Kozyris on Rome II: Tort Conflicts on the Right Track! A Postscript to Symeon Symeonides' "Missed Opportunity"

Prof. John Phaedon Kozyris (Universities of Thessaloniki and Ohio State) has published a very interesting article on Rome II in the latest issue of the American Journal of Comparative Law (Vol. 56(2), 2008): **Rome II: Tort Conflicts on the Right Track! A Postscript to Symeon Symeonides' "Missed Opportunity"** (*56 Am. J. Comp. L. 471*). As the title explains, the article discusses the new European conflict regime on torts, in the light of the assessment made by *Prof. Symeonides* in his recent works (see in particular "Rome II and Tort Conflicts: A Missed Opportunity", and the other articles cited in our related post, and "The American Revolution and the European Evolution in Choice of Law: Reciprocal Lessons"). While rejecting some of the critiques addressed by Symeonides to the final text of Rome II, Kozyris commends the EC co-legislators for adopting a "traditional" European approach:

> *Rome II must be praised for eschewing the "revolutionary" methodologies, especially of the American variety, and for employing definitive, recognizable, and practical connecting factors to determine the applicable law.*

In analysing the conflict rules, special attention is given by the author to the provision on product liability (or, as the author deems it more appropriate, "producer liability").

The abstract reads as follows:

> *Regulation 864/2007, covering tort conflicts, concludes a long process that had started in the late 1960s to cover the entire field of obligations in the European Community. The author expresses his satisfaction that the final text, with its emphasis on the lex loci damni, with some habitual residence exceptions, escaped the shoals of the so-called "American conflicts revolution" with its parochial and pro-forum implications and its uncertainties. Further, he*

comments favorably on the particularized treatment of certain areas such as producer liability and environmental protection and on the inclusion of the in-between topics of unjust enrichment, negotiorum gestio and culpa in contrahendo. However, a closer and more detailed study of the key field of producer liability leads him to considerable reservations on the contacts selected and their prioritization.

New References on Brussels I Regulation

Two new references for preliminary rulings on the Brussels I Regulation have been referred to the ECJ:

1. The ***Hof van Cassatie van België*** has referred the following question to the ECJ:

> *Is a creditor who pursues a claim in the name and for the account of his debtor a party within the meaning of Article 43(1) of Regulation No 44/2001, that is, a party who can lodge an appeal against a decision on the request for declaration of enforceability, even if he has not formally appeared as a party in the proceedings in which another creditor of that debtor applied for that declaration?*

(The case is pending as: Draka NK Cables Ltd, AB Sandvik International, VO Sembodja BV and Parc Healthcare International Limited v Omnipol Ltd (Case C-167/08)

2. The ***Hoge Raad der Nederlanden*** has referred the following questions:

> *a) Which harm is, in the case of unlawful conduct such as that which forms the basis for Zuid-Chemie's claim, to be treated as the initial harm resulting from that conduct: the harm which arises by virtue of the delivery of the defective*

product or the harm which arises when normal use is made of the product for the purpose for which it was intended?

(b) If the latter is the case, can then the place where that harm arose be treated as 'the place where the harmful event occurred' within the meaning of Article 5(3) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters only if that harm consists of physical harm to persons or goods, or is this also possible if (initially) only financial harm has been incurred?

(*The case is pending as: Zuid-Chemie B.V. v Philippo's Mineralenfabriek N.V./S.A., at present PMF Productions (Case C-189/08)*)

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

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (4/2008)

Recently, the July/August issue of the German legal journal "Praxis des Internationalen Privat- und Verfahrensrechts" (**IPRax)** was released.

It contains the following **articles/case notes (including the reviewed decisions)**:

- ***Burkhard Hess/David Bittmann***: "Die Verordnungen zur Einführung eines Europäischen Mahnverfahrens und eines Europäischen Verfahrens für geringfügige Forderungen – ein substantieller Integrationsschritt im Europäischen Zivilprozessrecht" – the English abstract reads as follows:

Two new European instruments, Regulation (EC) No. 1896/2006 concerning the

creation of a European Payment Order and Regulation (EC) No. 861/2007 establishing a European Procedure for Small Claims, will enter into force on the 9th of December 2008 and the 1st of January 2009, respectively. Both constitute a new step in the integration of European Civil Procedural Law, introducing a genuine European title and creating genuine European civil procedures in specific areas. The following article presents and analyses these new instruments. Furthermore, it scrutinizes the German implementation rules, which are currently still at a draft stage. Finally, the article assesses the interplay between the new parallel regulations and examines their implications for European as well as national procedural laws. In the long run, the vast number of different regulations on the cross-border recovery of debts may entail the fragmentation of European Civil Procedural Law.

- ***Rolf Wagner***: "Änderungsbedarf im autonomen deutschen internationalen Privatrecht aufgrund der Rom II-Verordnung? – Ein Überblick über den Regierungsentwurf eines Gesetzes zur Anpassung der Vorschriften des Internationalen Privatrechts an die Rom II Verordnung" – the English abstract reads as follows:

Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II Regulation) will enter into force in the EU member states (except for Denmark) as from 11 January 2009. The following observations examine whether national German law has to be changed as a consequence of the Rome II Regulation. In particular, the question arises as to whether the rules on non-contractual obligations in Articles 38 seqq. of the German Introductory Act to the Civil Code may be deleted, and whether further changes are necessary in order to give full effect to the Rome II Regulation.

- ***Sven Rugullis*** on anticipated choice of law by the parties with regard to non-contractual obligations: "Die antizipierte Rechtswahl in außervertraglichen Schuldverhältnissen"
- ***David Einhaus*** on the Regulation creating a European Order for Payment Procedure: "Qual der Wahl: Europäisches oder internationales deutsches Mahnverfahren?"
- ***Sascha Reichardt*** on a judgment of the Federal Supreme Court of 28

June 2007 (I ZR 49/04) dealing with the question of international jurisdiction regarding intellectual property rights: “Internationale Zuständigkeit deutscher Gerichte bei immaterialgüterrechtlichen Klagen”

- ***Peter Mankowski*** on a judgment of the Higher Regional Court Karlsruhe of 24 August 2007 (14 U 72/06) on Art. 15 (1) lit. c Brussels I Regulation: “Muss zwischen ausgerichteter Tätigkeit und konkretem Vertrag bei Art. 15 Abs. 1 lit. c EuGVVO ein Zusammenhang bestehen?”
- ***Rolf Stürner/Therese Müller*** show developments of the German-American mutual judicial assistance by analysing two recent decisions of the Federal Supreme Court (28 March 2007 – IV AR (VZ) 2/07) and the Higher Regional Court Celle (6 July 2007 – 16 VA 5/07) dealing respectively with the question of service of American class actions in Germany and the granting of assistance by German courts to obtain evidence for US-American pre-trial discovery-proceedings: “Aktuelle Entwicklungstendenzen im deutsch-amerikanischen Rechtshilfeverkehr”
- ***Fügen Sargin***: “A Critical Analysis of the Requirements of Recognition and Enforcement of Foreign Judgments under Turkish Law”
- ***Zeynep Derya Tarman*** on the acquisition of real estate by foreigners in Turkey and its restrictions: “Grundsätze und Beschränkungen beim Erweb von Grundstücken durch Ausländer in der Türkei”
- ***Torstein Frantzen*** on the recognition of foreign divorces in Norway: “Anerkennung ausländischer Ehen in Norwegen”

Further, this issue contains the following **materials**:

- Draft statute of the Federal Government for the adaptation of the German PIL rules (EGBGB) to the Rome II Regulation: Gesetzentwurf der Bundesregierung (2008) für ein Gesetz zur Anpassung der Vorschriften des Internationalen Privatrechts an die Verordnung (EG) Nr. 864/2007
- ***Peter Kindler/Karla Klemann***: Synopsis of the German PIL rules, Rome I and Rome II: “Synopse zum Inkrafttreten der Verordnungen Rom I und Rom II”

As well as the following **information**:

- ***Michael Stürner/Moritz Brinkmann*** on the conference of the Academy of European Law in Trier on the Draft Common Frame of Reference which has taken place in March 2008: “The Draft Common Frame of Reference –

Tagung der Europäischen Rechtsakademie am 6. und 7.3.2008 in Trier”

- ***Erik Jayme/Carl Friedrich Nordmeier*** on seminars having taken place in Thrace (Greece) in April 2008 on private international law of family and succession law and in particular on legal questions of Muslim Greek nationals: “Griechische Muslime in Thrazien: Internationales Familien- und Erbrecht in europäischer Perspektive”

Rome I Regulation Published in the Official Journal

The Rome I Regulation (see the dedicated section of our site, and the programme of the forthcoming conference organized by the Journal of Private International Law) has been published in the Official Journal of the European Union n. L 177 of 4 July 2008. The official reference is the following:

Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ no. L 177, p. 6 ff.). Pursuant to its Articles 28 and 29, **the regulation will apply from 17 December 2009, to contracts concluded after the same date**. As it is widely known, Denmark and the United Kingdom did not take part in the adoption of the regulation and are not bound by it (see Recitals no. 45 and 46): however, the position of the latter State is currently being evaluated in the frame of the public consultation launched by the British Ministry of Justice. The responses to the consultation paper and the final decision of the UK government will be posted as soon as they are available.

Which Law Governed at Abu Ghraib?

Four Iraqis who were detained in Abu Ghraib have sued U.S. military contractors before American courts. The cases were filed on June 30, 2008, in federal courts of Maryland, Ohio, Michigan and Washington state, where individual contractors reside. The plaintiffs are represented by law firms in Philadelphia and Detroit and by the Centre for Constitutional Rights.



Details on the parties can be found here.

The cases raise an interesting issue of choice of law. Which law will U.S. courts apply? The four complaints (which can also be found here) address the issue superficially, by stating that the laws of the United States have been violated, which seems to imply that they govern. Here is an excerpt of one of the complaints, but they are all drafted similarly:

> *DEFENDANTS KNEW THAT THEIR TORTURE OF PRISONERS VIOLATED THE LAWS OF THE UNITED STATES*
>
> *48 [Contractors] knew that military officials were prohibited from torturing prisoners by the Army Field Manual and other controlling law, and that any military official who were doing so were violating the law.*
>
> *49 [Contractors] knew that the US government has denounced the use of torture and other cruel, inhuman or degrading treatment at all times. [Contractors] knew that it was illegal for them to participate in, instigate, direct or aid and abet the torture of X and other prisoners.*
>
> *50 For example, in its Initial Report to the UN Committee Against Torture, the*

US Department of State note that "[t]orture is prohibited by law throughout the US. It is categorically denounced as a matter of policy and as a tool of state authority …. No official of the government, federal, state or local, civilian or military is authorized to commit or to instruct anyone else to commit torture. Nor may any official condone or tolerate torture in any form" (…) The State Department's Report on Human Rights Practices characterized the following as prohibited forms of torture: mock executions, sensory deprivation, repeated slapping, exposure to cold, stripping and blindfolding, food and sleep deprivation, threats to detainees or family members, dripping water on the head, squeezing of the testicles, rape and sexual humiliation.

51 [Contractors] knew that the ban on torture is absolute and no exigent circumstances permit the use of torture.

52 [Contractors] knew that the US intended and required that any person acting under the contract to the US would conduct themselves in accord with the relevant domestic and international laws.

53 [Contractors] knew and understood that the US does not condone torture of prisoners.

54 Defendants cannot credibly claim that the wrongful and criminal conduct of certain military and government personnel misled them into thinking that the torture of prisoners was lawful and permissible.

Given that American federal courts apply state choice of law rules, the issue will likely be addressed differently by each of the four district courts. Most readers will of course be aware that while a few American states still follow the traditional approach, most have moved on to the so called "modern approach", such as interest analysis. Although the complaints refer to the Army Field Manual and to the contract concluded by the contractors, this looks to me like a tort action. The complaints also rely on the Alien Tort Claims Act (though solely for jurisdictional purposes), so the plaintiffs may argue that public international law applies.

Book: Calvo Caravaca / Carrascosa González – Las obligaciones extracontractuales en derecho internacional privado. El Reglamento Roma II

Prof. Alfonso-Luis Calvo Caravaca (University Carlos III of Madrid) and *Prof. Javier Carrascosa González* (University of Murcia) have recently published their latest work, devoted to tort conflicts: **"Las obligaciones extracontractuales en derecho internacional privado. El Reglamento Roma II"** (Editorial Comares, May 2008). Despite its title, centered on the new EC Regulation on the law applicable to non-contractual obligations, the book (in Spanish) covers the whole area of tort conflicts, both under the point of view of jurisdiction and applicable law, including matters excluded from the scope of application *ratione materiae* of the Rome II Reg. It is divided into three parts.

The first part (*Competencia judicial internacional y obligaciones extracontractuales*), **devoted to jurisdictional issues**, focuses on Art. 5(3) Brussels I Reg./1968 Brussels Convention, and the abundant case law of the ECJ on the interpretation of these basic provisions. Other conventional texts are taken into account, in the Brussels system (new Lugano Convention of 2007) and in special matters (nuclear damages, civil liability for oil pollution, intellectual and industrial property rights, international transports, etc.), along with the Spanish rules on jurisdiction in torts (Art. 22 of the *Ley Organica del Poder Judicial*). The final section deals with jurisdictional issues arising out of torts committed on the Internet.

The second part (*Ley aplicable a las obligaciones extracontractuales: conexiones generales*) **analyses the main features of the Rome II Reg.**: its methodological foundations, relationships with other international/EC instruments, scope of application, the provision on **choice of law by the parties** (Art. 14) and the **general rule set out in Art. 4** (*lex loci damni*, common domicile exception, escape clause).

The third part (*Ley aplicable a las obligaciones extracontractuales: materias específicas*) **covers the special rules of the Rome II Regulation on specific categories of torts and other non-contractual obligations** (Articles 5-13), along with matters excluded from its material scope of application (such as rights relating to the personality) or whose conflict regime is provided in other international instruments (oil pollution damages, collision between vessels, nuclear damages, etc.). As in the first part on jurisdiction, the last sections are devoted to the Spanish conflict rule on torts (Art. 10(9) of the *Código Civil*) and to problems arising from Internet torts.

The analysis of each provision and issue is complemented by a number of examples, taken from real cases or fictitious, which help the reader to understand the conflict reasoning and the outcome of the choice-of-law process.

The detailed table of contents, and the introductory chapter (*Presentación*) can be found on the publisher's website.

Title: **Las obligaciones extracontractuales en derecho internacional privado. El Reglamento Roma II**, by *Alfonso-Luis Calvo Caravaca* and *Javier Carrascosa González*, Editorial Comares, Albolote (Granada), 2008, 248 pages.

ISBN: 978-84-9836-390-6. Price: EUR 23.

(Many thanks to Pietro Franzina, University of Ferrara, for the tip-off)

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Readers of this blog might also be interested in the forthcoming ninth edition of the conflict of laws manual by *Calvo Caravaca* and *Carrascosa González*: ***Derecho Internacional Privado – Volumen I*** and ***Volumen II*** (Editorial Comares, July 2008). In addition, a valuable resource on PIL cases and legislation is the **excellent website of the Accursio Group** (Spanish Multi-University Group of Research, Teaching & Practice on Private International Law), created and maintained by the two Spanish professors with other scholars: see, besides a number of sections focused on Spanish PIL (such as those on international successions and polygamy), the *Laboratorio Bruselas* section (references and text of the ECJ's case-law on the EC instruments on PIL) and the *Super-Caso* section (tricky conflict cases to be solved by readers).

Publication: Briggs on Agreements on Jurisdiction and Choice of Law

It has been our book of the month for a few weeks now, but as yet we have not formally announced the publication of Professor Adrian Briggs' latest work, ***Agreements on Jurisdiction and Choice of Law*** (Oxford, OUP, 2008). So, here's the blurb:

> *In this book, the author analyses the law and practice relating to the classification, drafting, validity and enforcement of contracts relating to jurisdiction and choice of law. The focus is on English law, EU law and common law measures, but there is also some comparative material built in. The book will be useful in particular to practising lawyers seeking to draft, interpret or enforce the types of contract discussed, but the in-depth discussion will also be valuable to academic lawyers specialising in private international law.*
>
> *Written by an academic who is also a practising barrister, this book gives in-depth coverage of how the instruments and principles of private international law can be used for the resolution of cross-border or multi-jurisdictional disputes. It examines the operation and application of the Brussels Regulation, the Rome Convention and the Hague Convention on Exclusive Choice of Court Agreements in such disputes, but also discusses the judgments and decisions of the courts in significant cases such as Turner v Grovit, Union Discount v Zoller, and De Wolf v Cox.*
>
> *Much of the book is given over to practical evaluation of how agreements on jurisdiction and choice of law should be put together, with guidance on, amongst other things, drafting of the agreements (including some sample clauses), severability of agreements, consent, and the resolution of disputes by arbitration.*

The table of contents:

1. Introduction and Scheme
2. Consent in private international law
3. Dispute resolution and severability
4. Clauses, principles, and interpretation
5. Drafting agreements
6. Jurisdiction agreements: primary obligations
7. Jurisdiction agreements: Brussels Regulation
8. Jurisdiction agreements: secondary obligations
9. Foreign Judgments
10. Agreements on choice of law
11. Giving effect to agreements on choice of law
12. Agreements to resolve disputes by arbitration
13. Conclusions

A more detailed table of contents can be found on the OUP website, where you can also download a sample chapter (PDF). The price is £145, and you can buy it from Amazon, or OUP. Needless to say, it is **highly recommended**.

Exxon, Punitive Damages and the Conflict of Laws

Yesterday, the U.S. Supreme Court delivered its decision in Exxon v. Baker. The central issue of the case was whether an award of punitive damages of US$ 2.5 billion (as reduced by the lower courts from an initial award of US$ 5 billion) was excessive as a matter of maritime common law. The Court held 5 to 3 (with Alito recused) that such awards should be limited by using a ratio of punitive to compensatory damages. The court held that, in maritime cases, a ratio of 1:1 is a fair upper limit. Thus, as the lower court had assessed the compensatory damages to US$ 507 million in that case, the Supreme Court held that punitive damages should be reduced to that amount as well.

This case comes after several decisions where the Supreme court has interpreted

the Due Process Clause as setting limits to punitive damages awards. In those cases, it was held that a ratio superior to one digit (i.e. superior to 9:1) would rarely satisfy Due Process, and that when the award of compensatory damages was already substantial, it might be that only a ratio of 1:1 would satisfy the constitutional requirement.

There is therefore a clear trend in American law towards more reasonableness and predictability in the award of punitive damages.

To bolster its holding limiting punitive damages, the Court noted that the practice of other common law jurisdictions was different, but also that awards of punitive damages were often denied recognition abroad:

> *For further contrast with American practice, Canada and Australia allow exemplary damages for outrageous conduct, but awards are considered extraordinary and rarely issue. See … Noncompensatory damages are not part of the civil-code tradition and thus unavailable in such countries as France, Germany, Austria, and Switzerland. See … And some legal systems not only decline to recognize punitive damages themselves but refuse to enforce foreign punitive judgments as contrary to public policy. See, e.g., Gotanda, Charting Developments Concerning Punitive Damages: Is the Tide Changing? 45 Colum. J. Transnat'l L. 507, 514,518, 528 (2007) (noting refusals to enforce judgments by Japanese, Italian, and German courts, positing that such refusals may be on the decline, but concluding, "American parties should not anticipate smooth sailing when seeking to have a domestic punitive damages award recognizedand enforced in other countries").*

From a conflict perspective, the interesting question is whether such an evolution of American law would change anything. Would Japanese, Italian or German courts recognize lower awards? Is size the issue? Or is it just the punitive nature of such judgments, which makes them, for conflict purposes, criminal in nature?

Comments from all jurisdictions welcome!

First Issue of 2008's Revue Critique de Droit International Privé

The first issue of 2008's *Revue Critique de Droit International Privé* has just been released. It contains three articles, but only one dealing with a conflict issue per se, the public law exception within the Brussels I Regulation after the *Lechouritou* case ("*Les actes* jure imperii *et le Règlement Bruxelles I – A propos de l'affaire* Lechouritou"). The two other articles discuss immigration law issues.

The article is authored by French scholars Horatia Muir Watt, who teaches at Paris I University (and who was our Guest Editor of last month), and Etienne Pataut, who teaches at Cergy University.

The authors have kindly provided the following abstract:

Inasmuch as private international law in continental legal systems is entirely structured by the distinction between private cross-border relationships subjected to the conflict of laws, and the public sphere, correlatively excluded, it is now undergoing profound transformations due to to the changing nature and function of substantive « private » law. The traditional opposition between public and private law is if not discredited, at least in search of re-definition. It is not surprising, therefore, that the "public law exception" which first appeared in the Brussels Convention in 1968 and continues to figure unaltered in the new Community private international law instruments, raises considerable difficulties in the case-law of the Court of justice, and gives rise to varying constructions in the courts of the various Member States. The 2007 Lechouritou case (C-292/05) is emblematic of these difficulties, insofar as it reveals a lack of coherence between the scope of sovereign immunity and the public law exception within the Brussels I Regulation. This article uses the Lechouritou case to revisit the distinction between public and « civil and commercial matters » and suggests a new reading of the Regulation in this context.

Conference: The Rome I Regulation – New Choice of Law Rules in Contract

We are pleased to announce the:

Journal of Private International Law Conference
The Rome I Regulation: New Choice of Law Rules in Contract
Friday 19th September 2008
Herbert Smith, Exchange House, London

The full programme, also set out below, can be found on our **dedicated conference page**. The speakers are all internationally recognised experts in the fields of private international law, insurance e-commerce and IP, and financial services. The keynote speech is to be delivered by The Honourable Mr Justice Richard Plender, Royal Courts of Justice.

Details on fees and booking can be found here – if you wish to attend, I suggest booking with all due speed as places *are* limited.

The conference is kindly sponsored by Herbert Smith, the University of Birmingham, the University of Aberdeen and the University of Southampton.

Programme

9.30am – 10.00am **Registration and Coffee/Tea**

10.00am – 10.15am **Opening and Keynote Address**

The Honourable Mr Justice Richard Plender, Royal Courts of Justice, *'Towards a European Private International Law of Obligations'*

10.15am – 11.30am **The General Framework**

(Chair: Professor Paul Beaumont, University of Aberdeen)

Raquel Correia, Legal Adviser and JHA Counsellor, Portuguese Permanent Representation to the European Union

Andrew Dickinson, Clifford Chance LLP, London; Visiting Fellow in Private International Law, British Institute of International and Comparative Law

Dr Michael Hellner, University of Uppsala

Oliver Parker, Legal Adviser, Ministry of Justice

11.30am – 12.00pm **Coffee/Tea Break**

12.00pm–1.00pm **Insurance**

(Chair: Adam Johnson, Partner, Herbert Smith LLP)

Richard Lord QC, Brick Court Chambers

Professor Robert Merkin, University of Southampton

Louise Merrett, Trinity College, University of Cambridge; Fountain Court Chambers

1.00pm – 2.15pm **Lunch**

2.15pm – 3.15pm **E-Commerce and IP**

(Chair: Professor Gerrit Betlem, University of Southampton)

Richard Fentiman, Queens' College, University of Cambridge

Dr Julia Hörnle, Queen Mary, University of London

Professor Paul Torremans, University of Nottingham

3.15pm – 4.30pm **Financial Services**

(Chair: Professor Jonathan Harris, University of Birmingham; Brick Court Chambers)

Professor Michael Bridge, London School of Economics, University of London

Professor Francisco Garcimartin Alférez, University of Madrid Rey Juan Carlos

Dr Joanna Perkins, Secretary of the Financial Markets Law Committee

Charles Proctor, Partner, Bird & Bird; Honorary Professor, University of Birmingham

4.30pm – 5.00pm **Coffee/Tea Break**

5.00pm – 5.30pm **Panel Discussion**

(Chair: Murray Rosen QC, Partner, Herbert Smith LLP)

5.30pm **Drinks Reception**

Booking and Fees