Owusu and Turner: The Shark in the Water?

Chris Knight (St John's College Oxford [BCL]) has written a short article in the *Cambridge Law Journal* entitled, "**Owusu and Turner: The Shark in the Water?**" (2007, 66: 288-301). Here's the abstract:

> *An important current issue in the conflict of laws is how to deal with the decision of the European Court of Justice in Owusu v. Jackson. It has left numerous unanswered questions on the scope of the Brussels I Regulation and the future is deeply uncertain. Much could be written on whether Owusu is correct, and even more on where one should progress from the current position. But the concern of the present article is more limited: how does the decision in Owusu interact with the previous decision of the European Court of Justice in Turner v. Grovit? Before addressing that question, however, it is necessary to introduce both decisions, and, in particular, the different views of where the future after Owusu may lie.*

Those with access to the CLJ can download it from **here**; otherwise, you can purchase the article for £10.00.

Austrian Article on Rome II

A critical article on the Rome II Regulation has been written by *Helmut Koziol* and *Thomas Thiede* (both Vienna) and is published in the latest issue of the *Zeitschrift für vergleichende Rechtswissenschaft* (ZVglRWiss 106 (2007), 235 et seq.):

"Kritische Bemerkungen zum derzeitigen Stand des Entwurfs einer Rom II-Verordnung"

Koziol and *Thiede* criticise the general rule provided in Art.5 of the Proposal (COM(2006) 83 final (now Art.4 of the Regulation)) for focusing solely on the

interests of the injured party by designating the law of the country in which the damage arises or is likely to arise and not taking into account the interests of the liable party sufficiently.

The authors argue that this rule neglected the basic principles of liability law, the main purpose of which is the compensation of the damage suffered by the injured party. Since – according to the rule of *casum sentit dominus* – everybody has to bear the risk within one's own sphere, a special justification was necessary to transfer liability to others. This was only the case if the other party is "closer" to the damage. Thus, not only the interests of the injured party, but also the interests of the liable party should be taken into account and should be balanced. Further, special rules derogating from the general rules in a large number of cases, as provided in Art.5 (2) and (3) of the Proposal (now Art.4 (2) and (3) of the Regulation), are not regarded as desirable since those might result in the consequence that either the general rule was applied in cases not included in the special rules without good reason or that the special rules were applied analogously which might lead to the result that the general rule is not applied anymore.

Therefore, the authors conclude that a general rule which designates in principle the law of the country in which the event giving rise to the damage occured – except cases where the occurrence of the damage could have been foreseen by the liable party – would have been preferable. As an alternative, which is more similar to the existing rule, the authors suggest a rule which designates the law of the country where the damage occurs, providing for an exception for cases where the damaging effects were not foreseeable for the tortfeasor.

Croatian Article on Choice-of-Law and Choice-of-Court Agreements

Davor Babi? has published an article on the choice-of-court and choice-of-law clauses in the cross-border contracts involving immoveables ("Izbor nadležnog

suda i mjerodavnog prava u ugovorima o nekretninama s me?unarodnim obilježjem") in the July edition of the Croatian monthly journal *Pravo i porezi*, pp. 47-58.

The summary states that the author deals with the contents and limits of party autonomy when prorogating competence of a foreign court or arbitral tribunal, as well as when choosing the applicable law for the contracts concerned with immoveables. Both issues are analyzed, first under the Croatian private international law *de lege lata*, and then under the unified rules of *acquis* and *quasi-acquis* in the field of private international law. The latter is important particularly due to the fact that following the potential Croatian membership in the EU, the analyzed national legal sources would be to a great extent replaced by the European ones.

Proceeds from the Croatian Arbitration and Conciliation Days Published

Perhaps not as fresh news as possible but still worth noting is the second most recent edition of the Croatian journal *Law in Economics*, vol 46, no. 2, which brings together some of the proceeds from the 14th Croatian Arbitration and Conciliation Days held on 30 November and 1 December 2006 in the Croatian Chamber of Economy in Zagreb. The number of renewed foreign and Croatian legal experts and practitioners gathered at this annual meeting to present current developments in arbitrations of several legal systems and institutional rules, including Austrian, Croatian, Italian, Serbian and Swiss. The contributions published in the cited journal are as follows:

Krešimir Sajko: *On Conciliation as an Alternative Way of Settling Private International Law Disputes – The Existing Situation and the Solutions* De Lege Ferenda, pp. 7-18.

Nina Tepeš: *Activities and Practice of the Conciliation Centre of the Croatian Chamber of Economy*, pp. 19-26.
Mihajlo Dika: *Legal Position of Institutional and* Ad Hoc *Arbitration in Croatian Law* De Lege Lata *and* De Lege Ferenda, pp. 27-37.
Hrvoje Sikiri?, *Zagreb Rules and the Arbitration Act in Practice of the Permanent Arbitration Court at the Croatian Chamber of Economy – Selected Issues*, pp. 38-70.
Miljenko A. Giunio, Compétence de compétence – *A Preliminary Decision or an Award?*, pp. 71-89.
Eduard Kunštek, *Authority of the ICSID Arbitration Court for Stay of Enforcement of an Award*, pp. 60-101.
Aleksandra Magani?, *Arbitrability in Non-Contentious Matters*, pp. 102-133.
Boris Stani?, *Arbitral Settlement of Disputes Arising Out of the Agreements on Association of the Attorneys-at-Law*, pp. 133-150.
Gašo Kneževi?, *New Serbian Law on Arbitration*, pp. 151-161.
Arsen Janevski/Toni Deskoski, *Law on International Arbitration in the Republic of Macedonia*, pp. 162-177.

The papers by foreign authors will be published in the next edition of the Croatian Arbitration Yearbook.

Physical Presence of Defendant As a Ground For International Jurisdiction – Decision of the South African Supreme Court of Appeal

In a recent decision, *Richman v Ben-Tovim* 2007 2 SA 283 (SCA); [2007] 2 All SA 234 (SCA), the Supreme Court of Appeal of South Africa decided that the mere

physical presence of the defendant in the foreign jurisdiction at the time process was served is a sufficient basis for international jurisdiction in the context of the recognition and enforcement of foreign judgements sounding in money. (The judgement under neutral citation [2006] SCA 148 (RSA) may be downloaded from www.supremecourtofappeal.gov.za. The decision of the court *a quo* was reported as *Richman v Ben-Tovim* 2006 2 SA 591 (C) (*per* Van Zyl J).)

There was some uncertainty in this regard as in *Purser v Sales; Purser v Sales* 2001 3 SA 445 (SCA) it was stated by the same court that South African private international law only accepted domicile or residence within the foreign jurisdiction and submission to the jurisdiction of the foreign court as grounds for international jurisdiction in this context. But in the *Richman* case, it was held: "There are compelling reasons why…, in this modern age, traditional grounds of international competence should be extended, within reason, to cater for itinerant international businessmen" (par 9; *per* Zulman JA). "[P]ublic policy would require the recognition by a South African court of a lawful judgment given by default by an English court where personal service in England had taken place" (par 12; *per* Zulman JA). Reading the *Purser* and *Richman* decisions together, it may be stated that the following grounds for international jurisdiction in respect of judgements sounding in money are recognised in South African private international law today: (1) domicile, residence or physical presence of the defendant within the foreign jurisdiction at the commencement of the proceedings; and (2) submission to the jurisdiction of the foreign court.

The French Like It Delocalized: Lex Non Facit Arbitrum.

Arbitral awards remain delocalized under the French law of international arbitration. They can be recognised and enforced in France irrespective of the decision of the court of the seat of the arbitration to set them aside. F.A. Mann, and many in England are of the opinion that arbitration only exists if the seat of the arbitration allows it. Lex facit arbitrum. The French disagree and believe that

arbitration is a private activity, which can be considered favorably or unfavorably, but certainly does not need to be empowered by any state ex ante. Thus, if the court of the seat nullifies the award, this does not mean that it cannot be recognised in another legal order. Would any court think of nullifying a road accident?

This delocalization doctrine builds on the *Hilmarton* precedent. On June 29, 2007, the French Supreme Court for Private Matters (*Cour de cassation*) confirmed in a case where the award had been set aside by the High Court in London. It held that the arbitral award did not belong to any state legal order, and that, as a consequence, it was an "international decision", the effect of which was a matter for the courts where recognition or enforcement was sought. In other words, it was not an "English award" for the sole reason that it had been made by a tribunal seating in England. As usual, the *Cour de cassation* relied on article VII of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards to justify the application of the French law of arbitration when it is more favorable than the NY Convention.

The dispute had arisen between French company Est Epices and Indonesian company PT Putrabali Adyamulia. Putrabali had sold white peper to Est Epices, but the goods were lost during the carriage by sea. Est Epices refused to pay, and Putrabali initiated arbitral proceedings in London under the aegis of the International General Produce Association. In 2001, an arbitral panel found that Est Epices was entitled not to pay the price. Putrabali challenged the award before the English High Court, appealing on a point of law as the 1996 Arbitration Act allowed it to. The challenged was admitted and the award partially set aside. A second award was made in 2003, and found in favor of Putrabali, ordering Est Epices to pay Euro 163,086.

Est Epices sought recognition of the first 2001 award in France. The 2001 award was declared enforceable by the Paris court of appeal in March 2005. Putrabali appealed to the *Cour de cassation*. In a first judgment of June 29, 2007, the Court dismissed the appeal on the grounds given above.

At the same time, Putrabali had sought the recognition of the second 2003 award. In November 2005, the Paris Court of Appeal held that it could not be declared enforceable. In a second judgment of June 29, 2007, the *Cour de cassation* confirmed. It held that the recognition of the first award precluded the

recognition of the second, as the first had res judicata. This was already held 13 years ago in *Hilmarton*.

The rationale behind the French solution is to limit the influence of local peculiarities. So, if a local mandatory rule obliges some witnesses to swear in a particular religious form, this should not be let jeopardize the whole arbitral process. In *Putrabali*, the award had been set aside as a consequence of a review of its merits. From France, this certainly looked like a shocking local peculiarity.

German Annotations on "Color Drack"

Two annotations discussing the judgment given by the European Court of Justice on 3 May 2007 on Article 5 (1) (b) Brussels I Regulation in *Color Drack* have been published in German legal journals:

Stefan Leible/Christian Reinert (both Bayreuth), EuZW 2007, 372 and

Burghard Piltz (Gütersloh), NJW 2007, 1801.

See with regard to the Advocate General's opinion and the judgment also our older posts which can be found here and here.

German Article on the Cross-Border Enforcement of English

Freezing Injunctions

Christian Heinze (Hamburg) has published an article on the enforcement of English world-wide freezing injunctions in a foreign jurisdiction ("Grenzüberschreitende Vollstreckung englischer freezing injunctions") in the latest issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (IPRax 2007, 343 et seq.).

An English abstract has kindly been provided by the author:

> *In recent years, the English freezing (former Mareva) injunction has become an important instrument of international litigation. Worldwide freezing orders were subject to enforcement proceedings in several European countries (e.g. Germany, France and Switzerland) and have recently served as a model for Art. 9 (2) of the directive 2004/48/EC on the enforcement of intellectual property rights. Under English law, the cross-border enforcement of freezing orders is normally not automatically permitted after such an order is granted, but rather subject to the permission of the English court to seek to enforce the order in a country outside England and Wales (Civil Procedure Rules Part 25 Practice Direction Annex Schedule B paragraph 10). In Dadourian Group International v. Simms (11 April 2006, [2006] 1 WLR 2499 = [2006] 3 All ER 48), the Court of Appeal has set out guidelines how to exercise its discretion to permit a party to enforce a worldwide freezing order in a foreign jurisdiction. The article discusses these guidelines and their implications with reference to the enforcement of freezing orders in Germany and Switzerland. As a result of the Dadourian Guidelines, evidence as to the applicable law and practice in the foreign court and the nature and terms of foreign relief might become more important (see guidelines 4 and 5) which would create a practical need for comparative studies in the field of enforcement.*

Here the **Dadourian Guidelines** of the Court of Appeal:

Guideline 1: The principle applying to the grant of permission to enforce a worldwide freezing order (WFO) abroad is that the grant of that permission should be just and convenient for the purpose of ensuring the effectiveness of the WFO, and in addition that it is not oppressive to the parties to the English proceedings or to third parties who may be joined to the foreign proceedings.

Guideline 2: All the relevant circumstances and options need to be considered. In particular consideration should be given to granting relief on terms, for example terms as to the extension to third parties of the undertaking to compensate for costs incurred as a result of the WFO and as to the type of proceedings that may be commenced abroad. Consideration should also be given to the proportionality of the steps proposed to be taken abroad, as well as the form of any order.

Guideline 3: The interests of the applicant should be balanced against the interests of the other parties to the proceedings and any new party likely to be joined to the foreign proceedings.

Guideline 4: Permission should not normally be given in terms that would enable the applicant to obtain relief in the foreign proceedings which is superior to the relief given by the WFO.

Guideline 5: The evidence in support of the application for permission should contain all the information (so far as it can reasonably be obtained in the time available) necessary to enable the judge to reach an informed decision, including evidence as to the applicable law and practice in the foreign court, evidence as to the nature of the proposed proceedings to be commenced and evidence as to the assets believed to be located in the jurisdiction of the foreign court and the names of the parties by whom such assets are held.

Guideline 6: The standard of proof as to the existence of assets that are both within the WFO and within the jurisdiction of the foreign court is a real prospect, that is the applicant must show that there is a real prospect that such assets are located within the jurisdiction of the foreign court in question.

Guideline 7: There must be evidence of a risk of dissipation of the assets in question.

Guideline 8: Normally the application should be made on notice to the respondent, but in cases of urgency, where it is just to do so, the permission may be given without notice to the party against whom relief will be sought in the foreign proceedings but that party should have the earliest practicable opportunity of having the matter reconsidered by the court at a hearing of which he is given notice.

Non-Justiciability and Political Questions in Australia

An interesting divided judgment of the Full Court of the Federal Court of Australia has considered the non-justiciability of political questions and the decision in *Buttes Gas* [1982] AC 888.

The appellant was a PNG national who sought joinder as a party to an Australian native title claim over an area in the Torres Strait abutting PNG. The respondents successfully opposed that joinder at first instance because of a concern that the appellant would use the proceedings to agitate political matters concerning the maritime boundaries treaty between Australia and PNG. Significantly, the Australian government did not oppose the joinder so long as those political questions were not raised.

Gyles J, with whom Sundberg J agreed, allowed the appeal and held that the appellant should have been joined. Gyles J held that:

> *The appellant does not need to put any argument based upon the [political issues] to establish his interests for the purposes of the case. The docket judge can control the proceeding to prevent truly irrelevant or inappropriate arguments or material being advanced by a party. Counsel for the Commonwealth indicated that there should be no problem if the case is approached along those lines. The Commonwealth should be in a good position to judge that situation. … An appropriate term could have been constructed imposing conditions upon a grant of leave to be joined.*

Kiefel J dissented. Her Honour summarised the non-justiciability principle as being that "negotiations and agreements between Australia and another country are not to be the subject of judicial determination for the reason that they might cause embarrassment and affect relations between the countries." Although the Australian government was not actually "embarrassed" by the potential joinder, her Honour considered that "it is the nature of the question for the Court which

renders it non-justiciable", and not the presence of actual embarrassment.

Gamogab v Akiba [2007] FCAFC 74 (18 July 2007)

German Book on European Ordre Public

A German monograph on the evolving concept of the public policy exception from a national level into a European perspective has been recently published by Mohr Siebeck. It has been written by ***Ioanna Thoma*** (Brunel University, London): **Die Europäisierung und die Vergemeinschaftung des nationalen ordre public (The Europeanization and Communitarization of National Public Policy)**.

The English presentation reads as follows (a longer version is available in German on the publisher's website):

> *Ioanna Thoma deals with the influence of the ECHR and EU law on the public policy exception in private international law. In spite of the harmonization of substantive laws in many areas, especially within the context of the EU, there is still room for the application of the public policy exception. She portrays the way in which the content of national public policy is gradually changing under the normative effect of the ECHR and EU law. By referring to seminal decisions of the European and national courts, Ioanna Thoma proves that the public policy exception is no longer purely national.*

Ioanna Thoma, Die Europäisierung und die Vergemeinschaftung des nationalen ordre public, 2007. XX, 288 pages (*Studien zum ausländischen und internationalen Privatrecht 182*). ISBN 978-3-16-149351-5. Available from Mohr Siebeck.