

Rome II and Small Claims Regulations published in the Official Journal

The Rome II Regulation (see the dedicated section of our site) and the Regulation establishing a European Small Claims Procedure have been published in the Official Journal of the European Union n. L 199 of 31 July 2007. The official references are the following:

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) (OJ n. L 199, p. 40 ff.): pursuant to its Articles 31 and 32, the Rome II Regulation will apply from 11 January 2009, to events giving rise to damage occurred after its entry into force (the twentieth day following its publication in the O.J., according to the general rules on the application in time of EC legislation).

Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure (OJ n. L 199, p. 1 ff.). The text of the Regulation is accompanied by four annexes, containing the standard forms to be used by the parties and the court in the procedure, as follows:

- Annex I: Form A – Claim form, to be filled in by the claimant (see Art. 4(1) of the Reg.)
- Annex II: Form B – Request by the Court or Tribunal to complete and/or rectify the claim form (see Art. 4(4) of the Reg.);
- Annex III: Form C – Answer form, containing information and guidelines for the defendant (see Art. 5(2) and (3) of the Reg.);
- Annex IV: Form D – Certificate concerning a judgment in the European Small Claims Procedure (to be filled by the Court/Tribunal: see Art. 20(2) of the Reg.).

According to its Art. 29, the ESCP Regulation will enter into force today (1 August 2007, the day following its publication in the O.J.), and will apply from 1 January 2009.

German Article: Costs of Free Choice of Law from an Economic Perspective

An interesting article written by *Giesela Rühl* has recently been published in the German legal journal *Rabels Zeitschrift* (71 *RabelsZ* 2007, 559 et seq.):


“Die Kosten der Rechtswahlfreiheit: Zur Anwendung ausländischen Rechts durch deutsche Gerichte”

Here's the English abstract:

Free choice of law has been the focus of the economic analysis of law for several years. However, most of the contributions have concentrated on one aspect of choice-of-law clauses only, namely their efficiency. In contrast, few authors have taken note of other economic problems that free choice of law might pose. One of these problems is the fact that choice-of-law clauses – at least if they call for application of foreign law – incur significant costs. After all, domestic courts will have to apply a law that they do not know and whose application, therefore, is more expensive than the application of domestic law. In economic terms, these additional costs can be classified as negative external effects. They may result in inefficiencies unless the parties – when making their choice consider and, thus, internalise the additional costs associated with the application of foreign law. Unfortunately, under current German law no such internalisation takes place: Courts have to determine the content of foreign law ex officio. And the parties neither have to support the courts in this endeavour nor to bear all the costs involved. This article, therefore, discusses several proposals for legal reform designed to provide the parties with an incentive to consider the additional costs when making their choice of law. More specifically, it discusses the economic advantages and disadvantages of adopting a lex fori approach, of requiring the parties to plead and proof foreign law and of increasing the court fees in cases where the parties have chosen a

foreign law. It comes to the conclusion that the last option complies best with economic and legal requirements and, therefore, suggests to change German law accordingly.

Owusu and Turner: The Shark in the Water?

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

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

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

Austrian Article on Rome II

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

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

Koziol and *Thiede* criticise the general rule provided in Art.5 of the Proposal (COM(2006) 83 final (now Art.4 of the Regulation)) for focusing solely on the interests of the injured party by designating the law of the country in which the damage arises or is likely to arise and not taking into account the interests of the liable party sufficiently.

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

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

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

Davor Babić has published an article on the choice-of-court and choice-of-law clauses in the cross-border contracts involving immoveables (“Izbor nadležnog suda i mjerodavnog prava u ugovorima o nekretninama s međunarodnim obilježjem”) in the July edition of the Croatian monthly journal *Pravo i porezi*, pp. 47-58.

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

Proceeds from the Croatian Arbitration and Conciliation Days Published

Perhaps not as fresh news as possible but still worth noting is the second most recent edition of the Croatian journal *Law in Economics*, vol 46, no. 2, which brings together some of the proceeds from the 14th Croatian Arbitration and Conciliation Days held on 30 November and 1 December 2006 in the Croatian

Chamber of Economy in Zagreb. The number of renewed foreign and Croatian legal experts and practitioners gathered at this annual meeting to present current developments in arbitrations of several legal systems and institutional rules, including Austrian, Croatian, Italian, Serbian and Swiss. The contributions published in the cited journal are as follows:

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

Nina Tepeš: *Activities and Practice of the Conciliation Centre of the Croatian Chamber of Economy*, pp. 19-26.

Mihajlo Dika: *Legal Position of Institutional and Ad Hoc Arbitration in Croatian Law De Lege Lata and De Lege Ferenda*, pp. 27-37.

Hrvoje Sikirić, *Zagreb Rules and the Arbitration Act in Practice of the Permanent Arbitration Court at the Croatian Chamber of Economy – Selected Issues*, pp. 38-70.

Miljenko A. Giunio, *Compétence de compétence – A Preliminary Decision or an Award?*, pp. 71-89.

Eduard Kunštek, *Authority of the ICSID Arbitration Court for Stay of Enforcement of an Award*, pp. 60-101.

Aleksandra Maganić, *Arbitrability in Non-Contentious Matters*, pp. 102-133.

Boris Stanić, *Arbitral Settlement of Disputes Arising Out of the Agreements on Association of the Attorneys-at-Law*, pp. 133-150.

Gašo Knežević, *New Serbian Law on Arbitration*, pp. 151-161.

Arsen Janevski/Toni Deskoski, *Law on International Arbitration in the Republic of Macedonia*, pp. 162-177.

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

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

In a recent decision, *Richman v Ben-Tovim* 2007 2 SA 283 (SCA); [2007] 2 All SA 234 (SCA), the Supreme Court of Appeal of South Africa decided that the mere physical presence of the defendant in the foreign jurisdiction at the time process was served is a sufficient basis for international jurisdiction in the context of the recognition and enforcement of foreign judgements sounding in money. (The judgement under neutral citation [2006] SCA 148 (RSA) may be downloaded from www.supremecourtofappeal.gov.za. The decision of the court *a quo* was reported as *Richman v Ben-Tovim* 2006 2 SA 591 (C) (*per* Van Zyl J).)

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

The French Like It Delocalized: Lex Non Facit Arbitrum.

Arbitral awards remain delocalized under the French law of international arbitration. They can be recognised and enforced in France irrespective of the decision of the court of the seat of the arbitration to set them aside. F.A. Mann, and many in England are of the opinion that arbitration only exists if the seat of the arbitration allows it. *Lex facit arbitrum*. The French disagree and believe that arbitration is a private activity, which can be considered favorably or unfavorably, but certainly does not need to be empowered by any state *ex ante*. Thus, if the court of the seat nullifies the award, this does not mean that it cannot be recognised in another legal order. Would any court think of nullifying a road accident?

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

The dispute had arisen between French company Est Epices and Indonesian company PT Putrabali Adyamulia. Putrabali had sold white pepper to Est Epices, but the goods were lost during the carriage by sea. Est Epices refused to pay, and Putrabali initiated arbitral proceedings in London under the aegis of the International General Produce Association. In 2001, an arbitral panel found that Est Epices was entitled not to pay the price. Putrabali challenged the award before the English High Court, appealing on a point of law as the 1996 Arbitration

Act allowed it to. The challenged was admitted and the award partially set aside. A second award was made in 2003, and found in favor of Putrabali, ordering Est Epices to pay Euro 163,086.

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

At the same time, Putrabali had sought the recognition of the second 2003 award. In November 2005, the Paris Court of Appeal held that it could not be declared enforceable. In a second judgment of June 29, 2007, the *Cour de cassation* confirmed. It held that the recognition of the first award precluded the recognition of the second, as the first had *res judicata*. This was already held 13 years ago in *Hilmarton*.

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

German Annotations on “Color Drack”

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

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

Burghard Piltz (Gütersloh), NJW 2007, 1801.

See with regard to the Advocate General’s opinion and the judgment also our

older posts which can be found [here](#) and [here](#).

German Article on the Cross-Border Enforcement of English Freezing Injunctions

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

An English abstract has kindly been provided by the author:

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

important (see guidelines 4 and 5) which would create a practical need for comparative studies in the field of enforcement.

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

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

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

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

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

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

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

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

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