Two new IPL Regulations

Today's Official Journal (L, nº 200), publishes two new IPL Regulations: REGULATION (EC) No 662/2009 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries on particular matters concerning the law applicable to contractual and non-contractual obligations; and COUNCIL REGULATION (EC) No 664/2009 of 7 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations, and the law applicable to matters relating to maintenance obligations. Both Regulations shall enter into force on the 20th day following their publication in the Official Journal of the European Union.

According to whereas nº 6 to 8 of both Regulations, it is for the Community to conclude, pursuant to Article 300 of the Treaty, agreements between the Community and a third country on matters falling within the exclusive competence of the Community; article 10 of the Treaty requires Member States to facilitate the achievement of the Community's tasks and to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty. With regard to agreements with third countries on specific civil justice issues falling within the exclusive competence of the Community, a coherent and transparent procedure should be established to authorise a Member State to amend an existing agreement or to negotiate and conclude a new agreement, in particular where the Community itself has not indicated its intention to exercise its external competence to conclude an agreement by way of an already existing mandate of negotiation or an envisaged mandate of negotiation.

Regulations (EC) No 662/2009 and No 664/2009 therefore establish a procedure to authorise a Member State to amend an existing agreement or to negotiate and conclude a new agreement with a third country. This is a summary of such procedure:

.- Following article 3, where a Member State intends to enter into negotiations in order to amend an existing agreement or to conclude a new agreement falling

within the scope of this Regulation, it shall notify the Commission in writing of its intention at the earliest possible moment before the envisaged opening of formal negotiations. Upon receipt of the notification referred to, the Commission shall assess whether the Member State may open formal negotiations. If the envisaged agreement meets the conditions set out in article 4(2) of the Regulation, the Commission shall, within 90 days of receipt of the notification referred to before, give a reasoned decision on the application of the Member State authorising it to open formal negotiations on that agreement. If necessary, the Commission may propose negotiating guidelines and may request the inclusion of particular clauses in the envisaged agreement.

.- If, on the basis of its assessment , the Commission intends not to authorise the opening of formal negotiations on the envisaged agreement, it shall give an opinion to the Member State concerned within 90 days of receipt of the notification referred to in Article 3. Within 30 days of receipt of the opinion of the Commission, the Member State concerned may request the Commission to enter into discussions with it with a view to finding a solution.

.- According to article 7 of both Regulations, the Commission may participate as an observer in the negotiations between the Member State and the third country as far as matters falling within the scope of the Regulation are concerned. If the Commission does not participate as an observer, it shall be kept informed of the progress and results throughout the different stages of the negotiations.

.- Article 8 states that before signing a negotiated agreement, the Member State concerned shall notify the outcome of the negotiations to the Commission and shall transmit to it the text of the agreement. Upon receipt of that notification the Commission shall assess whether the negotiated agreement meets the conditions stated in art. 8. If the negotiated agreement fulfils the conditions and requirements referred to in paragraph 2, the Commission shall, within 90 days of receipt of the notification referred to in paragraph 1, give a reasoned decision on the application of the Member State authorising it to conclude that agreement.

.- If, on the basis of its assessment under Article 8(2), the Commission intends not to authorise the conclusion of the negotiated agreement, it shall give an opinion to the Member State concerned, as well as to the European Parliament and to the Council, within 90 days of receipt of the nptification referred to in Article 8(1). Within 30 days of receipt of the opinion of the Commission, the Member State

concerned may request the Commission to enter into discussions with it with a view to finding a solution.

Where, at the time of entry into force of this Regulation, a Member State has already started the process of negotiating an agreement with a third country, the described procedure shall apply.

Article on Passengers' Rights

Jens Karsten (Brussels/Oslo) has written a paper on recent developments in the field of European passenger law with references to PIL issues. "Im Fahrwasser der Athener Verordnung zu Seereisenden: Neuere Entwicklungen des europäischen Passagierrechts" has been published in the German law journal "Verbraucher und Recht" (VuR) vol. 6/2009, pp. 213 et seq.

The article mainly deals with Regulation (EC) No. 392/2009 on the liability of carriers of passengers by sea in the event of accidents. The Athens Regulation incorporates most of the Athens Convention 2002 (www.imo.org) into the acquis communautaire but postpones the implementation of its Articles 17 and 17bis on jurisdiction and enforcement (deviating from 'Brussels I') until such time as the EC has acceded to the Convention.

Beyond the discussion of the Athens Regulation, the paper also presents new references for preliminary rulings and recent decisions of the ECJ linking travel law and PIL. The author refers inter alia to the "Rehder" case (which in the meantime – as we have reported – has been decided). It also introduces the Austrian reference on Art. 15(3) 'Brussels I' in the "Pammer" case (now also Case C-144/09, Alpenhof v. Heller).

Most significant for the development of EU-PIL, the paper raises the question of the interaction of the European Commission proposal of 8 October 2008 for a Directive on Consumer Rights (COM(2008) 614 final) with the 'Rome I'-Regulation (first discussed in this forum by Giorgio Buono on 9 October 2008: "EC Commission Presents a Proposal for a Directive on Consumer Rights"). The

proposal aims at merging four existing directives on consumer rights: Directive 85/577/EEC on contracts negotiated away from business premises; Directive 93/13/EEC on unfair terms in consumer contracts; Directive 97/7/EC on distance contracts; and Directive 1999/44/EC on consumer sales and guarantees. Three of these directives provide for conflict-of-law clauses concerning the scope of EC consumer law (scope clauses). Those clauses, where applicable, have the effect of making, for instance, unfair term control as foreseen in EC law under Directive 93/13/EEC on Unfair Terms in Consumer Contracts possible even when the law of a third country is chosen. Somewhat hidden in its provisions, the proposal would abolish the scope clauses of its predecessor directives. The author assesses the impact of this change in EC-PIL de lege ferenda, taking in particular into account Article 5 and Article 3(4) of 'Rome I', both new provisions compared to the Rome Convention. The choice of law of a third, non-EU-country for seat-only sales would consequently be possible also in those areas of EC consumer law whose application is so far guaranteed by the scope clauses. This significant change is welcomed; however, uncertainty remains whether this consequence has been properly considered in the proposal. The author encourages therefore a discussion on the territorial scope of EC consumer law with regard to passengers' rights.

United States Congress Considering Legislation Relating to Pleading

As was recently reported on this blog, this past May the United States Supreme Court decided the case of *Ashcroft v. Iqbal*, which will have relevance for pleading private international law cases in United States federal courts. The five-member majority in *Iqbal* (Justice Kennedy joined by Chief Justice Roberts and Justices Scalia, Thomas, & Alito) made clear that the heightened standards of pleading announced in 2007 in *Bell Atlantic v. Twombly* should be applied in cases beyond the antitrust context. In *Twombly*, the Court held that to comply with Federal

Rule of Civil Procedure 8(a)(2) (requiring that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief") that a complaint must contain "enough facts to state a claim to relief that is plausible on its face." There had been some confusion in the lower federal courts as to whether that heightened pleading standard of "plausibility" applied in cases outside of the antitrust context. The Court in *Iqbal* answered that question in the affirmative, generally requiring all civil plaintiffs to meet the following standard: "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Slip op. at 14. As such, enough facts must be plead to allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. A complaint must therefore show more than "a sheer possibility that the defendant has acted unlawfully." *Id*.

On Wednesday, Senator Arlen Specter of Pennsylvania introduced a bill to return pleading standards in United States federal courts back to the "standards set forth by the Supreme Court of the United States in *Conley v. Gibson*, 355 U.S. 41 (1957)." That standard, which was overturned by *Twombly*, merely required that the complaint "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." Likewise, *Conley* provided that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitled him to relief." That approach to pleading, generally described as "notice pleading," enabled plaintiffs to describe their case in the complaint in very general terms and then to use the mechanics of discovery to prove up their claims at trial and/or force settlement before trial. In overturning that case in *Twombly* and in clarifying in *Iqbal* that in *all* civil cases a complaint must meet the heightened pleading standard of plausibility, the Supreme Court has moved pleading in the the United States ever so slightly towards the civil law's "fact pleading" standard.

Senator Specter's bill would return the United States to the simple "notice pleading" of the pre-*Twombly* era. A couple of observations are in order. *First*, it is clear that *Iqbal* is a blockbuster decision. As recently described by Adam Liptak in the *New York Times*: "The most consequential decision of the Supreme Court's last term got only a little attention when it landed in May. . . . But the lower courts have certainly understood the significance of the decision, *Ashcroft*

v. Iqbal, which makes it much easier for judges to dismiss civil lawsuits right after they are filed. They have cited it more than 500 times in just the last two months." The impact for private international law cases will be substantial in that those cases often require extensive discovery to make out claims, as the acts and/or occurrences allegedly giving rise to unlawful activity occur outside the borders of the United States and present unique problems of factual development given their transnational dimension.

Second, Congress has now entered the fray given the importance of that decision to all civil cases. While Senator Specter's bill may be elegant in its simplicity, one wonders whether a bill more carefully crafted and detailed might be in order. For instance, might it be useful to have a carve out for cases, such as private international law ones, that pose unique pleading problems. Or, might it be useful for Congress to more precisely detail the discretion to be employed by district court judges in reviewing civil complaints. To be sure, both *Conley*'s liberal standard and *Iqbal*'s heightened standards are not studies in clarity. Thus, it might be better to provide more-focused principles to be employed by the courts in civil cases rather than merely returning to *Conley*'s opaque standard.

Finally, it should be asked from a comparative perspective whether US courts and Congress might look to the experience of fact pleading abroad before returning to the *Conley* standard. In Europe, there is a rich experience with heightened pleading standards that might provide concrete rules for application in the United States. For instance, perhaps moderating principles of judicial administration might be explored to lessen the seemingly blunt pronouncements in *Twombly* and *Iqbal*. This would be especially relevant in private international law cases, where cases sit at the interstices of the common law and civil law divide.

At bottom, private international lawyers should keep a close watch on these developments.

Publication: “La nuova disciplina comunitaria della legge applicabile ai contratti (Roma I)”

The papers presented at the conference on the Rome I Regulation hosted in November 2008 by the University of Venice “Ca’ Foscari” (see here for the webcast) have been published by the Italian publishing house Giappichelli under the editorship of *Nerina Boschiero*: **“La nuova disciplina comunitaria della legge applicabile ai contratti (Roma I)“**.

Here’s the table of contents:

Presentazione (*N. Boschiero*).

Introduction. Considérations de méthode (*P. Lagarde*).

Parte I: Problemi generali.

- Funzione ed oggetto dell’autonomia della volontà nell’era della globalizzazione del contratto (*F. Marrella*);
- I limiti al principio d’autonomia posti dalle norme generali del regolamento Roma I. Considerazioni sulla “conflict involution” europea in materia contrattuale (*N. Boschiero*);
- La legge applicabile in mancanza di scelta dei contraenti (*U. Villani*);
- Le norme di applicazione necessaria nel regolamento “Roma I” (*A. Bonomi*);
- A United Kingdom Perspective on the Rome I Regulation (*J. Fawcett*).

Parte II: Temi specifici.

- La definizione dell’ambito di applicazione del regolamento Roma I: criteri generali e responsabilità precontrattuale (*P. Bertoli*);
- I contratti di assicurazione tra mercato interno e diritto internazionale privato (*P. Piroddi*);
- Contratti con i consumatori e regolamento Roma I (*F. Seatzu*);
- La legge applicabile ai contratti individuali di lavoro nel Regolamento “Roma I” (*F. Seatzu*);

- Il contratto internazionale di trasporto di persone (*G. Contaldi*);
- Le relazioni intercorrenti tra il regolamento Roma I e le convenzioni internazionali (in vigore e non) (*A. Bonfanti*);
- La legge applicabile alla negoziazione di strumenti finanziari nel regolamento Roma I (*F.C. Villata*);
- La legge regolatrice delle conseguenze restitutorie e risarcitorie della nullità del contratto nei regolamenti Roma I e Roma II (*Z. Crespi Reghizzi*);
- I contratti relativi alla proprietà intellettuale alla luce della nuova disciplina comunitaria di conflitto. Analisi critica e comparatistica (*N. Boschiero*).

Osservazioni conclusive (*T. Treves*).

Title: **"La nuova disciplina comunitaria della legge applicabile ai contratti (Roma I)"**, edited by *Nerina Boschiero*, Giappichelli (Torino), 2009, XVI – 548 pages.

ISBN: 978-88-348-9562-7. Price: EUR 50. Available at Giappichelli.

Publications on International Surrogate Motherhood

A paper of Prof. Anna Quiñones Escámez (Pompeu Fabra Univerity, Barcelona) has just been published in the Spanish electronic magazine InDret. The English abstract reads as follows:

> *The following pages focus on Private International Law issues raised by the Resolution of the Spanish "Dirección General de los Registros y del Notariado" (DGRN) of last February the 18th. Reversing the previous decision of the Consular Register, the Resolution agrees to register in the Spanish Office of foreign birth certificates the double paternity of twins born by means of surrogate motherhood in California. Once submitted the main issue settled by*

the DGRN, we will examine the pending questions and the resolution methods available at Private International Law (mandatory rules, conflict of laws and recognition of official certificates, judicial decisions and legal situations). At this point we will take into account the relationship (cause-effect) between the judicial decision and the birth certificate as a title (artículo 83 RRC). Later on, we will review the limits provided by some domestic laws in order to avoid creating "limping situations" valid in the country of origin but illegal abroad. We will follow remarking the aspects of fraud in the jurisdiction (forum shopping) and the "fraud in the conflict of qualifications". Both aspects are relevant since the contract issue (surrogacy) is the one which attracts affiliation issues before the courts (and law) of the country where surrogacy is practised and where the children will be born. We will conclude with some remarks regarding the role of "the best interest of the Child clause" (supra-national rule of law) and the "best interest of the children" in this case.

The article itself can be downloaded (see here).

Australia to accede to Hague Convention on Service Abroad

On 25 June 2009, the Commonwealth Attorney General tabled the *Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters 1965* in Parliament. This is the first step to Australia's becoming a party to the *Convention*. In anticipation of that, there have been amendments to the rules of the Federal Court and those of the State Supreme Courts (see eg Victoria) relating to service under the *Convention*, which will commence on the day the *Convention* enters force in Australia.

ECJ: Judgments in “Hadadi” and “Zuid-Chemie BV”

Yesterday, the ECJ delivered its judgments in cases C-189/08 (*Zuid-Chemie BV v. Philippo’s Mineralenfabriek NV/SA*) and C-168/08 (*Laszlo Hadadi (Hadady*))

1. ***Zuid-Chemie*** concerns the interpretation of Art. 5 (3) Brussels I Regulation. The *Hoge Raad der Nederlanden* (Netherlands) had referred the following questions to the ECJ:

> *1. Which damage is, in the case of unlawful conduct such as that which forms the basis for Zuid-Chemie’s claim, to be treated as the initial damage resulting from that conduct: the damage which arises by virtue of the delivery of the defective product or the damage which arises when normal use is made of the product for the purpose for which it was intended?*
>
> *2. If the latter is the case, can then the place where that damage occurred be treated as “the place where the harmful event occurred” within the meaning of Article 5(3) of … Regulation … No 44/2001 … only if that damage consists of physical damage to persons or goods, or is this also possible if (initially) only financial damage has been incurred?*

The ECJ now held as follows:

> *Article 5(3) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that, in the context of a dispute such as that in the main proceedings, the words ‘place where the harmful event occurred’ designate the place where the initial damage occurred as a result of the normal use of the product for the purpose for which it was intended.*

See with regard to this case also our previous post on the referring decision which can be found here.

2. The second case, ***Hadadi***, concerns the interpretation of the Brussels II *bis*

Regulation. Here, the *Cour de cassation* (France) had referred the following questions to the ECj:

> *(1) Is Article 3(1)(b) [of Regulation No 2201/2003] to be interpreted as meaning that, in a situation where the spouses hold both the nationality of the State of the court seised and the nationality of another Member State of the European Union, the nationality of the State of the court seised must prevail?*
>
> *(2) If the answer to Question 1 is in the negative, is that provision to be interpreted as referring, in a situation where the spouses each hold dual nationality of the same two Member States, to the more effective of the two nationalities?*
>
> *(3) If the answer to Question 2 is in the negative, should it therefore be considered that that provision offers the spouses an additional option, allowing those spouses the choice of seising the courts of either of the two States of which they both hold the nationality?*

The Court now ruled as follows:

> *1. Where the court of the Member State addressed must verify, pursuant to Article 64(4) of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Council Regulation (EC) No 1347/2000, whether the court of the Member State of origin of a judgment would have had jurisdiction under Article 3(1)(b) of that regulation, the latter provision precludes the court of the Member State addressed from regarding spouses who each hold the nationality both of that State and of the Member State of origin as nationals only of the Member State addressed. That court must, on the contrary, take into account the fact that the spouses also hold the nationality of the Member State of origin and that, therefore, the courts of the latter could have had jurisdiction to hear the case.*
>
> *2. Where spouses each hold the nationality of the same two Member States, Article 3(1)(b) of Regulation No 2201/2003 precludes the jurisdiction of the courts of one of those Member States from being rejected on the ground that the applicant does not put forward other links with that State. On the contrary, the courts of those Member States of which the spouses hold the nationality*

have jurisdiction under that provision and the spouses may seise the court of the Member State of their choice.

See also our previous posts on the AG's opinion as well as the reference.

Publication. Punitive damages: Common Law and Civil Perspectives

On a previous post (see here) I gave notice of a Vienna Conference on Punitive Damages held in November 2008, organised by the Institute for European Tort Law and chaired by Sir Henry Brooke and Prof. Ken Oliphant. Following this event a book has just been published, entitled *Punitive Damages: Common Law and Civil Law Perspectives*. The study covers jurisdictions that openly endorse punitive damages -in particular, England, South Africa and the United States- as well as those jurisdictions which purport to deny their existence . The position in France, Germany, Italy, Spain, Hungary, the Scandinavian countries as well as EU Law are thus considered. The study also includes a report on punitive damages from an insurance, law and economics and private international law perspective. A report on aggravated damages precedes a comparative report and conclusions.

More information on the publication and a link to the index of contents is to be found here.

Round-Up of Canadian Conflicts Publications

Readers of this web site might find some of the following publications to be of interest. I have tried to gather togther recent work by Canadian conflicts scholars. Please post a comment if you are aware of another piece.

Vaughan Black & Angela Swan, "Concurrent Judicial Jurisdiction: A Race to the Court House or to Judgment?" (2008) 46 C.B.L.J. 292

Joost Blom, "Concurrent Judicial Jurisdiction and Forum Non Conveniens – What is to be Done?" (2009) 47 C.B.L.J. 166

Wayne Gray & Robert Wisner, "The Russians are Coming, But Can They Enforce their Foreign Arbitral Award?" (2009) 47 C.B.L.J. 244

Jacqueline King & Andrew Valentine, "The Structure of Jurisdictional Analysis" (2008) 34 Adv. Q. 416

Kenneth C. MacDonald, *Cross-Border Litigation: Interjurisdictional Practice and Procedure* (Aurora: Canada Law Book, 2009)

James Mangan, "The Need for Cross-Border Clarity: Recognizing American Class Action Judgments in Canada" (2009) 35 Adv. Q. 375

Tanya Monestier, "Lepine v. Canada Post: Ironing Out Wrinkles in the Interprovincial Enforcement of Class Judgments" (2008) 34 Adv. Q. 499

Austen Parrish, "Comity and Parallel Foreign Proceedings: A Reply to Black and Swan" (2009) 47 C.B.L.J. 209

Nicholas Pengelley, "Alberta Says Nyet! Limitation Act Declares Russian Arbitral Award DOA" (2009) 5 J.P.I.L. 105

Stephen Pitel, "Rome II and Choice of Law for Unjust Enrichment" in John Ahern & William Binchy, *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations* (Leiden: Martinus Nijhoff Publishers, 2009) 231

Stephen Pitel, "Choice of Law for Unjust Enrichment: Rome II and the Common

Law" [2008] Nederlands Internationaal Privaatrecht 456

Antonin Pribetic, "Staking Claims Against Foreign Defendants in Canada: Choice of Law and Jurisdictional Issues Arising from the In Personam Exception to the Mocambique Rule for Foreign Immovables" (2009) 35 Adv. Q. 230

Prasanna Ranganathan, "Survivors of Torture, Victims of Law: Reforming State Immunity in Canada by Developing Exceptions for Terrorism and Torture" (2008) 71 Sask. L. Rev. 343

Geneviève Saumier, "Transborder Litigation and Private International Law: The View from Canada" in F. Cafaggi & H.-W. Micklitz, eds., *New Frontiers of Consumer Protection: The Interplay between Private and Public Enforcement* (Antwerp: Intersentia, 2009) 361

Janet Walker, "Recognizing Multijurisdictional Class Action Judgments Within Canada: Key Questions – Suggested Answers" (2008) 46 C.B.L.J. 450

Janet Walker, "Teck Cominco and the Wisdom of Deferring to the Court First Seised, All Things Being Equal" (2009) 47 C.B.L.J. 192

Summer Seminar in Urbino

The Faculty of Law of the University of Urbino will host this summer its 51st Seminar of European Law.

The majority of the courses taught over the two weeks of the seminar (17-29 August) will deal with conflict issues, in particular European regulations. Although courses can be taught in English, this is a franco-italian seminar where courses are typically taught in French or Italian, with a translation in the other language.

This year, speakers will come from France, Italy, Portugal or Lebanon, and include Horatia Muir Watt, Bertrand Ancel, Luigi Mari, and Tito Ballarino.

The full program can be found here.