New German Authority for International Legal Relations

The report of Basedow and Schwarz is here.

Arresting a person for civil jurisdiction found unconstitutional by Supreme Court of Appeal of South Africa

In Bid Industrial Holdings (Pty) Ltd v Strang and another [2007] SCA 144 (RSA) the Supreme Court of Appeal of South Africa has ruled on 23 November 2007 that arresting a person in order to found or confirm (civil) jurisdiction is unconstitutional. Under South African law, when a person not domiciled in South Africa is sued in a South African court, the court's jurisdiction had to be confirmed either by attachment of property or arrest of the person, unless the foreign defendant submitted to the jurisdiction of the court. The part of this rule permitting the arrest of a person has now been found to infringe the rights to freedom and security of the person, equality, human dignity, freedom of movement, and possibly also the right to a fair civil trial. It could not be said that the rule provided a justifiable limitation to these fundamental rights. The Court stated that arresting a defendant was a profound infringement and had the effect of coercing him or her to submit to the jurisdiction of the court, to make prompt payment, or to provide security.

The Supreme Court of Appeal abolished the rule and adopted a replacement rule to the effect that where attachment was not possible to found or confirm jurisdiction, the South African courts will have jurisdiction if summons is served on the defendant while he or she is in South Africa and there is sufficient

connection between the suit and the area of the court.

First ECJ Judgment on Brussels II bis

Today, the ECJ delivered its first judgment on the Brussels II *bis* Regulation (C-435/06, *Applicant C*).

The Finnish *Korkein Hallinto-oikeus* had referred the **following questions** to the ECJ for a preliminary ruling:

> *1. (a) Does Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, (the Brussels 11a Regulation) apply, in a case such as the present, to the enforcement of a public law decision in connection with child welfare, relating to the immediate taking into custody of a child and his or her placement in a foster family outside the home, taken as a single decision, in its entirety;*
>
> *(b) or solely to that part of the decision relating to placement outside the home in a foster family, having regard to the provision in Article 1(2)(d) of the regulation;*
>
> *(c) and, in the latter case, is the Brussels IIa Regulation applicable to a decision on placement contained in one on taking into custody, even if the decision on custody itself, on which the placement decision is dependent, is subject to legislation, based on the mutual recognition and enforcement of judgments and administrative decisions, that has been harmonised in cooperation between the Member States concerned?*
>
> *2. If the answer to Question 1(a) is in the affirmative, is it possible, given that the Regulation takes no account of the legislation harmonised by the Nordic Council on the recognition and enforcement of public law decisions on custody,*

as described above, but solely of a corresponding private law convention, nevertheless to apply this harmonised legislation based on the direct recognition and enforcement of administrative decisions as a form of cooperation between administrative authorities to the taking into custody of a child?

3. If the answer to Question 1(a) is in the affirmative and that to Question 2 is in the negative, does the Brussels IIa Regulation apply temporally to a case, taking account of Articles 72 and 64(2) of the regulation and the abovementioned harmonised Nordic legislation on public law decisions on custody, if in Sweden the administrative authorities took their decision both on immediate taking into custody and on placement with a family on 23.2.2005 and submitted their decision on immediate custody to the administrative court for confirmation on 25.2.2005, and that court accordingly confirmed the decision on 3.3.2005?

The **Court** now held with regard to **Question 1 (a)**:

Article 1(1) of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, as amended by Council Regulation (EC) No 2116/2004 of 2 December 2004, is to be interpreted to the effect that a single decision ordering a child to be taken into care and placed outside his original home in a foster family is covered by the term 'civil matters' for the purposes of that provision, where that decision was adopted in the context of public law rules relating to child protection.

With regard to the first question, the Court examined first, whether a decision which orders the immediate taking into care of a child relates to parental responsibility (para. 25 et seq.). Here the Court held that the fact that the taking of a child into care is not explicitly listed in Art. 1 (2) of the Regulation cannot lead to the exclusion of these matters from the scope of the Brussels II *bis* Regulation (para. 28 et seq.). According to the Court, the wording of Art. 1 (2) ("in particular") shows that the provision has to be understood as a guide and is not exhaustive (para. 30). Further, this point of view is supported *inter alia* by Recital

5 in the Regulation's preamble according to which "all decisions on parental responsibility, including measures for the protection of the child" shall be covered (para. 31). Secondly, the Court examined whether a decision ordering the immediate taking into care and placement of a child which was adopted in the context of rules of public law constitutes a "civil matter" in terms of Art. 1 (1) Brussels II *bis*. In this respect the Court stressed that the term of "civil matters" has to be interpreted in view of the objectives of the Regulation which would be impaired, were decisions to be excluded from the Regulation only because they are governed by public law in some Member States (para. 45). Thus, the term of "civil matters" has to be interpreted autonomously (para. 46).

In respect of **Question 2** the Court held:

> ***Regulation No 2201/2003, as amended by Regulation No 2116/2004, is to be interpreted as meaning that harmonised national legislation on the recognition and enforcement of administrative decisions on the taking into care and placement of persons, adopted in the context of Nordic Cooperation, may not be applied to a decision to take a child into care that falls within the scope of that regulation.***

Here the Court emphasised that Art. 59 (2) (a) Brussels II *bis* constitutes the only exception from the general rule of Art. 59 (1) Brussels II *bis*, according to which the Regulation supersedes conventions concluded between the Member States regarding matters governed by the Regulation and that this exception has to be interpreted strictly (para. 60).

Regarding **Question 3** the Court held:

> ***Subject to the factual assessment which is a matter for the national court alone, Regulation No 2201/2003, as amended by Regulation No 2116/2004, is to be interpreted as applying ratione temporis in a case such as that in the main proceedings.***

In respect of this last question the Court referred to Art. 64 and Art. 72 Brussel II *bis*, which show that the Regulation applies in principle only to legal proceedings instituted after its date of application, i.e. 1 March 2005 (para. 68). However, Art. 64 (2) of the Regulation provides that judgments given after the date of

application of Brussels II *bis* in proceedings instituted before that date but after the entry into force of the Brussels II Regulation (Regulation 1347/2000) shall be recognised and enforced in accordance with the provisions of Chapter III of Brussels II *bis* if jurisdiction was founded on rules which accorded with those provided for either in Chapter II or in Brussels II or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted. According to the Court, these requirements are, subject to factual assessment which is a matter for the national court, met in the present case (para. 77).

See for the reference, the opinion and the full judgment the website of the ECJ and for the background of the case also our previous post on Advocate General Kokott' s opinion which can be found here.

Symeonides on Rome II: a Missed Opportunity (and other works on tort conflicts)

Symeon C. Symeonides (Dean, College of Law – Willamette University) has posted **Rome II and Tort Conflicts: A Missed Opportunity** (forthcoming on the *American Journal of Comparative Law*, Vol. 56, 2008) on SSRN. Here is the abstract:

> *This article reviews the European Union's new Regulation on tort conflicts ("Rome II"), which unifies and "federalizes" the member states' laws on this subject. The review accepts the drafters' pragmatic premise that a rule-system built around the lex loci delicti as the basic rule, rather than American-style*

"approaches," was the only politically viable vehicle for unification. Within this framework, the review examines whether Rome II provides sufficient and flexible enough exceptions as to make the lex loci rule less arbitrary and the whole system more workable.

The author's answer is negative. For example, the common-domicile exception is too broad in some respects and too narrow in other respects. Likewise, the "manifestly closer connection" escape is phrased in exclusively geographical terms unrelated to any overarching principle and is worded in an all-or-nothing way that precludes issue-by-issue deployment and prevents it from being useful in all but the easiest of cases. The review concludes that, although attaining a proper equilibrium between legal certainty and flexibility is always difficult, Rome II errs too much on the side of certainty, which ultimately may prove elusive.

On the whole, Rome II is a missed opportunity to take advantage of the rich codification experience and sophistication of modern European conflicts law. Nevertheless, Rome II represents a major political accomplishment in unifying and equalizing the member states' laws on this difficult subject. If this first step is followed by subsequent improvements, Europe would have achieved in a relatively short time much more than American conflicts law could ever hope for.

An interesting comparison can be made with two previous works by Prof. Symeonides, commenting the Rome II Commission's Proposal and the EP Rapporteur's Draft: **Tort Conflicts and Rome II: a View from Across** (published in the *Festschrift für Erik Jayme*) and **Tort Conflicts and Rome II: Impromptu Notes on the Rapporteur's Draft**. Both are available for download on Diana Wallis' website (Rome II seminars' page), together with other works by prominent scholars.

Prof. Symeonides has posted a number of interesting articles on tort conflicts on SSRN (see the complete list of his available works on the *author page*), among which: The Quest for the Optimum in Resolving Product-Liability Conflicts; Territoriality and Personality in Tort Conflicts; Resolving Punitive-Damages Conflicts.

(Many thanks to Prof. Lawrence B. Solum – Legal Theory Blog – for pointing out

Prof. Symeonides' latest article on Rome II)

BIICL seminar publications available at BIICL website

In an earlier post we reported on the seminar on Recognition of Foreign Insolvency Proceedings in the US to be held by the British Institute of International and Comparative Law (BIICL) on Monday 26 November 2007. Now the BIICL has made some of the seminar materials available online, with permission from the publication right owners Sweet & Maxwell, Chase Cambria Publishing, Prof Bob Wessels, and Look Chan Ho (Freshfields). The seminar speakers will discuss the latest decisions of the US Bankruptcy Court concerning the interpretation of Chapter 15 of the US Bankruptcy Code.
The seminar speakers are:
Professor Bob Wessels, Leiden University
Gabriel Moss QC, 3-4 South Square
Stephen Gale, Herbert Smith
Ron Dekoven, 3-4 South Square

The seminar publications can be downloaded here and are titled as follows:

Professor Bob Wessels, Leiden University

- Twenty suggestions for a makeover of the EU Insolvency Regulation (International Caselaw Alert, No. 12 – V/2006, October 31, 2006, pp. 68-73)
- The quest for coordination of proceedings in crossborder insolvency cases in Europe (Insolvency and Restucturing in Germany – Yearbook 2008, forthcoming)

Gabriel Moss QC, 3-4 South Square

- Mystery of the Sphinx – COMI In The US

- Beyond the Sphinx – Is Chapter 15 The Sole Gateway
- Death of the Sphinx (First printed in volume 20, pp. 4, 56, and 157 respectively, of Insolvency Intelligence, published by Sweet & Maxwell)

Ron Dekoven, 3-4 South Square

- US Chapter 15 Application Refused (First printed in issue 5, volume 4 of International Corporate Rescue, published by Chase Cambria Publishing)

Look Chan Ho, Freshfields Bruckhaus Deringer

- Proving COMI: Seeking recognition under chapter 15 of the US Bankruptcy Code

More information on the seminar is available at the BIICL´s seminar website.

Rome I – Agreement Reached by EP and Council?

The EP's Committee on Legal Affairs (JURI) adopted in its meeting of 20 November 2007 a **Draft Legislative Resolution on the Rome I Proposal** on the law applicable to contractual obligations, on the basis of a **new set of 62 "final" compromise amendments** presented by the rapporteur, Ian Dumitrescu.

According to the Rome I page of Diana Wallis' website (who acts as an EP shadow rapporteur in the Rome I codecision procedure, after her successful work on Rome II Regulation), **the final amendments**, which modify a substantial part of the recitals and provisions of the Regulation, **have been drafted by the rapporteur following a series of informal trialogues with the Council Presidency and the Commission** (thus adopting a different approach from the one taken in the Rome II procedure, in which an agreement could be found by the institutions only in the last-resort Conciliation Committee).

The vote on the Draft Legislative Resolution at first reading by the Parliament's plenary session is scheduled on 29 November 2007. According to the Rome I OEIL page, the text will be then examined by the Council in its meeting of 6 December 2007: given the agreement reached in the trialogues, it is entirely possible that the text will gain at least political agreement in the Council, thus making the adoption of the act far more imminent than previously expected (see Council's document no. 15325/07 of 19 November 2007 – currently not accessible, whose title reads "Approval of the final compromise package with a view to a first reading agreement with the European Parliament").

Further information on the evolution of the codecision procedure will be posted as soon as it is available.

Bookshop Updated

The secure, Amazon-powered **CONFLICT OF LAWS .NET online bookshop** has been updated and expanded, and now provides details and purchase options for most private international law books (written in English) currently available.

Any revenue from it goes towards the cost of running the website, so you are actively supporting CONFLICT OF LAWS .NET by using this bookshop, **but** note that the amount that *you* pay **does not differ** from the amount you would pay on the Amazon website direct.

Any suggestions for improvement, or any books that you would like to see available (including your own), are very welcome – send me an email.

Lecture: Liability from Marine Pollution between Uniform Law and Choice of Law and Jurisdiction

On 27 November 2007 the International Max Planck Research School (IMPRS) for Maritime Affairs together with the International Tribunal for the Law of the Sea (ITLOS) will host, within their lecture series titled "The Hamburg Lectures on Maritime Affairs", an evening lecture by Prof. Sergio Carbone (Professor, University of Genoa) titled "Liability from marine pollution between uniform law and choice of law and jurisdiction". The program can be found here.

The Applicable Law in Cases Involving the Loi Badinter

Sarah Prager (*1 Chancery Lane*) has written a piece in the Journal of Personal Injury Law on "**The applicable law in cases involving the loi badinter: sections 11 and 12 of the Private International Law (Miscellaneous Provisions) Act 1995 reviewed**" (J.P.I. Law 2007, 4, 338-344). Here's the abstract:

> *Discusses, with reference to salient case law, questions over the applicability of UK law in foreign jurisdictions. Outlines the relevant legal framework for accidents abroad under the Private International Law (Miscellaneous Provisions) Act 1995 s.11 and s.12. Focuses on the Lincoln County Court decision in Prince v Prince concerning the issue of jurisdiction for two British nationals involved in a road traffic accident whilst in France, highlighting the reluctance of the courts to displace the presumption of jurisdiction contained in s.11.*

Available to *J.P.I. Law* subscribers.

Third Issue of 2007's Revue Critique de Droit International Privé

The latest issue of the French *Revue Critique de Droit International Privé* has been released. In addition to 9 comments of French and European cases, it contains two articles. The table of contents can be found here.

The first article is authored by Dr. A. Aldeeb Abu-Sahlieh, who teaches in Lausanne, Marseille and Palermo. It deals with Muslim Family and Inheritance Law in Swizterland (*Droit musulman de la famille et des successions en Suisse*). The English abstract reads:

> *The fundamental opposition between Coranic family law and the Swiss legal order concerns, on the one hand, the very conception of law, here the work of God, there the work of man, and on the other hand, the divisions of society, which on the one hand follow religious obedience, and on the other, territoriality or nationality. The resulting antagonisms are of daily and practical import, since they affect marriage, parent-child relationship or succession. They will find a solution only if, within the Arab world, sources of religious law are confined to the Coran, and indeed if social governance leaves room for reason, and, in the western world, if the concept of revelation reinvests its reason-liberating dynamic, and if there is a firm reaction to all violations of the principle of secularity and non-discrimination on the basis of race or religion.*

The second article is authored by Professor Hélène Chanteloup, who lectures at Amiens University. It addresses the issue of National Laws Being Taken into Account by EC Courts (*La prise en consideration du droit national par le juge communautaire. Contribution à la comparaison des méthodes et solutions du droit*

communautaire et du droit international privé). The English abstract reads:

> *Far from the difficulties raised by the question of the right and duty of national courts when foreign law is applicable, the question of the status of the national laws pleaded in European litigations seems to be sobed with coherence and a relative simplicity. Except the specific case of the arbitration clause (art. 238 CE), the national law cannot be applied by European judges. It is just taken into account like any other factual element of the situation. National law is treated as a question of fact. Therefore, it is not to be imputed to European judges and has to be proved by the party with evidence of all kinds. Furthermore, the European Court of Justice has always considered that this question of proof has to be solved in respect of the interests of the European law which contributes to the coherence and the stability of the procedural treatment of national law.*

Articles of the *Revue Critique* cannot be downloaded.