Dickinson: Rome II Regulation Monograph Supplement, and our New Consultant Editor

Scholarly writings on the new Rome II Regulation have continued to pour in from all Member States, and the ECJ's recent case law on other civil justice instruments (particularly the Brussels I Regulation) has also addressed issues of relevance to Rome II. For the time being, national courts have had little opportunity to consider the Rome II Regulation, but that will no doubt soon change. Andrew Dickinson's monograph – The Rome II Regulation – The Law Applicable to Non-Contractual Obligations – was published on 18th December 2008, and will undoubtedly be a source of valuable guidance for practitioners and academics for some time to come. To ensure that it remains up to date, however, Andrew Dickinson has committed to publishing supplements to the work. The first supplement, which runs to some 54 pages, is available on the companion website to the book and can be downloaded from **here (PDF)**. I would urge all those interested in Rome II to take advantage of it.

It will, following from the above, come as no surprise that I am delighted to announce that Andrew will be joining the Conflict of Laws .net team as a Consultant Editor, posting primarily on developments in European civil and commercial matters. A short biography appears below, and I am sure everyone who uses this site will be pleased that he will be contributing to the website on a regular basis.

Biography

Andrew Dickinson is a solicitor advocate (qualified 1997; higher rights 2002), consultant to Clifford Chance LLP and visiting fellow at the British Institute of International and Comparative Law.

Andrew is a member of the North Committee (the Ministry of Justice's advisory committee on private international law) and of the editorial board of the Journal of Private International Law. He has recently joined the editorial team of Dicey, Morris and Collins on the Conflict of Laws.

Andrew's main area of legal practice and research interest is private international law, but his practice also covers civil litigation, commercial and banking law and public international law. He is the author of The Rome II Regulation: The Law Applicable to Non-Contractual Obligations (OUP, 2008) (romeii.eu), co-author of State Immunity: Selected Materials and Commentary (OUP, 2004) and an editor of the International Commercial Litigation Handbook (LexisNexis, 2006). His published papers include "European Private International Law: Embracing New Horizons or Mourning the Past? " (2005) 1 J Priv Int L 197 and "Third Country Mandatory Rules in the Law Applicable to Contractual Obligations: So Long, Farewell, Auf Wiedersehen, Adieu?" (2007) 3 J Priv Int L 53.

The New Solicitor General and Private International Law Cases: 2008 Term Round-Up

Elena Kagan, the new Solicitor General of the United States, had a few notable private international law cases on her desk when she arrived at her new job this past March. By then, the Court had invited the views of the Solicitor General in the first Hague Convention case to garner serious attention since *Schlunk* and *Aerospatialle* in the late 1980's, and had done the same regarding a case which sought to clarify the scope of specific personal jurisdiction over foreign nationals for their tortuous acts abroad. Just this week, she presented the views of the United States regarding those petitions.

In *Abbott v. Abbott*, the Hague Convention case which was previously discussed at length on this site, the United States recommended the Court grant the petition. In very plain terms, the Solicitor General concludes that the court of appeals erred in concluding that a ne exeat right is not a right of custody under the Convention; that there is disagreement among states party to this Convention, as well as among domestic circuits on this issue; and that it is an important question that merits the Supreme Court's review. The Court will decide whether

to take the Solicitor General's advice at its June 25 conference. As the SCOTUSBlog aptly notes, if the Court takes this case, it will indirectly be reviewing the work of its newest (proposed) member in Judge Sonia Sotomayor. The Second Circuit was the first court of appeals to consider this question, in *Croll v. Croll*, 229 F.3d 133 (2000), cert. denied, 534 U.S. 949 (2001), where the panel majority held that a ne exeat clause was not a right of custody for purposes of the Hague Convention. Judge Sotomayor wrote a dissenting opinion indicating that she would have held – as the Solicitor General now argues – that the ne exeat clause constitutes a right of custody. The full brief of the United States is available here.

Nearly contemporaneously, the Solicitor General recommended the Court deny the petition in *Federal Ins. Co. v. Kingdom of Saudi Arabia*. This case, which was also previewed on this site in the past, presented not only some important issues regarding the Foreign Sovereign Immunities Act, but also the very open question of when U.S. courts may exercise personal jurisdiction over civil claims against foreign nationals on the ground that those individuals engaged in acts abroad which had foreseeable consequences in the United States. The Second Circuit held that the Constitution permits the assertion of personal jurisdiction under these statutes only over foreign actors who "directed" or "commanded" terrorist attacks on U.S. soil, but bars such jurisdiction over persons who merely "fores[aw] that recipients of their donations would attack targets in the United States." The Solicitor General, however, thought it was "unclear precisely what legal standard the court of appeals" was applying. Br. at 19. Here is why she sees the issue as not worthy of the Court's attention (and how the Unites States views foreseeability as a function of personal jurisdiction):

> *To the extent that the court of appeals language suggests that a defendant must specifically intend to cause injury to residents in the forum before a court there may exercise jurisdiction over him, that is incorrect. It is sufficient that a defendant took "intentional . . . tortuous actions" and "knew that the brunt of the injury would be felt" in the foreign forum. Calder, 465 U.S. at 789-90. The court of appeals decision, however, is subject to a more limited construction, which focuses on the inadequacy of the particular allegations before it. At several points, the court of appeals stressed that the petitioners' claims were based on the "the [defendants] alleged indirect funding of al Quaeda." Where the connection between the defendant and the direct tortfeasor is separated by*

> *intervening actors, the requirement of showing an "intentional . . . tortuous act[]" on the part of the defendant demands more than a simple allegation. Petitioners would need to allege facts that could support the conclusion that the defendant acted with the requisite intention and knowledge. See Ashcroft v. Iqbal, No. 07-1015 (May 18, 2009, slip op. 16-19 [(previewed here)]. . . . . The court's case-specific holdings [that these allegations were not sufficiently plead] do not warrant review by this Court.*

Br. at 19-20. On similar grounds, the Solicitor General also downplays the circuit conflict alleged in the Petition, saying that the "in each of the three appellate cases cited by petitioners evidencing a conflict, the defendant was a primary wrongdoer—not, as here, a person whose alleged tortuous act consisted of providing material support to another party engaged in tortuous activity." Br. at 20-21. The full brief of the United States is available here. Again, we'll likely know whether the Court takes this advice by June 29.

And, just as she was clearing her desk of private international law matters, the Court sent her another invitation: it asked for the views of the United States regarding a new Petition which asks whether the antifraud provisions of the U.S. securities laws extends to transnational frauds. The case is *Morrison v. National Australia Bank, Ltd*., which presents the deep and long-running split of federal authority over the application of the "conduct and effects test," which courts typically use to determine the scope of their jurisdiction not only in federal securities fraud cases, but in cases that implicate other federal statutes (like civil RICO) as well. The Petition is available here. We'll see this brief from the Solicitor General over the summer, or early next Term, which could shape-up to be an interesting one for private international law matters.

Forum Shopping before

International Tribunals

As the number of international tribunals increases, the issue of forum shopping is begining to arise quite frequently in public international law. How should it be handled? Are doctrines of private international law useful? If so, which one?

It seems that the most common practice, and received wisdom, is to apply the doctrine of *lis pendens*. But why should the doctrine regulating parallel jurisdiction in the civil law world be made the applicable doctrine in the international arena? In case public international scholars have not noted, there is another legal tradition which deals with the issue differently (although it has been harder to see in Europe in recent years).

So what about exploring whether *forum non conveniens* could be an interesting option for regulating parallel litigation before international courts?

This is what a recent Article by Professor Joost Pauwelyn (HEI, Geneva) and Brazilian scholar Luiz Eduardo Salles on Forum Shopping Before International Tribunals: (Real) Concerns, (Im)Possible Solutions undertakes.

There is no abstract, but here is one of the first paragraphs of the introduction:

> *The article examines the nature and potential concerns of the relatively new phenomenon of forum shopping among international tribunals. Further, it asks the question whether domestic law principles such as res judicata, lis pendens, and forum non conveniens could be used to alleviate such concerns. The article finds that, to the extent these principles apply before international tribunals, they fail to address the problem. Instead, states should regulate forum shopping explicitly in their treaty regimes, and international tribunals should defer to such explicit treaty clauses. The article identifies the distinction between questions of a tribunal's jurisdiction and questions of admissibility of claims as key to the implementation of jurisdictional coordination— be it through general principles of law or treaty rules on forum selection. This distinction is generally applicable before international tribunals but has been overlooked in the WTO context. The article also argues that to deal with the rise of forum shopping in international adjudication, more thought should be given to the question of whether tribunals have or should have some margin of judicial discretion not to exercise jurisdiction in cases in which forum shopping is at stake. To put these*

proposals in dynamic context, the article uses four variables, or scales, that will impact the assessment of both concerns and solutions for forum shopping among international tribunals, namely (1) a regime vs. system approach to international tribunals, (2) a partyfocus vs. legality-focus, (3) consensual vs. compulsory jurisdiction, and (4) specific vs. general jurisdiction.

The Article is forthcoming in the *Cornell International Law Journal*.

United States Congress Considering Legislation Relating to Foreign Defendants

On May 19, 2009, the United States Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts held a hearing entitled "Leveling the Playing Field and Protecting Americans: Holding Foreign Manufacturers Accountable." The purpose of the hearing was to explore whether legislation is necessary to deal specifically with foreign defendants in products liability cases. The Committee Chairman, Senator Sheldon Whitehouse of Rhode Island, described the need for legislation as follows.

"We all know American manufacturers must comply with regulations that ensure the safety of American consumers. When they fail to do so, they must answer to regulators and are held accountable through the American system of justice. Unfortunately, however, foreign manufacturers are not being held to the same standards – this puts at risk American consumers and businesses, and puts American manufacturers at a competitive disadvantage.

A major cause of this disparity is that Americans injured by foreign products face unnecessary and inappropriate procedural hurdles if they seek to hold foreign manufacturers accountable. First, they must identify the manufacturer of the product that injured them – often not an easy task since many foreign products do

no more than indicate their country of origin. Second, an injured American must serve process on the foreign manufacturer. This means the injured American has to deliver legal papers to the company directly or through a registered agent explaining that he or she is bringing a legal action against it. But this simple step often requires enormous time and expense – lawsuits even can fail over it – as the injured American attempts to comply with various complicated international treaties. Third, an injured American must overcome the technical defense that, even though a foreign manufacturer's product was used by an American consumer, the courts of that consumer's home state do not have jurisdiction over that company. Finally, even after an injured American has overcome these hurdles and prevailed in court, a foreign manufacturer can avoid collection on the judgment – often simply cutting off communications or shutting up its business and starting up again with a different name.

Americans harmed by defective foreign products need justice, and they do not get it when foreign manufacturers use technical legal defenses to avoid paying damages to the people they have injured. Today's hearing will help us learn more about these failures of justice and what we can do to fix them."

More details on the hearing, including witness statements and a webcast, can be found here.

Among other things, it will be interesting to see whether Congress steps into the ongoing debate concerning the exercise of personal jurisdiction over foreign defendants in US courts.

ECJ: Judgment on Art. 15 Brussels I ("Ilsinger")

On 14 May 2009, the ECJ delivered its judgment in case C-180/06 (*Renate Ilsinger v. Martin Dreschers*).

The case basically concerns the question whether legal proceedings by which a

consumer seeks an order requiring a mail-order company to award a prize apparently won by him – without the award of that prize depending on an order of goods – are contractual in terms of Art. 15 (1) (c) Brussels I Regulation, if necessary, on condition that the consumer has none the less placed an order.

The Oberlandesgericht Wien (Austria) referred the following questions to the ECJ for a preliminary ruling:

> *Does the provision in Paragraph 5j of the … KSchG …, which entitles certain consumers to claim from undertakings in the courts prizes ostensibly won by them where the undertakings send (or have sent) them prize notifications or other similar communications worded so as to give the impression that they have won a particular prize, constitute, in circumstances where the claiming of that prize was not made conditional upon actually ordering goods or placing a trial order and where no goods were actually ordered but the recipient of the communication is nevertheless seeking to claim the prize, for the purposes of … Regulation … No 44/2001: a contractual, or equivalent, claim under Article 15(1)(c) of Regulation No 44/2001?*
>
> *If the answer to question 1 is in the negative:*
>
> *Does a claim falling under Article 15(1)(c) of Regulation No 44/2001 arise if the claim for payment of the prize was not made conditional upon ordering goods but the recipient of the communication has actually placed an order for goods?'*

The Court held as follows:

> *In a situation such as that at issue in the main proceedings, in which a consumer seeks, in accordance with the legislation of the Member State in which he is domiciled and before the court for the place in which he resides, an order requiring a mail-order company established in another Member State to pay a prize which that consumer has apparently won, and*
>
> *– where that company, with the aim of encouraging that consumer to conclude a contract, sent a letter addressed to him personally of such a kind as to give him the impression that he would be awarded a prize if he requested payment by returning the 'prize claim certificate' attached to that letter,*
>
> *– but without the award of that prize depending on an order for goods*

offered for sale by that company or on a trial order, the rules on jurisdiction laid down by 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 follows:

– such legal proceedings brought by the consumer are covered by Article 15(1)(c) of that regulation, on condition that the professional vendor has undertaken in law to pay that prize to the consumer;

– where that condition has not been fulfilled, such proceedings are covered by Article 15(1)(c) of Regulation No 44/2001 only if the consumer has in fact placed an order with that professional vendor.

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

First Issue of 2009's Revue Critique de Droit International Privé



The first issue of the *Revue Critique de Droit International Privé* was just released.

It contains two articles and several case notes.

The first article is authored by Dominique Bureau, a professor at Paris II University, and Horatia Muir Watt, a professor at Paris Institute of Political Science (commonly known as *Sciences Po*). The paper explores whether enforcing forum selection clauses when mandatory rules of the forum are applicable, desactivates the imperativity of such rules (*L'impérativité désactivitée*

?).

> *The applicability of mandatory regulation or loi de police does not prevent the enforcement of a choice of forum clause in favour of a foreign court. In France, the Cour de cassation has adhered in turn to a solution already prevailing in other jurisdictions and for which arbitrability of disputes involving social or economic regulation paved the way. As with arbitration, the progressive liberalisation of requirements for the cross-border movement of the chosen court's decision may empower private actors to cross jurisdictional boundaries and benefit from a quasi-immunity from the constraints of state law. One possible response to such neutralisation of mandatory rules would be to set up a regime which would be dual from the point of view of the subject-matter of the rules involved (i.e. whether they are protective of weaker parties or whether they carry public economic regulation) and transversally applicable whatever the nature of the chosen forum (i.e. similar principles would apply to choice of arbitrator or foreign court), so as to exclude weaker parties from access to jurisdictional autonomy, including as far as arbitration of their disputes is concerned, while, on the other hand, preserving freedom of choice of forum and, correlatively, a low level of control in other cases, subject of course to the procedural precautions which Community law now mandates when the dispute falls within its scope.*

The second article is authored by Iraqi scholar Harith Al Dabbagh (Mossoul and Saint Etienne Universities). It discusses the issue of marriages between spouses of different religions (*Mariage mixte et conflit entre droits religieux et laique*). More specifically, the starting point of the discussion is a case of the Supreme Court of Iraq of March 27, 2007, which ruled on the divorce of a christian Iraqi women and a Turkish muslim man. Unfortunately, no abstract is provided.

The table of contents is not yet online. Articles of the *Revue Critique* cannot be downloaded.

Dirty Dancing and Stays of Proceedings

A recent judgment of the NSW Supreme Court is as noteworthy for its name and subject-matter as it is for the legal principles involved; namely stay of proceedings on the basis of a foreign exclusive jurisdiction clause.

Dance With Mr D Limited v Dirty Dancing Investments Pty Ltd [2009] NSWSC 332 concerned a dispute between producers of, and investors in, the musical "Dirty Dancing" (based on the film of the same name). The dispute turned on the interpretation of two contracts, one of which contained English choice of law and exclusive jurisdiction clauses; the other containing an Australian arbitration clause, the interpretation of which was also in dispute.

In granting a stay, the judge observed that:

> *"Where parties to a contract have agreed by an exclusive foreign jurisdiction clause to submit to the exclusive jurisdiction of a foreign court, such a clause does not operate to exclude the forum court's jurisdiction. However, the courts of this country will hold the parties to their bargain, and grant a stay of proceedings, unless the party seeking that the proceedings be heard can show that there are strong reasons against doing so. In considering such an application the court should take into consideration all the circumstances of the particular case, but the application is not to be assimilated to cases where a stay is sought on the principle of forum non conveniens, nor is it a matter of mere convenience. See Huddart Parker Ltd v The Ship "Mill Hill" (1950) 81 CLR 502 at 508 – 509; Oceanic Sun Line Special Shipping Co Inc v Fay (1988) 165 CLR 197; FAI General Insurance v Ocean Marine Mutual Protection and Indemnity Association; Akai Pty Ltd v People's Insurance Co; Incitec Ltd v Alkimos Shipping Corporation and Anor; Owners of cargo on vessel Eleftheria v Owners of Ship Eleftheria [1969] 2 All ER 641 at 645."*

The Dirty Dancing decision is especially noteworthy in light of the reluctance of Australian courts to stay proceedings on forum non conveniens grounds. It also seems to stand in contrast to the apparently more tepid attitude towards the grant of stays exhibited the High Court in Akai Pty Ltd v People's Insurance Co.

The Australian newspaper has more details of the commercial and personal background of the dispute here.

Australian Lawyers and Overseas Clients

An interesting and unusual case before the State Administrative Tribunal of Western Australia contains a significant discussion of the professional obligations of Australian lawyers—especially regarding confidentiality and privilege—while representing overseas clients. In so doing, the Tribunal considered, among other things, (1) the extra-territorial legislative and regulatory competence of the State of Western Australia, (2) the proper law of contracts of retainer and, it would seem, extra-contractual obligations of confidence, and (3) burdens of proof regarding foreign law.

The case concerned a Western Australian QC who was engaged by the Commonwealth government of Australia to advise Schapelle Corby, an Australian citizen, after her arrest for drug offenses on the Indonesian island of Bali. The Tribunal found that the QC had committed unprofessional conduct by revealing, in statements to the Australian media, confidential information that had been imparted to him in Indonesia.

Legal Practitioners Complaints Committee and Trowell [2009] WASAT 42 (13 March 2009)

Heightened Pleading Standards in US Private International Law Cases

On Monday, the United States Supreme Court decided the case of *Ashcroft v. Iqbal*, which concerned whether current and former federal officials, including FBI Director Robert Mueller and former Attorney General John Ashcroft, are entitled to qualified immunity against allegations they knew of or condoned racial and religious discrimination against individuals detained in the wake of the September 11 attacks. The case presented the following legal issue: "Whether a conclusory allegation that a cabinet level officer or other high-ranking official knew of, condoned, or agreed to subject a plaintiff to allegedly unconstitutional acts purportedly committed by subordinate officials is sufficient to state individual-capacity claims against those officials under *Bivens*." Pet. for Cert. I. The Court concluded in an opinion authored by Justice Kennedy, that, among other things, Iqbal failed to comply with the pleading standards of the Federal Rules of Civil Procedure because the complaint failed to plead sufficient facts to state a claim for purposeful and unlawful discrimination. Slip op. at 23.

Outside of its specific *Bivens* context, this case is important generally for private international law cases in the United States. The five-member majority in *Iqbal* (Justice Kennedy joined by Chief Justice Roberts and Justices Scalia, Thomas, & Alito) has 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* has now 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*.

The impact on private international law cases in the US federal courts will be profound. Indeed, plaintiffs in such cases will now have to allege not simply a short and plain statement of alleged illegal activities, but enough specific facts so that a court may determine that the complaint is beyond the realm of mere possibility. General recitations of alleged illegal conduct and hopes for discovery to make out claims looking towards summary judgment will now no longer be enough to allow cases to go forward in US federal district court. As such, the preliminary motion to dismiss has now been converted in most cases to a motion for summary judgment. At bottom, plaintiffs will now find it harder to stay in federal district court, and defendants will now be armed with another defensive weapon, in many cases dispositive, in resisting private international litigation.

It should be asked whether this shift from the simple notice pleading countenanced by the Federal Rules to a form of heightened pleading is a good thing. The Court appears to be taken with the belief that US courts are being deluged with frivilous claims. As such, plaintiffs should be required to plead more than the possible to stay in federal court. But, the Federal Rules themselves seem to contemplate that most cases will proceed on to summary judgement and/or trial. The Court's rule will be especially problematic in private international law cases. Such 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. Under *Iqbal*, private international plaintiffs will not be able to depend on access to such discovery simply by filing a complaint.

In sum, surviving a motion to dismiss in private international law cases in US federal courts is now much harder and plaintiffs would be well served to conduct extensive and, to be sure, expensive fact development in advance of filing their complaint.

Tokyo symposium papers on IP available for download

The formerly announced international symposium in Tokyo on the topic of "Intellectual Property and International Civil Litigation" was held some ten days ago and several contributions from the speakers are accessible for download from the official website.

The available papers include:

1. Joinder of Jurisdiction, Provisional Measures, and International Parallel Litigation by *Professor Dai Yokomizo*
2. Legislative Proposal on Jurisdiction by *Professor Shigeki Chaen*
3. International Jurisdiction in Intellectual Property Rights Infringement Cases by *Associate Professor Tatsuhiro Ueno*
4. Applicable Law in Intellectual Property Infringement by *Associate Professor Ryu Kojima*
5. The Governing Law of Contracts for the Transfer or Licensing of Intellectual Property Rights by *Associate Professor Mari Nagata*
6. The Governing Law of Aspects of Intellectual Property Rights including Validity by *Professor Ryo Shimanami*
7. Recognition and Enforcement of Foreign Judgments Relating to Intellectual Property by *Professors Toshiyuki Kono and Nozomi Tada and Dr. Miho Shin*
   In addition, there are contributions presenting the provisional text of CLIP Principles in the part dealing with international jurisdiction and recognition/enforcement of foreign decisions in IP cases by two CLIP members, *Dr. Christian Heinze* and *Professor Pedro A. De Miguel Asensio*, respectively.