution and the administration of estates in private international law, as currently employed in the Netherlands, will disappear under the European Regulation. The conclusion reads that, notwithstanding the fact that the proposal still needs several improvements, the introduction of a European Succession Regulation will in my opinion contribute to an easier and more effective administration of cross-border successions within Europe.

S.F.G. Rammeloo – Op de valreep… Eenvormige interpretatie door Hof van Justitie EG van artikel 4 EVO (case note on ICF/MIC, ECJ C-133/08), p. 20-26); here is the English abstract:

On 6 October 2009, the ECJ gave an interpretative ruling in case C-133/08 on Article 4 of the EC Convention on the Law Applicable to Contractual Obligations (Rome, 1980). The questions in the preliminary proceedings relate to the applicable law to a charter-party contract cum annexis in the absence of choice by the parties ('objective proper law test'), the seperability of the contract, and the connecting criteria of Article 4, subsection 4 in conjunction with subsections 1, 2 and 5. The main proceedings and the essential observations of the ECJ judgment are followed by a critical analysis as well as some considerations on its potential effects on the interpretation of Article 4 (objective proper law test) and Article 5 (contract on the carriage of goods) of EC Regulation 593/2008 which on 27 December 2009 replaced the

1980 Convention.

L.R. Kiestra – De betekenis van het EVRM voor de internationale gerechtelijke vaststelling van het vaderschap (case note on three Dutch judgments concerning 8 ECHR and the judicial establishment of paternity), p. 27-30; here is the English abstract:

This case note discusses three Dutch cases concerning the meaning of Article 8 ECHR for the judicial establishment of paternity ('gerechtelijke vaststelling van het vaderschap'). All three cases concerned a mother who wanted to establish the paternity of a man over her child(ren). In all three cases a foreign law was applicable to the situation, according to the relevant Dutch choice of law rules ('Wet conflictenrecht afstamming'). Under the applicable foreign laws in the three cases, it was not possible to judicially establish paternity over the child(ren). The Dutch judge had to decide whether this would result in a violation of the ECHR and consequently whether the applicable law had to be set aside on the basis of
the public policy exception. In two of the three cases, the judge came to the conclusion that the normally applicable foreign law had to be set aside, while in one of the cases the judge decided that this was not
necessary. This case note discusses the different outcomes in these three cases and examines a number of issues related to the possible impact of the ECHR on private international law. These include whether or not the ECHR can in fact be at all applicable to such private international law matters and the relationship between the public policy exception and the ECHR.

Richard Fentiman – Book presentation: 'International Commercial Litigation', Oxford University Press 2010, p. 31-32.

Trevor Hartley – Book presentation: 'International Commercial Litigation: Text, Cases and Materials on Private International Law', Cambridge University Press 2009, p. 32-33.

Program on International Commercial Contracts in Ravenna

The Faculty of Law of the University of Bologna and the Center for International Legal Education (CILE) of the University of Pittsburgh School of Law have announced their Summer School program in International Commercial Contracts, which will take place on June 7-11, 2010 at the Ravenna campus of the University of Bologna. The Summer School aims at providing participants with an in-depth understanding of drafting, managing and litigating international contracts under different sources of law, with a focus on selected contracts that are of particular relevance in international practice. Instructors will include academics from the University of Bologna, the University of Pittsburgh, New York University, as well as academics from other top-level European and US institutions and professionals specifically involved in international contract practice. The brochure with all relevant information on applications, fees, schedules and CLE credits, is available here.

ERA Conference International Commercial Transactions

This ERA Conference on International Commercial Transactions takes place on 10-11 June 2010. The objective is to analyse the legal aspects of international commercial transactions with a special focus on cross-border sale of goods.

Key topics include:

– UN Sales Convention (CISG). The CISG represents a landmark in the process of international unification of law. For example, if a company from Germany enters into a sales contract with a business that comes from the US, France or any other of the more than 70 Contracting States, the CISG will apply (unless the parties expressly agree otherwise). It is estimated that 75% of all international

sales transactions worldwide are potentially governed by the CISG. There will be particular emphasis on: drafting international commercial contracts; cross-border sales; application and ambit of the CISG; remedies for breach of contract.

– UNIDROIT Principles of International Commercial Contracts (PICC). The UNIDROIT Principles on international commercial contracts are considered the most important set of rules which parties to an international contract can choose to govern their agreement. Moreover, they are becoming increasingly indispensable in international arbitration. There will be particular emphasis on: use of the PICC in international arbitration; damages; assignment of rights / contracts; coexistence of CISG, PICC and CFR.

Target group is primarily: practitioners of law dealing with transnational commercial law.

Click here for further information

Reminder: Conference on Party Autonomy in Property Law

On 27 and 28 May 2010 a conference on Party Autonomy in Property Law, organized by Erasmus School of Law and Leiden University (the Netherlands), will be held at the Erasmus University Rotterdam, the Netherlands. Leading specialists will present their views on diverse aspects of international property law.

For more information and registration, please click here. See also our previous post.

Preliminary question Dutch Court on Art. 45 Brussels Regulation

In a case concerning the enforcement of a Belgian judgment in the Netherlands, between Prism Investments BV v. J.A. van der Meer qq Arilco Holland BV, the Dutch Supreme Court (HR 12 March 2010, LJN BK4932, 08/04424) referred the following question regarding Art. 45 of the Brussels Regulation to the ECJ **(Case C-139/10)**

> *Does Article 45 of Council Regulation (EC) No 44/2001 [1] preclude the court with which an appeal is lodged under Article 43 or Article 44 of that regulation from refusing or revoking the declaration of enforceability on a ground, other than one of those specified in Articles 34 and 35 of that regulation, which has been advanced against enforcement of the judgment declared enforceable and which arose after that judgment had been delivered, such as the ground that there has been compliance with that judgment?*

Abusive Forum Shopping?

On April 28th, 2010, the Paris Court of Appeal dismissed the claim of Vivendi that its shareholders had abused their right to sue by initiating a class action against the company in New York, and thus dismissed the appeal lodged by Vivendi against the first instance judgment.

The argument of Vivendi was that its shareholders had abused their "right to forum shopping" by failling to bring their action before the "natural forum" (*juge naturel*) of the parties, i.e. a French court, and by bringing it instead before a foreign court. To give credit to its case theory, Vivendi, a French company, had only sued a couple of French shareholders in France. The remedy sought was an anti-suit injunction.

I have already summarized the facts of this case in a previous post. Suffice to say that a class action had been initiated in New York by shareholders, many of whom were French, but also many of whom were not. Shares had been traded in France,

but also in the US. The directors of Vivendi were accused of having made financial misrepresentations in the US while living there. Vivendi was accused, and eventually found guilty, of numerous violation of US securities law.

Abuse of Law

So, were French courts the natural forum for this case? The Paris Court of appeal did not think so.

First, it underlined that, in tort matters, the Brussels I Regulation granted jurisdiction to a variety of fora, without establishing any hierarchy between them.

Second, it insisted that there were serious connections indeed between the dispute and the US: shares traded in the US, alleged violations of US law, directors living in NY and making representations there.

Third, it was in no way fraudulent to bring an action in New York for French plaintiffs, who were free to assess and conclude that US law was more favorable to their interests.

Finally, the Court rejected the argument that the issue of the enforceability of the American judgment was at all relevant. There has been debate in France with regard to whether the recognition of a class action judgment would be constitutional. The Court held that the issue was irrelevant, as the American judgment could no doubt be enforced in the US, where Vivendi has significant assets.

So what did Vivendi exactly mean when it argued that French courts were the natural forum for the dispute? As the Court underlined, Vivendi never argued that French courts had exclusive jurisdiction. Vivendi actually relied on an old French case where French courts had been found to be the natural forum for the purpose of applying Article 14 of the French Civil Code. It is hard to see how it could be relevant at all for a dispute falling within the scope of the Brussels I Regulation. But some French scholars find Vivendi's position perfectly legitimate. In an article published two weeks ago in the *Recueil Dalloz* (*Contentieux d'affaires et abus de* forum shopping), professor Daniel Cohen argued that French courts were indeed the natural forum for this dispute, and that the shareholders had abused their right. He concluded that French courts should not become second rank fora, that the French legal order should fight against American judicial imperialism, and

that the Court of appeal had a great opportunity to convey a message to the American court. In a newspaper article published at the same time, Ms Lafarge-Sarkozy, who practises at Proskauer, recognised that the political dimension of the case could hardly be denied.

Remedy

Unfortunately, as the Court did not find that the plaintiffs had abused any of their rights, it did not rule on the remedy. We will have to wait to know whether French courts consider that they have jurisdiction to grant antisuit injunctions (they certainly can be friendly to foreign injunctions). An interesting question is whether the Brussels I Regulation had any impact on their power to do so (yet to be confirmed, to say the least).

Mari and Pretelli on Choice-of-Court Agreements, Lis Pendens and Torpedo Actions

Luigi Mari is professor of private international law and Ilaria Pretelli, Ph. D. Université Panthéon-Assas, is research fellow in private international law at the Carlo Bo University of Urbino. Both are members of the Group Galileo supported by the Université franco-italienne*.*

The question we would like to address is whether the *lis pendens* rule should be amended to allow the judge designated by the parties to a contract to decide on the jurisdiction, despite the case having been previously filed with a different Court in violation of the covenant Forum agreement.

If on one hand we do think that the actual rule leads many parties to “play” with a *Forum* selection with the only aim to delay the controversy definition by filing the case in front of a Court different from the one agreed upon by the parties [and apparently without Jurisdiction, so forcing the defendant to counterclaim the lack

of Jurisdiction and obviously spend time before being able to get a court decision about its jurisdiction and power to hear and decide the merits of the law suit] on the other hand we do not think that the rule should be so amended as proposed by the rapporteur in the working document of 2.12.2009, but we feel to suggest to suggest another solution for the protection of choice of forum agreements in lieu of the raised issues.

According to those in favor of the modification of the *lis pendens* rule, the choice of forum covenant is a super-agreement that no other Judge but the one selected in the forum agreement should have the power to investigate in order to decide about its validity between the parties.

Firstly, it is important to stress that the prorogation agreement concerns judicial power to decide a case and therefore should the *forum selection clause* be invalid, as it happens, why should only the judge designated by the parties declare it to be so? Why should a forum selection covenant even carry the legal effect to prohibit a court decision about its own validity?

Secondly, it should be kept in mind that the terms of validity of the agreement set out in article 23 of Bruxelles I regulation do not guarantee that we are in front of a covenant which has been actually negotiated by parties.

This happens not only in the framework of a negotiation between companies with different contractual power, even though it is self-evident that between a large corporation and a small firm, the prorogation of jurisdiction may well be not subject to debate but in particular in all the agreements among companies and professionals whereby there is no negotiation at all and the professional can only adhere to the agreement without any power to amend any of the contract provision (think about all the Bank agreements, the online purchase agreements and so on and so forth).

Another very meaningful example has been given by Mme Muir Watt whom pointed out that it is important to avoid a strategic use of choice of court agreements especially when these are contained in bills of lading passing from hand to hand. This happens every day in the field of the international carriage of goods by sea, where the rules set out in art. 23 Bruxelles I – in particular the opposability of choice of court agreements to third parties according to the *Coreck* ruling – can be used to restrict carrier liability for cargo loss or damage.

Even still there is no doubt that unfair trial tactics, better known as *torpedo actions*, should be fought effectively.

Is this use of unfair trial tactics a reason sufficient to alter the *lis pendens* rule, which is grounded on the priority of action, whatever the action may be? We would like to point out that this rule, in the *Gasser* interpretation, is a rule that guarantees predictability (as the European Court of Justice stresses in *Gasser*: "in view of the disputes which could arise as to the very existence of a genuine agreement between the parties, expressed in accordance with the strict formal conditions laid down in Article 17 of the Brussels Convention, it is conducive to the legal certainty sought by the Convention that, in cases of lis pendens, it should be determined clearly and precisely which of the two national courts is to establish whether it has jurisdiction under the rules of the Convention. It is clear from the wording of Article 21 of the Convention that it is for the court first seised to pronounce as to its jurisdiction, in this case in the light of a jurisdiction clause relied on before it, which must be regarded as an independent concept to be appraised solely in relation to the requirements of Article 17)".

On the contrary a change, as suggested as a second option in the Green Paper (COM(2009) 175 final of 21.4.2009) wouldn't be conducive and could even give new opportunities to parties in search of delaying tactics: it could lead, for instance, to the allegation of the existence of an inexistent choice of court agreement in order to continue a trial initiated in a second time in front of a judge that lacks jurisdiction.

Moreover: are we sure that the two judges will decide that there is a jurisdiction agreement and the *lis pendens* rule does not apply, in cases where the existence of the jurisdiction agreement is unclear and depends on the existence of a usage in international trade or commerce, or a usage between the parties?

If we change the *lis pendens* rule and guarantee the protection of the clause by affirming the sole jurisdiction of the judge selected in the covenant, than we should also amend the recognition and enforcement procedure and establish that any decision taken by a judge that is not the designated judge must not be recognized.

If the designated judge has to be the only one allowed to evaluate the validity of the clause (or of the commercial practice), it would become impossible to give

effect to any decision coming from a different judge, in order to avoid the risk of a contrast in the judgments.

It is easy to see, in our opinion, that changing the *lis pendens* rule will lead to a great confusion.

This is probably the reason why the Lugano Convention of 30 October 2007, signed after the Gasser ruling doesn't change the rules on *lis pendens* and continue to differentiate in art. 19, the case of exclusive jurisdiction by virtue of art. 16 from all other cases, as the case of exclusive jurisdiction by virtue of art. 17.

It is more desirable, instead of changing a general rule, to find appropriate means in order to counteract unfair practices.

As regards to judges, it seems clear that if the judge of a Member States decides on clearly abusive cases, initiated only to block the other party, that State will be held responsible for violation of the principle of loyal cooperation laid down in Art. 10 of the EC treaty.

This hypothesis is hopefully exceptional: in the majority of cases judges will not be willing to uphold an unfair practice, so it should be up to them to guarantee the efficacy of the agreement.

Many European legal systems empower the judges with instruments to punish abusive conducts: in Italy, for instance the judge may condemn the party who sued or resisted in a trial with bad faith or gross negligence to pay – in addition to judicial expenses – damages to the other party. The judge may also sanction *ex officio* the abusive conduct by condemning the loser to pay a lump sum to the other party (see art. 96 of the Italian code of civil procedure and art. 32-1 et 700 of the French code o civil procedure).

Leaving inaltered the *lis pendens* rule in the *Gasser* interpretation, the new provisions on choice of forum should contain a more detailed regulation on the validity of the agreement, its opposability to third parties, the consequences of its violations (for instance providing the assessment of damages, to be quantified in a uniform rule or according to the *lex fori*).

In our opinion, changing a general rule is nothing more than a tactic to

counteract an abuse of that rule, an abuse happening in a percentage of cases the importance of which is not easy to determine, while stigmatizing the abusive conduct of those who believe to be capable of escaping to justice by way of torpedo actions or other judicial unfair practices has also an high educational value and definitely contribute to build confidence in the European judicial system.

Conference in Oslo – Choice of law on arbitration

A conference followed by a seminar on choice of law clauses and arbitration will take place next week in Oslo on Tuesday 6 and Friday 7 May.

The conference is organised by a research project run by prof. Giuditta Cordero Moss (Oslo) at the Oslo university on the **impact of choice of law on arbitration** and by the Norwegian committee of the ICC (more information on the project: here).

Here is the program of the conference (Thursday 6 May):

09.00-09.10 Welcome – Professor Kristin Normann, Selmer Lawfi rm, Oslo

Part 1: Arbitration law, its developments and its signifi cance for International disputes

09.10-09.25 Introduction: Why national law for international arbitration? –
Professor Giuditta Cordero, Moss, University of Oslo

09.25-09.45 International Arbitration and the impact of the national law of the place of arbitration –
Professor Luca Radicati di Brozolo, Catholic University, Milan, Partner, Bonelli Erede Pappalardo, Milan

09.45-10.05 International Commercial Arbitration in the Us: The Restatement –

Professor George Bermann, Columbia University, New York, Chief Reporter on the ALI Restatement of the US Law on International Commercial Arbitration

10.05-10.25 New Trends in International Commercial Arbitration in Latin America –
Professor Diego Fernandez Arroyo, Complutense University, Madrid

Part 2: Ad hoc or institutional arbitration?

10.45-11.05 Ad hoc arbitration v. institutional arbitration –
Ms Carita Wallgren-Linholm, Partner, Lindholm Wallgren, Helsinki

11.05-11.25 New Trends in ad hoc international commercial arbitration: the UNCITRAL Arbitration Rules –
Ms Corinne Montineri, Legal Offi cer, UNCITRAL, and Secretary, UNCITRAL Working Group II on Arbitration

11.25-12.15 Discussion on Part 1 and Part 2

12.15-13.15 Lunch

Part 3: Features of selected Arbitration Institutions

13.15-13.35 Arbitration under the Rules of the International Chamber of Commerce
Dr. Anders Ryssdal, Partner, Wiersholm Lawfi rm, Oslo, chairman of the Norwegian Committee,
International Chamber of Commerce

13.35-13.55 Arbitration in London: Features of the London Court of International Arbitration –
Mr Matthew Saunders, Partner, DLAPiper London

13.55-14.15 Arbitration under the Swiss Rules –**Dr. Daniel Wehrli**, Partner, Gloor & Sieger, Zürich,
Member of the Board, Swiss Arbitration Association

14.45-15.05 Arbitration in Sweden: Features of the Stockholm Rules – **Marie Öhrström**,
Associate and Business Development Lawyer, Setterwalls Lawfi rm, Stockholm,

and previously Deputy Secretary General of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC).

15.05-15.25 Arbitration in Finland: Features of the Central Chamber of Commerce of Finland –
Justice Gustaf Möller, Partner, Krogerus Attroneys Ltd, Chairman of the Board, Arbitration Institute, CCCF

15.25-15.45 Arbitration in Denmark: Features – **Mr Georg Lett**, Partner, Lett Law firm, Copenhagen

15.45-16.05 Arbitration in the Oslo Chamber of Commerce –
Mr Stephen Knudtzon, Partner, Thommessen Law f rm, Oslo, Member of the Board, Arbitration Institute of the Oslo Chamber of Commerce

16.05-16.45 Discussion

16.45-17.00 Final observations – Professor Giuditta Cordero Moss, University of Oslo
The conference will be followed by a seminar on Friday 7 May for the project participants.

The New Chinese Tort Law: Conflict Rules on Tort Untouched

I am grateful to Fang Xiao, a postdoctoral fellow and lecturer at the Renmin University School of Law in Beijing, for contributing this report.

The Tort Law of the People's Republic of China was adopted at the 12th session of the Standing Committee of the Eleventh National People's Congress on December 26, 2009 and promulgated on the same day according to President Decree No. 21. It shall come into force on July 1, 2010.

The Tort Law consists of 12 chapters and 92 articles, divided into General

Provisions, Constituting Liability and Methods of Assuming Liability, Circumstances to Waive Liability and Mitigate Liability, Special Provisions on Tortfeasors, Product Liability, Liability for Motor Vehicle Traffic Accident, Liability for Medical Malpractice, Liability for Environmental Pollution, Liability for Ultrahazardous Activity, Liability for Harm Caused by Domestic Animal, Liability for Harm Caused by Object and Supplementary Provision.

Different from the Contract Law of the P.R.C. (1999), which stipulates in Article 126 a conflict rule on the law applicable to contract, this new legislation does not include clause on the law applicable to tort. The present system of law application on tort will not be changed in waiting for the new Chinese legislation of the conflict rules on foreign related commercial and civil relations.

The present rules on choice of law in tort matters were established by Article 146 of the General Principles of the Civil Law of the P.R.C. (1986) and Article 187 of the "Interpretations" of the Supreme People's Court on its implementation (1988). According to these rules, an act committed outside the P.R.C. shall not be treated as an infringing act if under Chinese law it is not considered an infringing act (the rule of double actionability); the tort will be governed by the law of the place of the tort, which includes the place where an infringing act was committed and the place where the damage occurred, if the two places are different, the judge can make a choice between them; if both parties are citizens of or have established domicile in the same country, their common *lex personalis* may also be applied.

In practice, these rules vest a large discretion in courts which may use several connecting factors: place where the infringing act was committed, place where the damage occurred, common nationality and common domicile of the parties. The generally accepted suggestion on the amendment of the present rules is, in addition to the above connecting factors, that the law with the most significant relationship with the tort should be applied in priority.