CLIP Principles for Conflict of Laws in Intellectual Property: First Preliminary Draft

The European Max-Planck Group for Conflict of Laws in Intellectual Property, or simply CLIP, has published the first version of their Principles which are available for download at their web page. The purpose of publishing the First Preliminary Draft is to invite scholars and practitioners outside the Group to make suggestions or advance critical remarks in regard to the proposed rules on international jurisdiction, applicable law, and recognition and enforcement of foreign decisions in matters of intellectual property. They expect to bring foraward the Second Draft by the end of October 2009, while the final version of the Principles accompanied with the commentary is planned to be published next year.

Lawrence Collins Appointed to the House of Lords

It does not seem very long ago that we announced the appointment of Sir Lawrence Collins (co-author and General Editor of Dicey Morris and Collins: *The Conflict of Laws*) to the Court of Appeal; and, in fact, it wasn't. After two years sitting as a Lord Justice of Appeal, Sir Lawrence has been appointed a Lord of Appeal in Ordinary, and will replace Lord Hoffman (who is retiring) on 20th April 2009. Here is, in relevant part, the rest of the press release:

> *Lord Justice Lawrence Antony Collins (67) was admitted as a solicitor in 1968, took Silk in 1997 and was appointed a Deputy High Court Judge in 1997. He was appointed to the High Court in 2000 and made a Bencher (Inner Temple) in 2001. He was appointed to the Court of Appeal in 2007. He has been a Fellow of Wolfson College, Cambridge since 1975 and a Fellow of the British Academy*

> *since 1994. Lord Justice Collins was knighted in 2000.*
>
> *Lord Justice Collins…will become a Justice of the Supreme Court of the United Kingdom when it is launched on 1 October 2009. On that date The Right Honourable Lord Phillips of Worth Matravers will become the President of the Supreme Court and the Law Lords will become Justices of the Supreme Court.*

Sir Brian Kerr will be replacing Lord Carswell on 28th June 2009.

Manitoba Law Reform Commission Releases Report on Private International Law

The province of Manitoba's Law Reform Commission has released a report on Private International Law (available here). It considers three central issues:

1. Should legislation be adopted to modify the common law choice of law rule for torts as formulated in *Tolofson v. Jensen*?

2. Should legislation be adopted regarding the characterization of limitation periods?

3. Should Manitoba adopt the Uniform Law Conference of Canada's model Court Jurisdiction and Proceedings Transfer Act?

A secondary question under the first issue is how similar the legislation should be to the English PIL(MP)Act 1995.

Journal of Private International Law Conference 2009 at NYU

There are just a few places left at the Journal of Private International Law Conference 2009 – to be held at NYU from 16th – 18th April – so (if you wish to attend) I suggest that you book with all due speed.

I shall be attempting to 'live blog' the conference, alerting readers to the main points and themes from each panel. It promises to be a fantastic event, and I hope to see many of you there.

EC Signs Hague Choice of Court Convention

On 1st April 2009, the Czech Minister for Justice signed the Convention on behalf of the European Community (see the proposal to do so here). Negotiations on the Convention at the Hague were carried out ostensibly under shared competence between the EC and the Member States, but in the wake of Opinion 1/03, of course, the Community has exclusive competence to ratify the Convention. In other words, it does not need to be signed by the Member States (i.e. we're stuck with it, whether we like it or not.) Denmark, however, will not be bound.

~~You will remember that~~ Mexico ~~and the~~ USA ~~have already signed the Hague Choice of Court Convention, and with the EC joining that exclusive club only one more ratification is needed for the entry into force of the Convention~~. My attention has been drawn to the fact that the above statement is vague at best, and misleading/confusing/wrong at worst. Apologies; allow me to rework: the Hague Convention requires *two* ratifications or accessions to enter into force (Art 31(1)). So far, only Mexico has acceded to the Convention, and no State has ratified it. If either the EC or US ratify it (having already signed it), or a non-signatory State accedes to it, or another Hague member state signs and ratifies it,

then the Convention will enter into force (thanks Andrew and Ralf.)

(Many thanks to everyone who emailed/commented to let us know; much appreciated.)

ECJ: Judgment on Brussels II bis (A)

On 2 April 2009, the ECJ has delivered its judgment in case C-523/07 (*A*).

The case, which has been referred to the ECJ by the Finnish *Korkein hallinto-oikeus*, concerns three children who lived originally in Finland with their mother (*A*) and stepfather. In 2001 the family moved to Sweden. In summer 2005 they travelled to Finland – originally with the intention to spend their holidays there. In Finland, the family lived on campsites and with relatives and the children did not go to school there. In November 2005 the children were taken into immediate care and placed into a child care unit. This was unsuccessfully challenged by the mother and the stepfather.

The *Korkein hallinto-oikeus*, which is hearing the appeal, had doubts with regard to the interpretation of the Brussels II *bis* Regulation. Thus, it referred four questions to the ECJ for a preliminary ruling.

With the **first question** referred to the ECJ, the Finnish court basically asks whether Article 1(1) of the Regulation is to be interpreted to the effect that, first, it applies to a single decision ordering a child to be taken into care immediately and placed outside his original home and, second, that decision is covered by the term 'civil matters' for the purposes of that provision, where it was adopted in the context of public law rules relating to child protection. Since the exact question had been dealt with already in case C-435/06 (*C*) – the first judgment on the Brussels II *bis* Regulation (see with regard to this case our previous post which can be found here) – the ECJ referred to its decision in this case and held that

Article 1(1) of [the Brussels II bis Regulation] must be interpreted as meaning that a decision ordering that a child be immediately taken into care and placed outside his original home is covered by the term 'civil matters', for the purposes of that provision, where that decision was adopted in the context of public law rules relating to child protection.

The **second question** aims at the definition of "habitual residence" in terms of Art. 8 Brussels II *bis* – in particular in a situation in which the child has a permanent residence in one Member State but is staying in another Member State carrying on a peripatetic life there. With regard to this question the Court held that

the concept of 'habitual residence' under Article 8(1) of Regulation No 2201/2003 must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case.

With its **third question**, the referring court asks first the conditions to which the adoption of a protective measure such as the taking into care of children is subject under Article 20(1) of the Regulation. Secondly, the Finnish court wishes to know whether such a measure may be applied in accordance with national law and whether those provisions are binding. Thirdly, the court asks whether the case has to be transferred to the court of another Member State having jurisdiction after the protective measure is taken. In this respect the ECJ held:

A protective measure, such as the taking into care of children, may be decided by a national court under Article 20 of Regulation No 2201/2003 if the following conditions are satisfied:

– the measure must be urgent;

– it must be taken in respect of persons in the Member State concerned, and

– it must be provisional.

The taking of the measure and its binding nature are determined in accordance with national law. After the protective measure has been taken, the national court is not required to transfer the case to the court of another Member State having jurisdiction. However, in so far as the protection of the best interests of the child so requires, the national court which has taken provisional or protective measures must inform, directly or through the central authority designated under Article 53 of Regulation No 2201/2003, the court of another Member State having jurisdiction.

By means of the **fourth question**, the *Korkein hallinto-oikeus* asks whether a court of a Member State which has no jurisdiction at all must declare that it has no jurisdiction or transfer the case to the court of another Member State. Here, the Court held as follows:

Where the court of a Member State does not have jurisdiction at all, it must declare of its own motion that it has no jurisdiction, but is not required to transfer the case to another court. However, in so far as the protection of the best interests of the child so requires, the national court which has declared of its own motion that it has no jurisdiction must inform, directly or through the central authority designated under Article 53 of Regulation No 2201/2003, the court of another Member State having jurisdiction.

See with regard to this case also our previous posts on the reference as well as Advocate General Kokott's opinion.

Canadian National Class Action Judgment Not Recognized in Quebec

The Supreme Court of Canada has confirmed the decision of the Quebec Court of Appeal in *Canada Post Corp. v. Lepine* (available here). The decision flows from Canada Post's termination, after only a year, of a lifetime internet service it sold to customers. This led to class proceedings in Quebec and Ontario. While aware of the proceedings in Quebec, the parties settled the class proceedings in Ontario in a judgment that purported to cover residents of Quebec. When the Quebec proceedings continued (due to dissatifaction with what was obtained under the Ontario settlement) the defendant sought to have the Ontario judgment recognized in Quebec.

Recognition of foreign judgments in Quebec is governed by Art 3155 of the Civil Code, and so this case is very centrally concerned both with civil law (rather than common law) and with interpreting the specific provisions of the Code. Art 3155 provides several bases for refusing to recognize a foreign judgment (see para. 22).

The first issue is whether the Ontario court had jurisdiction to grant the judgment. The Supreme Court of Canada devotes the most attention to this issue because it raises an interesting question within Quebec's law on recognition. Quebec uses the "mirror principle" for assessing jurisdiction, and so would consider whether the foreign court had taken jurisdiction in accord with Quebec's own approach to taking jurisdiction. That approach includes the doctrine of forum non conveniens. So this raised the issue of whether the Quebec court could hold that, because Ontario did not stay the proceedings at least as they concerned residents of Quebec, it did not have jurisdiction in the sense contemplated by the Code (para. 27). The Supreme Court of Canada rejects this approach: forum non conveniens issues are not to be considered in assessing the foreign court's jurisdiction (paras. 34-37). The Ontario court had jurisdiction.

The second issue is whether the Ontario judgment contravened fundamental principles of procedure. Here the court holds that the class proceeding notices

provided to residents of Quebec under the Ontario judgment were deficient. On the facts, this is an understandable conclusion: there is no question that the notices could have been clearer, especially as concerned the relation between the Ontario and Quebec proceedings (para. 45). This conclusion, in itself, is sufficient to resolve the case.

Third, Art 3155 provides a defence to recognition where essentially the same proceeding as that giving rise to the judgment is pending before the Quebec courts. Canada Post had advanced its argument based on a somewhat technical distinction between a proceeding seeking certification for a class action and the subsequently-certified action (para. 53) but the court rejected this distinction (para. 54). This aspect of the decision, interpreting Art 3155(4), could prove very important to the future of so-called national class actions in Canada, since it would then seem that as long as proceedings had started in Quebec, a decision from another province purporting to cover Quebec residents in the same class action would not be recognized in Quebec. This gives residents of Quebec a protection residents of the other provinces do not have.

This is a welcome decision on the first issue, an understandable decision on the second issue, and a decision that requires more consideration on the third issue.

PIL conference at the University of Johannesburg

Comparative private international law conference; University of Johannesburg; 8-11 September 2009

Key-note speakers:
(1) Prof Dr C F Forsyth (University of Cambridge):
Reconciling classic private international law with fidelity to constitutional values

(2) Prof Dr M Martinek (University of Saarland):
The Rome I and Rome II regulations in European private international law –

a critical analysis

34 participants from 17 countries:

Cameroon (1); Canada (1); China (4); Croatia (1); Czech Republic (1); Germany (2); Israel (1); Italy (1); Japan (1); Mauritius (1); the Netherlands (2); Poland (1); Portugal (1); South Africa (7); Spain (4); United Kingdom (4); United States of America (1)

Sections on:

Private international law of obligations
Private international family law
Commercial private international law
Procedural private international law
Arbitration and private international law
Miscellaneous topics of private international law

Further information: http://www.uj.ac.za/law. Conference organiser: Prof Jan L Neels (jlneels@uj.ac.za). The provisional programme will be available shortly.

Forum Non Conveniens and Treaty Rights: King v. Cessna

On Monday, the Eleventh Circuit rendered an interesting opinion in the case of *King v. Cessna Aircraft* . The case concerned several interesting points on the doctrine of*forum non conveniens*, the most interesting of which is the competing rights guaranteed to foreign plaintiffs under bilateral treaties.

As a bit of background, the case arose out of wrongful death actions by one American, and numerous European plaintiffs, against Cessna Aircraft arising from a plane crash in Italy. Because, under *Piper*, foreign plaintiffs deserve less deference in their choice of forum, the district court dismissed the claims of all the European plaintiffs on the basis of forum non conveniens but stayed the action

concerning the American plaintiff pending resolution of the foreign claims in Italy. The question presented is whether bilateral FCN treaties between the United States and Denmark, Finland, Italy, Norway, and Romania–all of which guarantee the foreign nationals "no less favorable" access to U.S. courts–should impact the private interest analysis under *forum non conveniens*. Here is how the Eleventh Circuit ruled on the question:

> *In the forum non conveniens analysis, "[a] foreign plaintiff's choice of forum . . . is a weaker presumption that receives less deference. The European Plaintiffs point out a majority of them are from countries having bilateral treaties with the United States that accord them "no less favorable" access to U.S. courts to redress injuries caused by American actors. Thus, they argue, the district court erred in giving their choice less deference. We disagree. . . . Even assuming that, by treaty, plaintiffs were entitled to access American courts on the same terms as American citizens …, our case law does not support plaintiffs' assertion that such a treaty would require that their choice of forum be afforded the same deference afforded to a U.S. citizen bringing suit in his or her home forum. Such a proposition impermissibly conflates citizenship and convenience. . . . A court considering a motion for dismissal on the grounds of forum non conveniens does not assign "talismanic significance to the citizenship or residence of the parties," . . . and there is no inflexible rule that protects U.S. citizen or resident plaintiffs from having their causes dismissed for forum non conveniens. . . . [A]ppellants cannot successfully lay claim to the deference owed an American citizen or resident suing in her home forum. Plaintiffs are only entitled, at best, to the lesser deference afforded a U.S. citizen living abroad who sues in a U.S. forum. This analysis makes clear that although citizenship often acts as a proxy for convenience in the forum non conveniens analysis, the appropriate inquiry is indeed convenience. In this case, then, the lesser deference given by the district court to the European Plaintiffs' choice of forum was consistent with the treaty obligations of the United States. Just as it would be less reasonable to presume an American citizen living abroad would choose an American forum for convenience, so too can we presume a foreign plaintiff does not choose to litigate in the United States for convenience.*

Roger Alford at Opinio Juris sums up that, "based on this logic, foreign plaintiffs stand in the shoes of ex pat Americans living abroad." If that is right, then, "one

should find case law in which Americans living abroad enjoy this lesser presumption." He correctly notes, however, that there is "no such case law and the court provides none." And, the more fundamental problem with the opinion is that all the convenience factors they discuss on the defendant side are identical as between the European and American plaintiffs. The location of much of the evidence is in Italy, including evidence from Italian witnesses, that is true for *both* the American and European plaintiffs. Unless the claims of the Americans and the Europeans are different, and require differing use of the evidence (which is not the case here), then shouldn't the convenience factors that the court touts so headily apply evenly to both sets of plaintiffs? I'm not suggesting that *forum non* dismissal was an inappropriate decision in the balance of factors–indeed, the place of the tort, the applicable law and the evidence is all in Italy–but I would think that the American plaintiffs should be equally vulnerable to dismissal on that grounds as well.

ECJ Judgment in Gambazzi

The European Court of Justice (ECJ) has delivered today its judgment in *Gambazzi v. Daimler Chrysler Canada, Inc. and CIBC Mellon Trust Company*.

The case, previously known as *Stolzenberg*, had been already litigated in numerous jurisdictions (see our previous posts here and here). The defendants had sued Gambazzi in London and obtained there a *Mareva* injunction. As Gambazzi failed to comply with it, he was sanctioned by the English court and debarred from defending in the main proceedings. As a consequence, the defendants entered into a default judgment against him. They then sought enforcement of the said default jugdment throughout Europe, including in Italy. The Court of Appeal of Milan referred the case to the ECJ, and asked:

> *On the basis of the public policy clause in Article 27(1) of the Brussels Convention, may the court of the State requested to enforce a judgment take account of the fact that the court of the State which handed down that judgment denied the unsuccessful party which had entered an appearance the*

> *opportunity to present any form of defence following the issue of a debarring order as described [in the grounds of the present Order]? Or does the interpretation of that provision in conjunction with the principles to be inferred from Article 26 et seq. of the Convention, concerning the mutual recognition and enforcement of judgments within the Community, preclude the national court from finding that civil proceedings in which a party has been prevented from exercising the rights of the defence, on grounds of a debarring order made by the court because of that party's failure to comply with a court injunction, are contrary to public policy within the meaning of Article 27(1)?*

Following closely the conclusions of Advocate General Kokott, the ECJ ruled this morning that it could only give guidelines to national courts so that they would make a decision themselves. It held:

> ***the court of the State in which enforcement is sought may take into account, with regard to the public policy clause referred to in [Article 27(1)], the fact that the court of the State of origin ruled on the applicant's claims without hearing the defendant, who entered appearance before it but who was excluded from the proceedings by order on the ground that he had not complied with the obligations imposed by an order made earlier in the same proceedings, if, following a comprehensive assessment of the proceedings and in the light of all the circumstances, it appears to it that that exclusion measure constituted a manifest and disproportionate infringement of the defendant's right to be heard.***

Clearly, this is a bit disappointing. We will have to wait longer before getting a chance to know whether nuclear weapons of English civil procedure are compatible with human rights in general, and Article 6 of the European Convention on Human Rights (ECHR) in particular.

The ECJ addressed two issues in its judgment.

First, it made it clear that English default judgments are judgments within the meaning of Article 25 of the Brussels Convention. It held that they meet the *Denilauler* test of being adversarial. This is good to know, but I am not sure this was the most interesting issue. Advocate General Kokott had also focused on

whether English default judgments meet the *Solokleinmotoren* test, and this was much more questionable. AG Kokott had concluded that they did meet that test, but the Court is silent in this respect.

Second, the Court discussed whether the English default judgment was contrary to public policy. It only addressed the issue referred to it by the Milan Court, i.e. whether rendering a 'default' judgment as a consequence of debarment from defending was a violation of the right to a fair trial. Along the lines of AG Kokott's conclusions, the ECJ only gave guidelines to national courts which will have to appreciate whether, in the light of all circumstances, there was such violation. In particular, the Court insisted that they should assess whether debarment was a proportionate sanction.

> *33 With regard to the sanction adopted in the main proceedings, the exclusion of Mr Gambazzi from any participation in the proceedings, that is, as the Advocate General stated in point 67 of her Opinion, the most serious restriction possible on the rights of the defence. Consequently, such a restriction must satisfy very exacting requirements if it is not to be regarded as a manifest and disproportionate infringement of those rights.*
>
> *34 It is for the national court to assess, in the light of the specific circumstances of these proceedings, if that is the case.*

The ECJ does not discuss whether the lack of reasons of English default judgments is contrary to Article 6 ECHR. It does not discuss either whether being prevented from accessing to one's evidence because it is withheld by one's lawyer is contrary to the right to a fair trial. As we had previously reported, other courts in Europe had found that these were violations of their public policy.