The Standard of Proof of Facts going to Jurisdiction

The recent case of *Purple Echo Productions, Inc. v. KCTS Television*, 2008 BCCA 85 (available here) addresses, at some length, the standard of proof required of jurisdictional facts.

I have recently co-written an article on a related topic – the standard of proof for jurisdiction clauses – in the Canadian Business Law Journal. See SGA Pitel & J de Vries, "The Standard of Proof for Jurisdiction Clauses" (2008) 46 C.B.L.J. 66.

In the main, the British Columbia Court of Appeal uses the language of the orthodox cases – facts need not be proven on the balance of probabilities, but rather only need to be proven to the "good arguable case" standard. And to some degree the decision may turn on the specifics of the province's regulatory provisions, which allow the defendant to keep jurisdiction a live issue up to and including trial (see paras. 38 and 39 of the decision). But overall I am troubled by the court's analysis.

In the article, we draw the distinction between the sort of facts that can found jurisdiction under the heads of service out, like the breach of a contract committed in Ontario, and other sorts of facts. For the former, the good arguable case standard seems right. The plaintiff does not have to show, at the jurisdiction stage, that there has, on balance of probabilities, been such a breach. That is for trial. For the latter, in which we include the existence of a jurisdiction clause, there is much less reason for the lower standard of proof. Indeed, in many jurisdictions the determination of the issue will be final in both law and fact. In a footnote at the end of the article we make the following argument:

"This article has focused on jurisdiction clauses because of the highly important role they play—greater than any other factor—in both the jurisdiction and stay of proceedings analyses. While it is beyond the scope of this article, there may be other factual disputes on jurisdictional motions that should also use the higher balance of probabilities standard of proof rather than the traditional lower standard. It is possible, for example, that in light of the importance of whether the defendant is present in the jurisdiction, the higher standard of care should be

used for a dispute over that issue. More problematic could be disputes over facts that are deemed or presumed to conclusively found jurisdiction. See for example *The Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28, s. 10."

Purple Echo, it seems to me, is a case that fits into this area. The facts in issue were as to whether the defendant had a place of business in British Columbia. Why should the standard of proof for this, a "pure" jurisdictional issue (it goes to nothing else), not be the balance of probabilities? Why delay the resolution of this issue until some later stage of the litigation?

Stephen

New References for Preliminary Rulings

New references for preliminary rulings on the interpretation of the Brussels I Regulation, the Brussels II *bis* Regulation and the Insolvency Regulation have been referred to the ECJ:

1. Reference on Brussels I Regulation

The Swedish *Högsta Domstolen* has referred the following question to the ECJ:

> *Is the exception in the Brussels I Regulation regarding insolvency, compositions and analogous proceedings to be interpreted as meaning that it covers a decision given by a court in one Member State (A) regarding registration of ownership of shares in a company having its registered office in Member State A, which ownership is transferred by the liquidator to a company in another Member State (B), where the court based its decision on the fact that Member State A, in the absence of an agreement between the States regarding mutual recognition of insolvency proceedings, does not recognise the liquidator's powers of disposal over property in Member State A?*

The case is pending as *SCT Industri Aktiebolag i likvidation v. Alpenblume Aktiebolag* (C-111/08).

2. Reference on Insolvency Regulation

The Spanish *Juzgado de lo Mercantil No 1* has referred the following questions to the ECJ:

> *1. For the purposes of Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty of European Union and the Treaty establishing the European Community, should Denmark be considered to be a Member State within the meaning of Article 16 of Regulation (EC) No 1346/2000 on insolvency proceedings?*
>
> *2. Does the fact that that Regulation is subject to that Protocol mean that that Regulation does not form part of the body of Community law in that country?*
>
> *3. Does the fact that Regulation No 1346/2000 is not binding on and is not applicable in Denmark mean that other Member States are not to apply that Regulation in respect of the recognition and enforcement of judicial declarations of insolvency handed down in that country, or, on the other hand, that other Member States are obliged, unless they have made derogations, to apply that Regulation when the judicial declaration of insolvency is handed down in Denmark and is presented for recognition and enforcement in other Member States, in particular, in Spain?*

The case is pending as *Finn Mejnertsen v Betina Mandal Barsoe* (C-148/08).

3. Reference on Brussels II *bis* Regulation

The French *Cour de Cassation* has referred the following questions to the ECJ:

> *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?*
>
> *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 dominant of the two nationalities?

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 case is pending as *Iaszlo Hadadi (Hadady) v Csilla Marta Mesko, married name Hadadi (Hadady)* (C-168/08).

(Many thanks to Jens Karsten (Brussels) for the tip-off.)

Book: Conflits de Lois et Régulation Economique

This interesting book on *Conflict of Laws and Economic Regulation* gathers the contributions of the speakers to a conference held in Paris a year ago. It is edited by three French scholars, Mathias Audit, Horatia Muir Watt (who was our Guest Editor last month) and Etienne Pataut, who all teach in Paris.

Here is how the conference was presented:

Within the specific instance of the internal market, the installation and the operation of mechanisms of economic regulation raise a well identified difficulty. Building legal instruments suitable to ensure this regulation supposes indeed to resort to community instruments, which have by nature vocation to transcend national legal orders. However, it is the object of private international law to implement the management tools of this normative diversity. Consequently, this raises the question which will be at the center of this conference: the relationship between the internal market's tools of regulation (set up by the European Union) and private international law.

The first part of the book discusses the influence of economic regulation on choice of law in fields which are regulated, such as companies, products, services, banks or securities. The second part wonders whether other areas such as culture, environment, employment, health and judicial services, could be subjected to economic regulation, and how this would influence choice of law.

Contributors include the three editors, but also T. Azzi, M. Behar-Touchais, O. Boscovic, E. Bouretz, F. Fages, S. Francq, M.-A. Frison-Roche, F. Garcimartin-Alferez, L. Idot, M.-N. Jobard-Bachellier, P. Mavridis, A. Perrot.

Article on the Eurofood Case

Matteo M. Winkler, an Italian scholar and practising lawyer in Milan, has recently published an article on the *Eurofood* case in the Berkeley Journal of International Law: *From Whipped Cream to Multibillion Euro Financial Collapse: The European Regulation on Transnational Insolvency in Action*.

The author has kindly provided the following abstract:

> *Determining the most competent court for the adjudication of a transnational insolvency case is an old problem and different theories – i.e., universalism, territorialism, modified universalism and cooperative territorialism – have been applied by courts and scholars in the past in order to adjudicate and solve the disputes concerning the insolvency of debtors having their assets in more than one country. Although different in some sense, all four theories aim to balance the same interests: domestic adjudication of foreign assets, efficiency of the bankruptcy proceedings, and protection of local investors and markets.*
>
> *Significantly, the difficulties arising from the application of these theories are rooted in the current international trade system. First, states differ as to their bankruptcy procedures, especially with regard to the nature of the bankruptcy itself, the remedies available to debtors and creditors, and the priorities of creditors over the debtor's assets. Second, the differences among the various legal regimes generate competition between courts, which makes the prospect*

of an international treaty very difficult.

In analysing the outcomes of Eurofood, I argue that, in determining the centre of the debtor's main interests (COMI) pursuant to article 3 of the EC Regulation No. 1346/2000 on transnational insolvency, the European Court of Justice actually maintained an hyperflexible definition of COMI, which favours the creditors or the debtors' race to national courts in order to find the best conditions in filing for bankruptcy. The race to national courts is well-illustrated by the European courts practice, which, instead of enforcing the spirit of cooperation and reciprocal reliance which underlies in the EC Regulation, actually backs national interests. From this standpoint, European institutions are convinced that the issue has been settled, while in reality, much work has yet to be done.

Matteo Winkler has also published two other articles on this topic in Italian, which can be found respectively in *Int'l Lis*, 2007, at 15, and in 21 *Diritto del commercio internazionale*, 2007, pp. 527-536.

A Round-Up of Articles Recently Published

Conflicts scholars have been busy since my last round-up of published articles in February, so the time seems ripe for another list of potential material to add to your reading pile. The usual caveats apply: the list is limited to articles published in *English*, and even then is almost certainly not comprehensive. If you know of any articles, reviews or casenotes published in 2008 not included in either this list or the previous one, then **let me know**.

- M. Danov, '**Awarding exemplary (or punitive) antitrust damages in EC competition cases with an international element – the Rome II Regulation and the Commission's White Paper on Damages**' (2008) 29 *European Competition Law Review* 430 – 436.

Discusses the importance of choosing the most appropriate EU jurisdiction to bring private proceedings to enforce competition law and to claim punitive or exemplary damages in jurisdictions where those remedies are available. Considers the absence of proposals for procedural harmonisation in the Commission White Paper on Damages actions for breach of the EC antitrust rules. Examines whether Regulation 864/2007 (Rome II) will require national courts which ordinarily do not award exemplary damages for breach of competition law to change their practice when it comes into force.

- C. Joerges, **'Integration through de-legalisation?**' (2008) 33 *European Law Review* 291 – 312. Abstract:

*Discusses theories of governance and law with reference to changes in the forms of European governance, including the European committee system, the principle of mutual recognition, and the open method of coordination. Asks whether the rule of law is challenged by the change of governance proclaimed by the Commission's White Paper on European Governance in 2001. Suggests a shift towards a **conflict** of **laws** approach in the conceptualisation of European law and governance.*

- A. Scott, **'Reunion Revised?**' (2008) *Lloyd's Maritime and Commercial Law Quarterly* 113 – 118. Abstract:

Discusses the European Court of Justice ruling in Freeport Plc v Arnoldsson (C-98/06) on the national court's jurisdiction to hear connected claims against foreign domiciliaries together with the main action against a domiciled defendant under Regulation 44/2001 (Judgments Regulation) art.6(1). Considers whether claims against a parent company and its subsidiary were connected even if the two claims had different legal bases. Examines whether the legal basis of each claim was relevant to jurisdiction under the ruling in Reunion Europeenne SA v Spliethoff's Bevrachtingskantoor BV (C-51/97). Looks at the possibility of abusive claims brought solely to found jurisdiction for connected claims.

- A. Rushworth, '**Assertion of ownership by a foreign state over cultural objects removed from its jurisdiction**' (2008) *Lloyd's*

Maritime and Commercial Law Quarterly 123 – 129.

Discusses the Queen's Bench Division judgment in Iran v Barakat Galleries Ltd on preliminary issues in an action to recover antiquities taken without permission from Iran, examining whether the court had jurisdiction to enforce foreign law by returning property to a foreign sovereign.

- A. Briggs, **'Review: Brussels I Regulation (2007), edited by Ulrich Magnus and Peter Mankowski**' (2008) *Lloyd's Maritime and Commercial Law Quarterly* 244 – 246.
- J. Davies, '**Breach of intellectual property warranties and jurisdiction**' (2008) 19 *Entertainment Law Review* 111 – 113. Abstract:

Comments on the Chancery Division judgment in Crucial Music Corp (Formerly Onemusic Corp) v Klondyke Management AG (Formerly Point Classics AG) on whether to set aside service out of the jurisdiction in a dispute about warranties in a copyright licensing agreement for music. Considers the place of performance and the place where damage was sustained within the meaning of the Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1988 art.5.

- A. Staudinger, **'From international conventions to the Treaty of Amsterdam and beyond: what has changed in judicial cooperation in civil matters?**' (2007) *European Legal Forum* 257 – 265. Abstract:

Discusses the shift from treaties and directives towards secondary EC law in the fields of European civil procedure law and conflict of law rules. Considers the scope of the allocation of competence under the EC Treaty arts 61(c) and 65, the absence of unified conflict of law rules within the inner market and the decreasing national competence and external competence of the EU Member States. Examines advantages and disadvantages of the shift from treaties and directives towards regulations, including in relation to legal consistency in the inner market, reducing sources of law, review and modernisation of regulations, the extent of conformity to a coherent system, and proceedings for a preliminary ruling.

- P. Hay, '**The development of the public policy barrier to judgment**

recognition within the European Community‘ (2007) *European Legal Forum* 289 – 294. Abstract:

Discusses the extent to which national public policy concerns present an obstacle to the harmonisation of areas of substantive law, focusing on the role of public policy in trans-border litigation, in particular in relation to judgment recognition in the EU. Reviews traditional defences to judgment recognition, the defences in Regulation 44/2001 art.34 relating to violation of procedural due process or national public policy, and English judgments awarding or recognising punitive damages or contingent fees. Comments on calls for the public policy exception to be abandoned.

- S. Calabresi-Scholz, ‘**Brussels I Regulation Article 5(2): the concept of “matters relating to maintenance**‘ – autonomous interpretation’ (2007) *European Legal Forum* 294 – 295. Abstract:

Comments on the German Federal Supreme Court ruling in Bundesgerichtshof (XII ZR 146/05) on whether the German courts had jurisdiction to hear a claim by a German domiciled divorced spouse for compensation from her former husband, who had transferred his domicile from Germany to France, for the disadvantages she suffered as a result of the limited real income splitting under German tax law. Considers whether the action was a matter relating to maintenance within the meaning of Regulation 44/2001 art.5(2).

- T. Simons, ‘**Lugano Convention Article 21: lis alibi pendens – priority**‘ (2007) *European Legal Forum* 296 – 297. Abstract:

Comments on the Swiss Federal Supreme Court judgment in Bundesgericht (4A 143/2007) on whether an application to stay Swiss proceedings, under the Lugano Convention art.21, on the basis that the defendants had lodged a negative declaratory action in the Italian courts prior to the commencement of the Swiss proceedings, should be refused on the basis that the defendants’ comportment had been fraudulent.

- L. Osona, **‘Brussels I Regulation Article 33(2), Article 1(2)(d): contract for the supply of services – arbitration clause’** (2007) *European Legal Forum* 297 – 298. Abstract:

Reviews the Dusseldorf Court of Appeal ruling in Oberlandesgericht (Dusseldorf) (I 3 W 13/07) on whether an order of a Spanish court denying jurisdiction over a dispute on the basis that the agreement between the parties contained an arbitration clause in favour of an arbitration court in Barcelona should be recognised by the German courts.

- S. Magniez, **'Brussels II Regulation Article 2(1)(a), (2) and (6): jurisdiction over matrimonial matters – last habitual residence of the spouses'** *European Legal Forum* 301 – 302. Abstract:

Comments on a Luxembourg Court of Appeal ruling dated June 6, 2007 on whether the Luxembourg courts had jurisdiction under Regulation 1347/2000 to hear divorce proceedings brought by the ambassador of Luxembourg to Greece where the spouses had been resident in Greece and where the husband had returned to Luxembourg and the wife had moved to Germany. Considers whether the husband had established a habitual residence in Greece.

- C. Wadlow, **'Bugs, spies and paparazzi: jurisdiction over actions for breach of confidence in private international law'** (2008) 30 *European Intellectual Property Review* 269 – 279. Abstract:

This, the first of two connected articles, discusses the allocation of jurisdiction for breach of confidence actions, focusing on trade secrets. Reviews cases under common law, the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1968 and Regulation 44/2001.

- G. Ward, **'Protection of the right to a fair trial and civil jurisdiction: the institutional legitimacy in permitting delay'** (2008) *Juridical Review* 15 – 31. Abstract:

Examines the operation of the right for proceedings to be heard within reasonable time, provided by the European Convention on Human Rights 1950 art.6, in the context of civil jurisdiction, with reference to case law on the compatibility of the reasonable time requirement with: (1) the lis pendens system of the Brussels civil jurisdiction regime; and (2) the forum non conveniens doctrine.

- S. Kingston & C. Burrows, **'Europe and beyond'** (2008) 76 *Family Law Journal* 5 – 7. Abstract:

This, the second of a two-part article on the approach in different countries towards jurisdiction in family proceedings, considers the application of Regulation 1347/2000 (Brussels II) through case law of the European Court of Justice and domestic courts of Member States. Discusses the jurisdictional rules followed by non-EU countries, giving information on the jurisdiction, domicile, residence and matrimonial property provisions in Australia, Switzerland, Denmark, California, and New York.

- Y. Amin & A. Rook, **'Capacity to marry and marriages abroad'** (2008) 152 *Solicitors Journal* 8 – 10. Abstract:

Examines the Court of Appeal ruling in Westminster City Council v IC on whether: (1) the marriage of a British man with severe learning disabilities conducted over the telephone to a woman in Bangladesh, which was valid according to Sharia law was recognised as a valid marriage according to English law, where it was accepted by the parties that the man lacked the capacity to marry in accordance with English law; (2) the court's inherent jurisdiction was usurped by the Mental Capacity Act 2005; and (3) the court could prevent the man leaving the jurisdiction to travel to Bangladesh.

- W. Shi, **'Review: Private International Law and the Internet (2007) by Dan Jerker B. Svantesson'** (2008) 13 *Communications Law* 64 – 65.
- C. Knight, **'Of coups and compensation claims: Mbasogo reassessed'** (2008) 19 King's Law Journal 176 – 182. Abstract:

Comments on Adrian Briggs's analysis of the Court of Appeal decision in Mbasogo v Logo Ltd (No.1), on the justiciability of Equatorial Guinea's claim for compensation against the participants of an attempted coup, which appeared in the Law Quarterly Review (2007, 123(Apr), 182-186). Evaluates Briggs's assessment of the Court's application of the rule that the English courts lack jurisdiction to hear an action for the enforcement of a public law brought by a foreign state. Considers how this rule was applied in the Court of Appeal decision in Iran v Barakat Galleries Ltd where the state party attempted to enforce Iranian law.

- C. Bjerre & S. Rocks, **'A transactional approach to the Hague Securities Convention'** (2008) 3 *Capital Markets Law Journal* 109 – 125. Abstract:

Examines the scope and effect of the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary (the Hague Securities Convention). Reviews the background to the Convention, its core agreement based mechanism, including the substantive issues for which the Convention prescribes applicable law, key definitions, the Convention's scope, the main ways that parties can draft agreements to achieve the Convention's effect and the "Qualifying Office" requirement, and the Convention's impact on agreements which do not fully use the Convention's core agreement based mechanism, including the fall back rules and pre-Convention agreements.

- B. Ubertazzi, **'The law applicable in Italy to the capacity of natural persons in relation to trusts'** (2008) 14 *Trusts & Trustees* 111 – 119. Abstract:

Examines Italian law on the capacity of natural persons in relation to trusts. Reviews the substantive law categories of capacity under Italian private international law and the four rules on the law applicable to capacity related to international trade of natural persons. Discusses Italian law applicable to the capacity of the settlor, trustee, protector and beneficiary and to the capacity to choose the governing law of the trust.

- I. Thoma, **'Applicable law to indirectly held securities: a non-"trivial pursuit"'** (2008) 23 *Butterworths Journal of International Banking & Financial Law* 190 – 192. Abstract:

Discusses conflict of laws issues arising in connection with indirectly held securities. Considers difficulties in the application of the lex cartae sitae rule. Examines the respective approaches to conflict of laws of the EC law of the place of the relevant intermediary (PRIMA), the free choice of applicable law under the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary and the draft UNIDROIT Convention on Intermediated Securities.

- D. Rosettenstein, **‘Choice of law in international child support obligations: Hague or vague, and does it matter? – an American perspective’** (2008) 22 *International Journal of Law, Policy and the Family* 122 – 134. Abstract:

Discusses, from a US perspective, the choice of law rules under the draft Convention on the International Recovery of Child Support and other Forms of Family Maintenance. Considers the significance and value of these rules, and compares them to the regime applicable in US child support proceedings.

- S. James, **‘Rome I: Shall we Dance?’** (2008) 2 *Law & Financial Markets Review* 113 – 122. Abstract:

Discusses whether the UK should opt into the Draft Regulation on the law applicable to contractual obligations (Rome I), comparing Rome I with the Convention on the Law Applicable to Contractual Obligations 1980 (Rome Convention), including the provisions on: (1) party autonomy; (2) applicable law in the absence of express choice; (3) overriding laws; (4) insurance contracts; (5) consumer contracts; (6) contracts of carriage; and (7) assignment. Illustrates the operation of the Rome I Regulation with flowcharts, and presents text from the Regulation in boxes. Notes how its applicable law clauses differ from those of Regulation 864/2007 (Rome II Regulation).

- L. Enneking, **‘The common denominator of the Trafigura case, foreign direct liability cases and the Rome II Regulation: an essay on the consequences of private international law for the feasibility of regulating multinational corporations through tort law.’** (2008) 16 *European Review of Private Law* 283 – 312. Abstract:

Identifies a trend towards claims that parent companies should be liable in their home country for damage caused by their subsidiaries abroad. Cites the claim issued in 2006 in the UK against Trafigura Beheer BV for environmental damage caused in the Ivory Coast as an example of this type of claim. Appraises the adequacy of regulation of international corporate activities and considers whether tort law could fill gaps in the regulatory framework. Examines the background to and provisions of Regulation 864/2007 (Rome II) and the impact it could have on tortious liability in this field.

- A. Mills, **‘Arbitral jurisdiction and the mischievous presumption of identity of foreign law’** (2008) 67 *Cambridge Law Journal* 25 – 27. Abstract:

Examines the Commercial Court judgment in Tamil Nadu Electricity Board v ST-CMS Electric Co Private Ltd on whether a dispute over the pricing arrangements under an electricity supply contract between two Indian parties, which involved elements to be determined by Indian regulatory authorities, fell outside the scope of an arbitration agreement governed by English law. Considers the extent and validity of the supposed presumption of English law that, if the content of foreign law is not proved satisfactorily, the equivalent English law rule will apply.

- R. Bailey-Harris, **‘Jurisdiction: Brussels II revised’** (2008) 38 *Family Law* 312 – 314. Abstract:

Reports on the European Court of Justice decision in Sundelind Lopez v Lopez Lizazo on whether the Swedish or French court had jurisdiction in a divorce petition where the respondent was a Swedish national but was habitually resident in France. Comments on Regulation 2201/2003 arts 3, 6 and 7 and whether a court of a member State has exclusive jurisdiction where the respondent is neither habitually resident in, nor a national of, a Member State.

- D. Eames, **‘The new Hague Maintenance Convention’** (2008) 38 *Family Law* 347 – 350. Abstract:

Discusses the Convention on the International Recovery of Child Support and other Forms of Family Maintenance 2007. Considers: (1) the scope of the Convention and provisions therein in relation to recognition and enforcement of judgments, including the grounds upon which recognition can be refused, and the definition of a maintenance arrangement; (2) the Protocol on applicable law; and (3) the EU draft Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

- M. Matousekova, **‘Private international law answers to the insolvency of cross border groups: comparative analysis of French**

and English case law' (2008) *International Business Law Journal* 141 – 163. Abstract:

Compares the approaches of French and UK courts to the conflict of laws issues arising from the insolvency of cross border groups of companies, particularly whether to adopt different strategies towards each entity in a group. Reviews the relevant provisions of French domestic law, the UK statutory regime before and after 2006, and case law on the policy of each jurisdiction towards application of the conflict of laws rules in Regulation 1346/2000. Considers the extent to which French courts have applied the principle of automatic recognition to the UK's centralisation of group interests.

- Y. Farah, **'Allocation of jurisdiction and the internet in EU law'** (2008) 33 *European Law Review* 257 – 270. Abstract:

Assesses the scope and interpretation of Regulation 44/2001 Art.15(1)(c) in its application to electronic consumer contracts. Outlines policy considerations and whether they are achieved by Regulation 44/2001. Questions whether traditional rules determining jurisdiction are adequate or whether internet-specific rules are required. Discusses the concept of a consumer contract, the jurisdictional risks for website operators, the meaning of the words "directs such activities" in Art.15(1)(c), the principle of good faith, and fairness. Compares the EU and the US approach.

- S. Voigt, **'Are international merchants stupid? Their choice of law sheds doubt on the legal origin theory'** (2008) 5 *Journal of Empirical Legal Studies* 1 – 20. Abstract:

Evaluates the legal origin hypothesis, the commonly held view in economic literature that common law systems are superior to civil law systems, by examining the choice of law of international trade transactions in cases referred to the International Court of Arbitration. Presents data in tables comparing the expected proportion of contracts choosing the law of a common law jurisdiction with the actual findings. Considers the effects and implications of the legal origin hypothesis.

- I. Fletcher, **'Alfa Telecom Turkey Ltd v Cukurova Finance**

International Ltd' (2008) 21 *Insolvency Intelligence* 61 – 64. Abstract:

Comments on the British Virgin Islands High Court decision in Alfa Telecom Turkey Ltd v Cukurova Finance International Ltd on the role of expert evidence in the proof of foreign law, and the meaning of the words "to appropriate the collateral" in the Financial Collateral Arrangements (No.2) Regulations 2003 reg.17, implementing Directive 2002/47. Notes the novelty of a Commonwealth court having to interpret an English statutory provision not previously considered by the English courts, and the reference made by the court to the Directive as an aid to interpretation.

- P. Shine, **'Establishing jurisdiction in commercial disputes: arbitral autonomy and the principle of kompetenz-kompetenz'** (2008) *Journal of Business Law* 202 – 225. Abstract:

Examines the balance of power between the courts and arbitral tribunals on questions of jurisdiction. Analyses the judgments in Fiona Trust & Holding Corp v Privalov and Albon (t/a N A Carriage Co) v Naza Motor Trading SDN BHD on the extent to which a challenge to the validity of an agreement containing an arbitration clause affects the validity of the clause itself. Considers the application of the principles set out in those cases in other cases. Notes the approach of other countries which have also adopted the UNCITRAL Model Law for International Commercial Arbitration 1985 as the basis for their arbitration legislation.

Rome I Reg. Adopted (and Other Results of the JHA Council Session of 5-6 June 2008)

Following our post on the agenda of the JHA session held in Luxembourg on 5-6 June 2008, a factsheet has been released by the Slovenian Presidency with the

main results of the Council in the field of judicial cooperation in civil matters.

The first and most important achievement is the **adoption of the Rome I Regulation on the law applicable to contractual obligations** (text of the regulation and declarations), that will be soon published in the OJ. The application in time of the act is set out in its Articles 28 and 29 (18 months after its adoption, to contracts concluded after the same date).

As regards the other items discussed in the Council, here's an excerpt of the factsheet (emphasis added):

> ***Maintenance obligations***
>
> *The Council agreed on a set of political guidelines for further work on a proposal for a Regulation on maintenance obligations and in particular on the principal goal of the Regulation: the complete abolition of exequatur on the basis of harmonised applicable law rules. […] The guidelines agreed contain compromise solutions on six key elements of the proposal: its scope, jurisdiction, applicable law, recognition and enforceability, enforcement and a review clause.*
>
> ***Rome III – Applicable law in matrimonial matters***
>
> *A large majority of Member States supported the objectives of this proposal for a Council Regulation. Therefore and due to the fact that the unanimity required to adopt the Regulation could not be obtained, the Council established that the objectives of Rome III cannot be attained within a reasonable period by applying the relevant provisions of the Treaties. Work should continue with a view to examining the conditions and implications of possibly establishing enhanced cooperation between Member States. […]*
>
> ***The Hague Convention – Protection of children***
>
> *The Council adopted a Decision authorising certain EU member states to ratify, or accede to, the 1996 Hague Convention, and to make a declaration on the application of the relevant internal rules of EU law. This very important Convention concerns jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children. It constitutes a crucial instrument to protect the interest*

of a children at worldwide level. [see also this press release by the Commission and a preparatory document to the attention of COREPER]

Recognition and enforcement of judgments on civil and commercial matters (Lugano)

Pending the assent of the European Parliament the Council approved the conclusion of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which will replace the Lugano Convention of 16 September 1988 (see Council doc. n. 9196/08 of 27 May 2008). […]

External dimension

The Council agreed on an update of the external relations strategy in the field of judicial cooperation in civil matters. The document is not a legal framework but rather an evolving process of defining and achieving policy objectives in full conformity with the provisions of the EC Treaty.

In The Hague Programme the European Council called for the development of a strategy reflecting the Union's special relations with third countries, groups of countries and regions and focusing on the specific needs for JHA cooperation with them.

In April 2006 the Council approved a strategy document outlining aspects of judicial cooperation in civil matters (doc. n. 8140/06). As indicated in this document, the development of an area of freedom, security and justice can only be successful if it is underpinned by a partnership with third countries on these issues which includes strengthening the rule of law and promoting respect for human rights and international obligations.

The external dimension of judicial cooperation in civil matters has growing significance. On the one hand, international agreements with third countries are indispensable for providing legal certainty and foreseability for European citizens on a global scale. On the other hand, it is also important to safeguard the uniform application of Community law in international negotiations.

Dutch Reference for a Preliminary Ruling on Art. 4 of the Rome Convention (Update)

Following our post on the **first reference for a preliminary ruling on the Rome Convention** on the law applicable to contractual obligations, the questions referred by the **Dutch Supreme Court** (*Hoge Raad*) have been published on the ECJ's website.

The case, lodged on 2 April 2008, is pending under **C-133/08**, ***ICF* (Intercontainer Interfrigo (ICF) SC v Balkenende Oosthuizen BV and MIC Operations BV)**.

> *Questions referred:*
>
> *a) Must Article 4(4) of the 1980 Convention on the law applicable to contractual obligations be construed as meaning that it relates only to voyage charter parties and that other forms of charter party fall outside the scope of that provision?*
>
> *(b) If Question (a) is answered in the affirmative, must Article 4(4) of the 1980 Convention then be construed as meaning that, in so far as other forms of charter party also relate to the carriage of goods, the contract in question comes, so far as that carriage is concerned, within the scope of that provision and the applicable law is for the rest determined by Article 4(2) of the 1980 Convention?*
>
> *(c) If Question (b) is answered in the affirmative, which of the two legal bases indicated should be used as the basis for examining a contention that the legal claims based on the contract are time-barred?*
>
> *(d) If the predominant aspect of the contract relates to the carriage of goods, should the division referred to in Question (b) not be taken into account and*

must then the law applicable to all constituent parts of the contract be determined pursuant to Article 4(4) of the 1980 Convention?

With regard to the ground set out in 3.6.(ii) above:

(e) Must the exception in the second clause of Article 4(5) of the 1980 Convention be interpreted in such a way that the presumptions in Article 4(2), (3) and (4) of the 1980 Convention do not apply only if it is evident from the circumstances in their totality that the connecting criteria indicated therein do not have any genuine connecting value, or indeed if it is clear therefrom that there is a stronger connection with some other country?

JHA Council Session (5-6 June 2008): Adoption of the Rome I Reg. – Political Guidelines on Rome III and Maintenance Reg. – External Dimension of JHA

On 5 and 6 June the **Justice and Home Affairs Council** will hold its 2873rd session in Luxembourg, the last under the Slovenian Presidency. Among the "Justice" issues, scheduled for Friday 6th, **the Council is expected to adopt the Rome I Regulation on the law applicable to contractual obligations** (see the list of public deliberations; for earlier stages of the procedure, see the Rome I section of our site). It should be noted that the vote had been already scheduled for the JHA session held in April, but then, due to reasons not publicly known, it did not take place. The Council's deliberation, that is open to public, will be broadcasted on the videostreaming section of the Council's website, at 10:00 AM (GMT+1).

As regards the proposals that are still under consideration, the Council is expected to agree on **some political guidelines for further work on the Rome III and Maintenance regulations**. Here's an excerpt from the background note of the meeting (see in particular the underlined part on Rome III, *emphasis added*):

> ***Maintenance obligations***
>
> *The Council will discuss a set of political guidelines of a proposal on maintenance obligations. The guidelines contain a compromise solution on six components of this draft Regulation and thus set out the framework for further discussions on this file. The Council will try to agree on the principal goal of the Regulation – complete abolition of exequatur on the basis of harmonised applicable law rules.*
>
> *The ambition of the proposal is to eliminate all obstacles which still today prevent the recovery of maintenance within the European Union, in particular the requirement of exequatur procedure. By abolishing this procedure all decisions on maintenance obligations would be allowed to circulate freely between the Member States without any form of control in the Member State of enforcement and this would significantly speed up the recovery of maintenance owed. It would enable the creation of a legal environment adapted to the legitimate expectations of the maintenance creditors.*
>
> *The latter should be able to obtain easily, quickly and, generally, free of charge, an enforcement order capable of circulation without obstacles in the European area of justice and enabling regular payment of the amounts due. The six elements of the compromise refer to the scope, jurisdiction, applicable law, recognition and enforceability, enforcement and a review clause.*
>
> ***Jurisdiction and applicable law in matrimonial matters (Rome III)***
>
> *The Council will have a debate on a proposal for a Council Regulation on rules concerning applicable law in matrimonial matters (Rome III). The purpose of this Regulation is to provide a clear and comprehensive legal framework (covering both jurisdiction as well as applicable law rules in matrimonial matters) and allowing the parties a certain degree of autonomy in choosing the competent court and applicable law in case of divorce.*

Spouses would be allowed to choose a competent court or the law applicable to divorce. In the absence of a choice of law by the spouses, the text would introduce conflict-of-law rules. According to the proposal, there is a cascade of connecting factors: the divorce is governed by the law of the country of habitual residence of both spouses, failing that, by that of the last habitual residence of the spouses if one of them still resides there; failing that, of the common nationality of the spouses or, failing that, by the law of the forum. The conflict-of-law rules of the proposal aim at ensuring that, wherever the spouses lodge their request for divorce, the courts of any Member State would normally apply the same substantive law (avoiding of "forum shopping").

It should be noted that the instrument will be of universal application. This means that the Regulation would also apply if the law applicable is that of a third State. Therefore, according to the proposal, courts have to apply either their own substantive law, that of another Member State or that of a third State (e.g. Switzerland, a US State or Turkey).

It should be noted that the Regulation needs unanimity of the Member States to be adopted and that so far the attempts made by the Presidency failed because of the concerns of some Member States. The goal of the Presidency is to establish at the Council that all possibilities for a compromise have been exhausted, that a large majority of delegations supports the objectives of this proposal and to discuss the possibility of enhanced cooperation between some Member States on this file.

As a last point, the Council will take note of the progress made regarding the **implementation of the strategy for the external dimension of Justice and Home Affairs**. While this strategy encompasses all the heterogeneous matters included in Title IV of the TEC ("Visas, asylum, immigration and other policies related to free movement of persons"), an increasing importance is given to the external relations in the field of judicial cooperation in civil matters.

The Council is currently **considering the accession of the EU to some Hague Conventions**, and **bilateral contacts are taking place with countries like Russia and Ukraine with the aim of clarifying the potential of a bilateral agreement on judicial cooperation in civil and commercial law matters** (see the provisional agenda of the meeting of the Committee on Civil Law Matters

held on 27 May 2008). Unfortunately, most part of the related documents are not publicly available (see, for instance, the title of this document).

Some information can be found in the progress reports “on the implementation of the strategy for the External Dimension of the JHA”, prepared by the Commission and the General Secretariat of the Council. The first one, covering year 2006, can be downloaded here (Commission and Council Secretariat), while the second one (January 2007-May 2008) is due at the end of June (a preparing document by the Commission is available here).

(Many thanks to Pietro Franzina, University of Ferrara, for the tip-off on some of the documents referred to above)

Suit Challenges Decision of New York to Recognize Same-Sex Unions

A law suit was filed in New York on June 3rd to challenge the decision of New York Governor to recognize same-sex unions.

It is argued that the Legislature was the sole branch of government which could have made such decision, and that the Governor, who is the executive power of the state of New York, usurped legislative authority.

The report of the New York Times can be found here.

Canadian Conflicts Publications

During a recent round-up of Canadian publications dealing with the conflict of laws, I have found the following articles which some might find of interest:

– Robert Flannigan, "The Use of Foreign Forms to Circumvent Local Liability Rules" (2007) 44 Alta. L.R. 803-14

– Lily Ng, "Covenant Marriage and the Conflict of Laws" (2007) 44 Alta. L.R. 815-36

– Jean-Gabriel Castel, "The Uncertainty Factor in Canadian Private International Law" (2007) 52 McGill L.J. 555-76

– Pamela D. Pengelley, "A Compelling Situation: Enforcing American Letters Rogatory in Ontario" (2006) 85 Can. Bar Rev. 345-72

– John P. Sullivan & Jonathan M. Woolley, "*Oakwell Engineering Limited v. Enernorth Industries Inc.*: Questions of Burden and Bias in the Enforcement of Foreign Judgments" (2006) 85 Can. Bar Rev. 605-32

– Craig Jones, "New Solitudes: Recent Decisions Call into Question the National Class Action" (2007) 45 Can. Bus. L.J. 111-22

Most are available on-line through various collections of legal scholarship, like Hein Online or Scholars Portal.