Annual Survey of French PIL of E-Commerce

For several years, Professor Marie-Elodie Ancel (Paris Est Creteil Val de Marne University, formerly Paris 12) has published an annual survey on French private international law of E-commerce in the French monthly law review *Communication, Commerce Electronique*.

The survey for 2009 has just been published in the first issue of the review for 2010. It discusses a variety of issues, including jurisdiction, choice of law and foreign judgments. It reports on both cases and legislation, French and European.

Communication, Commerce Electronique is available online for lexisnexis suscribers.

BIICL event: Private International Law – Challenges for Today's Markets

The British Institute of International and Comparative Law (BIICL) hosts an event titled "Private International Law – Challenges for Today's Markets" as part of the Herbert Smith Private International Law Seminar Series at the BIICL.

What is this event about? This conference shall offer a platform to exchange views of different industry sectors on current Private International Law problems they encounter. The speakers will deal with various issues such as the difficult new rules in the Rome I regulation on financial market contracts, current Private International law problems arising in the field of Swaps and Derivatives and in the Energy sector and will look in a more general way at the pitfalls of Private International Law for business contracts between important market players.

Date: Tuesday 9 February 2010, 17:00 to 19:00

Location: British Institute of International and Comparative Law, Charles Clore House, 17 Russell Square,London, WC1B 5JP

Chair: Lord Justice Rix, Royal Courts of Justice

Speakers: 1) Joanna Perkins, Secretary to the Financial Markets Law Committee, 2) Edward Murray, Partner, Allen & Overy London; Chair of the ISDA Financial Law Reform Committee, 3) Murray Rosen QC, Partner, Herbert Smith LLP, 4) Matthew Evans, Chief Counsel, BG Group plc

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Books and Articles on Private International Law

Our readers will be interested to see that Dean Symeon Symeonides has compiled a list of books and articles published on the topic of private international law in the past year. See here for the list.

Maher v Groupama Grand Est: Law Applicable to Direct Action Against Insurer

This post was written by Mrs Jenny Papettas, a PhD Candidate and Postgraduate Teaching Assistant at the University of Birmingham.

The Court of Appeal delivered its judgment in the case of *Maher v. Groupama*

Grand Est. on 12 November 2009, upholding both the decision and reasoning of Blair J. in the Queen's Bench Division. The case, concerning issues of applicable law in a direct action against an insurer, is noteworthy because it is illustrative of the type of case that will fall to be decided under Article 18 Rome II and serves as a reminder that individual Member State reasoning on these issues is obsolete under that Regulation.

The Claimants, an English couple, Mr. and Mrs. Maher, were involved in a collision in France with a van being driven negligently by French resident M Marc Krass. M Krass was sadly killed in the collision. The claim was brought directly against M Krass' third party liability insurer. Liability and the application of French law to the substantive issues in the case were not at issue. The outstanding issues to be determined by the court were; (1) Whether damages should be assessed in accordance with French law or English law, (2) Whether pre-judgment interest on damages should be determined in accordance with French law or English law.

The Assessment of Damages

Under English law the assessment of damages in tort claims falls to be decided as a procedural issue *(Harding v. Wealands* [2007] 2 AC 1). The issue in *Maher* was whether in a direct action against the tortfeasor's insurer the issue was to be characterised as tortious, with damages being dealt with as a procedural issue under the *lex fori* or as a claim founded in contract, where assessment of damages is dealt with as a substantive issue by the applicable (French) law as stipulated in both the Rome Convention (implemented in English law by Contracts (Applicable Law) Act 1990, s.2 and Sch.1, Art.10(1)(c)) and the Rome I Regulation. Despite the Defendant's arguments that the claim only arose because it was contractually obliged to indemnify the insured and that therefore the claim was contractual in nature, the Court, citing *Macmillan Inc v. Bishopgate Investment Trust plc (No. 3) [1996]1 WLR 387,* held that it was not the claim that fell to be characterised but each individual issue. Further citing Law Com Report No. 193 (Private international Law: Choice of Law in Tort and Delict (1990)) where it was stated that direct actions against liability insurers are better seen as an extension of a tortious action (para 3.51) the Court held that since liability was admitted and the insurer therefore had to meet the tortfeasor's liability the claim was tortious with the consequence that assessment of damages was procedural and a matter for the

lex fori.

Pre-judgment Interest

With regard to pre-judgment interest the Court found that the issue was split. The existence of a right to such interest was held to be a substantive issue whilst the calculation of any interest, being partially discretionary in nature under s 35A Supreme Court Act 1981, was procedural. However, although the quantification of interest would as a result be determined with reference to English law, s35A is flexible enough to allow the Court to apply French rates if it is necessary to achieve justice in the circumstances.

Anticipating Rome II

Article 15 of Rome II provides a lengthy list of issues which will be determined by the applicable law, largely disposing of any possibility of subjecting different issues to different laws. This extends to the assessment of damages thereby expanding the scope of Rome II into areas previously classified as procedural under the traditional English substance /procedure dichotomy. Indeed, it was acknowledged during *Maher* that the application of Rome II would have produced a different result in this regard.

However an intriguing question remains as to whether Article 18, which provides for direct actions against insurers, will be interpreted so that the injured party's choice of either the applicable law or the law of the insurance contract will govern the whole claim or simply the question of whether a direct action can be permitted. Furthermore it will be interesting to see how the issue of characterisation plays out. For example, will the insurer be able to rely on the contractual limits of the policy where the applicable law to a direct action is determined by the law applicable under the Regulation. The only certainty is that such questions will have to be answered with reference to the autonomous definitions which are yet to develop and the methods currently employed by Member State courts will be obsolete for dealing with issues which fall within the remit of Rome II.

Haiti Earthquake and Intercountry Adoption

The Secretariat of the Hague Conference has posted an Information Note to States and Central Authorities on the *Haiti Earthquake and Intercountry Adoption of Children* on its website.

Are We Witnessing the Demise of Alien Tort Statute Litigation?

Over the past few months, various US federal courts have handed down opinions that may presage a more limited role for the Alien Tort Statute in US litigation. The Alien Tort Statute provides US district courts with original jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. In a series of cases starting with *Filartiga v. Pena-Irala*, US courts had been willing to give a robust reading to the statute, thus allowing recovery in cases that pushed the envelope for violations of customary international law. When the Supreme Court issued its most recent opinion on the statute in *Sosa v. Alvarez-Machain*, hope existed in some quarters that the statute would be more narrowly construed by US lower courts. Decisions following that case, however, continued to follow caselaw allowing for robust recovery.

We may be witnessing a subtle sea change in ATS litigation, which is surprisingly being accomplished not by the US Supreme Court but by US lower courts. In the past six months, five decisions in particular have changed the litigating landscape substantially and will make it harder for plaintiffs to plead and prove ATS cases. These decisions span various subject areas, but each contributes to reining in ATS

cases. A short summary of these cases follows.

In *Sarei v. Rio Tinto*, the Ninth Circuit has been willing to consider applying exhaustion of remedies requirements in ATS cases, thus allowing district court judges to dismiss ATS cases unless a plaintiff can show that all local legal remedies have been exhausted or that such remedies are unavailable, ineffective, or futile. In *Turedi v. Coca-Cola* and *Aldana v. Del Monte Fresh Produce*, the Second and Eleventh Circuits have been willing to affirm ATS dismissals on grounds on *forum non conveniens*. In *Sinaltrainal v. Coca-Cola*, the Eleventh Circuit relied on heightened pleading standards enunciated in the Supreme Court's *Iqbal* and *Twombly* decisions, discussed here, to impose a higher standard of pleading on ATS claimants. Finally, and perhaps most importantly, the Second Circuit in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, ruled that in order to find aiding and abetting liability under the ATS, a plaintiff must show "that a defendant purposefully aided and abetted a violation of international law." In changing the standard from mere knowledge to purpose, the Second Circuit has placed a heavier burden on plaintiffs bringing ATS claims.

The upshot of these decisions is that from pleading to proof to discretionary doctrines like *forum non conveniens* US federal courts are perhaps closing the door on many ATS cases. While this movement will be favorable to defendants, at the level of process it is a surprising outcome for several reasons. Congress has known since *Filartiga* that there was potential for ATS abuse and has done nothing about it. In the wake of congressional silence, US courts had been hesitant for 28 years to restrict the statute's use, and rather looked to the US Supreme Court to provide guidance. The Supreme Court's guidance in *Sosa* was opaque at best. Faced with such minimal direction, US lower courts have been forced to make a choice regarding the ATS. Momentum appears to be gathering in favor of choosing to limit ATS litigation. As such, US lower courts have been forced to use discretionary judicial doctrines to cabin the reach of a congressional statute.

While it may be too soon to say that the death knell has sounded for ATS litigation, these developments show that we may be witnessing the demise of ATS litigation.

Choice of Law in American Courts 2009

Once again, Dean Symeon Symeonides has compiled his annual choice of law survey. Here is the abstract:

"This is the Twenty-Third Annual Survey of American Choice-of-Law Cases. It is written at the request of the Association of American Law Schools Section on Conflict of Laws and is intended as a service to fellow teachers and students of conflicts law, both within and outside the United States. Its purpose is to inform, rather than to advocate.

The Survey covers cases decided by American state and federal appellate courts from January 1 to December 31, 2009, and posted on Westlaw before the end of the year. Of the 1,490 conflicts cases meeting both of these parameters, the Survey focuses on those cases that may contribute something new to the development or understanding of conflicts law – and particularly choice of law.

For the conflicts afficionados, 2009 brought many noteworthy developments, including the enactment of the second choice-of-law codification for tort conflicts in the United States, and a plethora of interesting cases, such as the following:

– Several cases brought under the Alien Torts Statute (ATS) involving human rights abuses in foreign sites, including Iraq's Abu Ghraib prison, one case denying a Bivens remedy to a victim of "extraordinary rendition," and one case allowing an ATS action against an American pharmaceutical company for nonconsensual medical experiments on children in Nigeria;

– Two cases holding that the Holy See was amenable to suit under the tortious activity exception of the Foreign Sovereign Immunity Act for sexual abuses allegedly committed by clergymen in the United States;

– Two cases declaring unconstitutional two California statutes (dealing with Nazi looted artwork and the Armenian Genocide, respectively) as infringing on the

Federal Government's exclusive power over foreign affairs;

– Several cases dealing with the recognition of same-sex marriages and their implications on issues of parentage, adoption, and child custody; Several cases striking down (and a few enforcing) class-action or class-arbitration waivers in consumer contracts;

– A Minnesota case holding that Panama's blocking statute did not prevent dismissal on forum non conveniens grounds an action arising from events occurring in Panama; and

– A case of legal malpractice for mishandling a conflicts issue, a case involving alienation of affections and "criminal conversation," and the usual assortment of tort, product liability, and statute of limitation conflicts."

The full survey is available for free here.

Thanks to Dean Symeonides for providing this valuable resource on the state of American conflicts law.

ERA Conference on European Contract Law

Much debated issue of harmonisation of the European contract law by means of the Common Frame of Reference is topic of the ERA conference taking place on 18 and 19 March 2010 in Trier, Germany. More precisely, the conference titled "European Contract Law: EU Consumer Law Revision and the CFR. Towards an optional instrument?" will address different aspects of adapting the academic DCFR to fit the purpose of the "political" CFR, the possibility for linking the CFR and the proposed Consumer Rights Directive, as well as the prospects of the CFR serving as an optional instrument.

The speakers at the conference include: **Mr Giuseppe Abbamonte**, DG Justice, Freedom and Security, European Commission, Brussels; **Professor Christian**

von Bar, European Legal Studies Institute, University of Osnabrück; **Professor Hugh Beale**, University of Warwick; **Professor Eric Clive**, University of Edinburgh; **Professor Bénédicte Fauvarque-Cosson**, University Panthéon-Assas, Paris; **Mr Rafael Gil Nievas**, Permanent Representation of Spain to the EU, Brussels; **Professor Piotr Machnikowski**, University of Wroclaw; **Dr Chantal Mak**, University of Amsterdam; **Professor Guillermo Palao Moreno**, University of Valencia; **Mr Patrice Pellegrino**, Senior Adviser, EuroCommerce, Brussels; **Ms Nuria Rodríguez Murillo**, Senior Legal Officer, BEUC, Brussels; **Professor Hans Schulte-Nölke**, European Legal Studies Institute, University of Osnabrück; **Professor Matthias E. Storme**, KU Leuven and University of Antwerp; **Ms Diana Wallis**, Vice-President of the European Parliament, Brussels/Strasbourg.

The conference web page is accessible here.

Fraudulent alienation of foreign immovables and the Moçambique rule in the Western Australian Court of Appeal

Singh v Singh (2009) 253 ALR 575; [2009] WASCA 53, in the Western Australian Court of Appeal, was a dispute between two brothers, both resident in Western Australia. One, the plaintiff, claimed that the alienation by the other, the defendant, of real estate in Malaysia was made with the intent to defraud creditors, within the meaning of s 89(1) of the *Property Law Act 1969* (WA). (That section is the modern equivalent in Western Australia of the Elizabethan statute 13 Eliz c 5, which has been reproduced in all Australian states and the Commonwealth.)

The defendant owed the plaintiff money arising from the purchase of a restaurant in Western Australia. After the plaintiff commenced an action in Western

Australia to recover the debt, the defendant transferred his interests in real estate both in Western Australia and in Malaysia to relatives. He transferred the Malaysian property to his wife and daughter, also resident in Western Australia. The instruments of transfer were all executed in Western Australia. As to the Malaysian property, the plaintiff sought orders restraining the wife and daughter from dealing with the property and that they deliver up vacant possession for the property to be sold at auction. The defendant sought summary judgment on the basis that the Supreme Court of Western Australia had no jurisdiction under the *Moç*ambique rule or alternatively that the proceeding should be stayed on the grounds of *forum non conveniens*. A Master dismissed the defendant's application and the defendant appealed to the Court of Appeal.

Pullin JA (with whom the rest of the Court of Appeal agreed) dismissed the appeal. Pullin JA held that the plaintiff's claims fell within an exception to the *Moçambique* rule, saying (at [22]):

> *The case does not concern the Moçambique rule itself. The [plaintiff]'s claim falls within an exception to the rule. This is because in this case the [plaintiff] does not deny that the [defendant] is the legal owner of the Malaysian land, ie the registered proprietor and does not seek an in rem judgment. His complaint is that the [defendant] became the registered proprietor by reason of the train of events beginning in Perth, when the [defendant] signed a transfer of the Malaysian land, and ending with the registration of the transfer in Malaysia. It was contended that this was an alienation of property with the intent of the appellant to defraud his creditors. The [plaintiff] having become aware of the alienation of the Malaysian property elected to exercise his right to avoid the alienation based on his allegation that the [defendant] had the intent to defraud. In the Supreme Court, he asks for declarations concerning the conduct of the [defendant] and the [wife and daughter] and in personam relief against [them]. If the [plaintiff]'s claims are upheld then the court will 'act upon the conscience' of the [defendant] and his wife and daughter. The jurisdiction is not over the property but over the person of each of [them].*

His Honour referred to various cases in which claims in equity based on fraud provided an exception to the *Moçambique* rule and concluded (at [32]):

> *The Western Australian Parliament must be taken to have known of the*

> *equitable jurisdiction of its courts to make decrees to deal with fraudulent dealing of foreign immovable property by a person within the jurisdiction and it is therefore clearly arguable that it must have intended to legislate to confer the right on a person, prejudiced by an alienation of foreign immovable property with intent to defraud creditors, to avoid such a disposition.*

Pullin JA further considered that it was at least arguable that any judgment of the Supreme Court of Western Australia could be enforced in Malaysia. In any event, his Honour agreed with the plaintiff's submission that since the relief sought was *in personam* relief against the wife and daughter, this issue did not arise, because it could be enforced against them in Western Australia.

Pullin JA also rejected the defendant's submission that, for various reasons, the transfer of the Malaysian property did not fall within the terms of the Act. In particular, his Honour held that the Act was not confined to property in Western Australia, but extended to applications by persons resident in Western Australia to set aside alienations of foreign property by acts performed within the state by other persons resident in the state. This was not an extraterritorial operation of the Act because (at [75]): 'Parliament does not legislate extraterritorially if it legislates concerning fraudulent conduct (occurring in the state) by a person resident within the state.'

Finally, Pullin JA considered that the connections to Western Australia meant that the Supreme Court was not *forum non conveniens* (in the sense of a clearly inappropriate forum).

Australian article round-up

At the beginning of a new year, readers may be interested in the following Australian articles, which were published throughout last year and escaped a post at the time:

- Chief Justice Spigelman, 'The Hague Choice of Court Convention and

International Commercial Litigation' (2009) 83(6) *Australian Law Journal* 386

- Chief Justice Spigelman, 'Cross-border insolvency: Co-operation or conflict?" (2009) 83 *Australian Law Journal* 44
- Amrit MacIntyre, 'Taxation of investments by foreign sovereigns' (2009) 83 *Australian Law Journal* 752
- Daril Gawith, 'Cost-effective redress for disputed/failed low-value international consumer transactions: Current status and potential directions' (2009) 37 *Australian Business Law Review* 83
- Daniel Clarry, 'Contemporary approaches to market definition: Taking account of international markets in Australian competition law' (2009) 37 *Australian Business Law Review* 143