What Do We Really Know About the American Choice of Law Revolution?

There is a substantial book review in the new issue of the *Standard Law Review* (Oct 2007, Vol. 60, Issue 1): What Do We Really Know About the American Choice-of-Law Revolution? by Hillel Y. Levin (*Stanford*). It provides a detailed critique of Symeon Symeonides' most recent book, *The American Choice-of-Law Revolution: Past, Present and Future* . Here's some of the introduction:

> *Virtually everyone who has engaged in choice-of-law scholarship has had unflattering things said about him or her, and every scholar's favorite methodology has come under attack. Given the reputation of the First Restatement of Conflicts of Laws, it should come as little surprise that Joseph Beale, its drafter, "has been the target of ridicule by practically every conflicts writer in the last four decades," or that the First Restatement itself "has been the favorite punching bag of every conflicts teacher." But the scholars who succeeded Beale and pioneered the modern approaches have fared no better, and neither have their theories. William Prosser memorably referred to conflicts scholars as "learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon." Prosser's assessment is charitable compared to that of Lea Brillmayer, who has described them as "a wild-eyed community of intellectual zealots." Meanwhile, the modern doctrinal approaches have yielded "gibberish" and "confused and misguided thinking." In short, modern conflicts theory and doctrine is a mess—a "debacle," according to one scholar—and there is no real consensus on how to clean it up.*
>
> *It is time for a new treatment of conflicts, one that does not approach it either through high-minded theory or as a set of convoluted law school exam fact patterns. What the field really needs is empirical inquiry: what has the revolution in choice of law wrought, and what can we learn from that? Intrepid researchers have undertaken this task in fits and starts over the past fifteen years or so, and the conflicts giant Dean Symeon Symeonides has been at the forefront of the project. His highly anticipated and ambitious new book, The*

> *American Choice-of-Law Revolution: Past, Present and Future, is the pinnacle of his efforts and aims to be the authoritative word on the impact of the revolution. First delivered as a series of lectures at The Hague Academy of International Law in 2002 and now widely available for the first time, it should be required reading for anyone engaging in conflicts scholarship.*

You can download the full review from here (PDF). Highly recommended.

Fourth issue of 2007's Journal du Droit International

The fourth issue of the French *Journal du Droit International (Clunet)* has been released. It contains three articles dealing with private international law issues (the table of contents in French can be found here).

First, the *Journal* offers the end of the article of Ms Legros (the first part of which was published in the third issue of the Journal) on Conflicts of Norms in the Field of International Contracts for Carriage of Goods ("*Les conflits de normes en matière de contrats de transport internationaux de marchandises*"). The second part of the study focuses on jurisdictional and enforcement issues.

The second article is authored by Professor Emmanuel Gaillard, who teaches at Paris XII university, and who is also a leading practionner of international commercial arbitration. It discusses the Representations of International Arbitration, Between Sovereignty and Autonomy ("*Souveraineté et autonomy: réflexions sur les représentations de l'arbitrage international*"). The English abstract reads:

> *The autonomy of international arbitration vis-à-vis national legal orders raises important question of legal theory. There are several representations of international arbitration: that assimilating the arbitrator to the courts of a single legal system; that perceiving the autonomy of international arbitration as*

detached of national legal systems; and that considering such autonomy as anchored in the entirety of the legal systems that accept, under certain conditions, to recognize the arbitral award. Significant practical consequences follow from these distinctions.

The third is authored by Didier Lamethe, who is the *Secrétaire Général* of EDF International, a subsidiary of the French national electricity company. His article discusses the Languages of International Arbitration ("*Les langues de l'arbitrage international : liberté or contraintes raisonnées de choix ou contraintes réglementées ?*"). The English abstract reads:

As far as international contracts are concerned, language plays a key part beyond the negotiation and the signature, in the event of deviations of interpretation ending up in an arbitration. Thus arises the question of the choice an the backgrounds of the choice of the language(s) regarding not only the proceedings, but also some sides of the proceedings. This essays puts up the principles of a sharing-out between the feasible and the forbidden, the content of arbitration rules making up a reference for a comparative analysis of great interest. Such an approach outlines the areas of freedom for the choice to be made and gives a demonstration of the imprecise figure of the constraints.

Available to suscribers.

Au Revoir to Renvoi?

C.J.S. Knight has written a casenote in the *Conveyancer and Property Lawyer* on the High Court decision in *Iran v Berend* (Conv. (2007) November/December Pages 564-571). Here's the abstract:

Discusses the Queens Bench Division decision in Iran v Berend on whether renvoi has a place in choice of law cases concerning title to moveable property, in particular whether in a case concerning title to a fragment of limestone relief originating in ancient Persia, bought in New York by a resident of France and

sent to England to be auctioned the English court was bound to apply French private international law rules or whether the dispute fell to be determined by reference to French domestic law. Considers the purpose of the lex situs rule in conflict of law cases.

Available to *Conv.* subscribers.

Who is Bound by the Brussels Regulation? LMCLQ November 2007

Adrian Briggs (*Oxford*) has written a note in the November issue of the L.M.C.L.Q. (2007, 4(Nov), 433-438) on the recent decision of the Court of Appeal in *Samengo-Turner v J&H Marsh & McLennan (Services) Ltd* [2007] EWCA Civ 723. The *Westlaw* abstract reads:

Discusses the Court of Appeal judgment in Samengo-Turner v J&H Marsh & McLennan (Services) Ltd on whether to grant an anti-suit injunction to stop New York proceedings. Examines whether the insurance broker should be allowed to sue an associate's former employees in New York to recover incentive payments, under a contract which stipulated the New York court. Considers whether the rules on contracts of employment under Regulation 44/2001 (Brussels Regulation) applied to an action by the employer's associate.

There is also an article in the same issue on "Ship Mortgagees and Charterers" by David Osborne which touches on conflict of laws issues:

Explores the circumstances in which the mortgagee of a ship could be liable to a charterer or cargo interest when it enforces its mortgage, thereby preventing performance of a charterparty or contract of affreightment by the owner, in light of the Commercial Court's consideration of the issue on an obiter basis in Anton Durbeck GmbH v Den Norske Bank ASA. Assesses the often conflicting

case law on the question and the re-shaping of the law regarding economic torts.

Several book reviews are also in the LMCLQ this month:

- R. Cox, L. Merrett & M. Smoth, *Private International Law of Insurance and Reinsurance* (LLP, 2007), reviewed by Johanna Hjalmarsson
- J. Fawcett, J. Harris & M. Bridge, *International Sale of Goods in the Conflict of Laws* (OUP, 2005), reviewed by Christopher Hare
- L. Collins et al, *Dicey Morris & Collins on the Conflict of Laws* (Sweet & Maxwell, 14th edn, 2006), reviewed by Andrew Scott

The LMCLQ is available to subscribers.

Conflict of Laws Issues Associated with an Action for Interference with Privacy

Dan Jerker B Svantesson (Bond University) has written a short article on "Conflict of Laws Issues Associated with an Action for Interference with Privacy" in the current issue of *Computer Law and Security Report* (C.L.S.R. 2007, 23(6), 523-528). The abstract reads:

Examines Australian conflict of laws issues associated with actions for interference with privacy. Considers developments indicating a movement towards the recognition of such actions in Australia. Discusses the potential impact of actions for interference on internet conduct and the application to such actions of Australian rules of jurisdiction and choice of law, including the three key concepts relating to: (1) where the cause of action is committed; (2) where the damage is suffered; and (3) what is the "place of wrong". Notes the issue of forum non conveniens.

Available to CLSR subscribers (*via Westlaw*.)

Inter-Country Adoptions from India

Ranjit and Anil Malhotra have written a piece on "**Inter-Country Adoptions from India**" in the new issue of the *Commonwealth Law Bulletin* (C.L.B. 2007, 33(2), 191-207). Here's the abstract:

> *This article discusses the inter-country adoption procedure, coupled with the relevant legislation to be complied with by foreigners seeking to adopt children from India. At the outset, it is important to emphasise that at present there exists no general law on adoption of children governing non-Hindus and foreigners. Adoption is permitted by statute among Hindus, and by custom among some other communities. Quoting extensively from case law and legal provisions, this article examines the procedure to be followed in inter-country adoption from India and the role of the Central Adoption Resource Agency (CARA), the principal monitoring agency of the Indian Government handling all affairs connected with national and inter-country adoptions. In the section dealing with problems faced in Inter-Country adoption, the authors point out that: "At present non-Hindus and foreign nationals can only be guardians of children under the Guardian and Wards Act 1890. They cannot adopt children." In conclusion, the authors call for an overhaul of the existing adoption law in India, not least, in the light of the growing demand for a general law of adoption enabling any person, irrespective of his religion, race or caste, to adopt a child.*

Electronic access is available to subscribers.

ECJ Judgment on Articles 11 (2) and 9 (1) (b) Brussels I Regulation

Today, the ECJ delivered its judgment in case C-463/06 (*FBTO Schadeverzekeringen N.V. v. Jack Odenbreit*).

The German Federal Supreme Court (*Bundesgerichtshof*) had referred the following question to the ECJ for a preliminary ruling:

> *Is the reference in Article 11(2) 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 to Article 9(1)(b) of that regulation to be understood as meaning that the injured party may bring an action directly against the insurer in the courts for the place in a Member State where the injured party is domiciled, provided that such a direct action is permitted and the insurer is domiciled in a Member State?*

The Court held as follows:

> ***The reference in Article 11(2) 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 to Article 9(1)(b) of that regulation is to be interpreted as meaning that the injured party may bring an action directly against the insurer before the courts for the place in a Member State where that injured party is domiciled, provided that such a direct action is permitted and the insurer is domiciled in a Member State.***

See for the full judgment the website of the ECJ and for the background of the case our previous posts which can be found here and here.

Compulsory Processes of the Federal Court of Australia Cannot be Invoked while Jurisdiction is under Challenge

In a recent case, the Federal Court of Australia held that a US-incorporated corporation which had been served in the US, and which had filed a conditional appearance only to challenge the Court's jurisdiction, was not required to produce documents pursuant to a notice to produce (similar to a subpoena). Jacobson J said (at [10]): 'I do not consider that at this stage of the proceedings in which the jurisdiction is under challenge, the applicant can invoke the compulsory processes of the Court.' See *Armacel Pty Limited v Smurfit Stone Container Corporation* [2007] FCA 1928.

Commission's Report on the Application of the Council Regulation (EC) 1206/2001 (Taking of Evidence)

From the European Judicial Network website:

> *On 5 December 2007, the Commission adopted its* ***report on the application of the Council Regulation (EC) 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters****.*
>
> *The report has been prepared in accordance with Article 23 of the* Regulation*.*

It concludes that the application of the Regulation has generally improved, simplified and accelerated the cooperation between the courts on the taking of evidence in civil or commercial matters. The Regulation has achieved its two main objectives, namely firstly to simplify the cooperation between Member States and secondly to accelerate the performance of the taking of evidence, to a relatively satisfactory extent. Simplification has been brought about mainly by the introduction of direct court-to-court transmission (although requests are still sometimes or even often sent to central bodies), and by the introduction of standard forms. As far as acceleration is concerned, it can be concluded that most requests for the taking of evidence are executed faster than before the entry into force of the Regulation and within 90 days as foreseen by the Regulation. Consequently, modifications of the Regulation are not required, but its functioning should be improved. In particular in the current period of adaptation which is still ongoing, there are certain aspects concerning the application of the Regulation which should be improved.

The Commission

- *encourages all further efforts – in particular beyond the dissemination of the practice guide – to enhance the level of familiarity with the Regulation among legal practitioners in the European Union.*
- *is of the view that measures should be taken by Member States to ensure that the 90 day time frame for the execution of requests is complied with.*
- *is of the view that the modern communications technology, in particular videoconferencing which is an important means to simplify and accelerate the taking of evidence, is by far not used yet to its possible extent, and encourages Member States to take measures to introduce the necessary means in their courts and tribunals to perform videoconferences in the context of the taking of evidence.*

The Commission's report is **based on a study prepared by an external contractor**, available on the DG Freedom, Security and Justice website: the contractor carried out a survey, using the feedback provided by administrations of Member States, judges, attorneys and other persons involved in the application of the Regulation (see the annexes to the study).

New Service Regulation Repealing Reg. 1348/2000 Published in the Official Journal

The new service regulation repealing reg. 1348/2000, adopted by the European Parliament at second reading in its plenary session of 24 October 2007 (see our dedicated post here), has been published in the Official Journal of the European Union n. L 324 of 10 December 2007. The official reference is the following:

Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000 (OJ n. L 324, p. 79 ff.): pursuant to its Article 26, the new regulation will apply from 13 November 2008.

(Many thanks to Raluca Ionescu – Universidad Autónoma de Barcelona and Àrea de Dret Internacional Privat blog – and to Pietro Franzina – University of Ferrara – for the tip-off)