German Article on Rome II

On 11 July 2007, Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations (Rome II) has been adopted.

Stefan Leible and *Matthias Lehmann* (both Bayreuth) have now written an article on Rome II which has been published in the German legal journal *„Recht der Internationalen Wirtschaft*" (RIW 2007, 721 et seq.):

"Die neue EG-Verordnung über das auf außervertragliche Schuldverhältnisse anzuwendende Recht ("Rom II")"

In their article, *Leible* and *Lehmann* give an overview of the scope of application and functioning of the new Regulation and comment on the most important rules by means of several examples.

In principle, the authors welcome Rome II for establishing a uniform measure on the law applicable to non-contractual obligations and creating more legal certainty. Nevertheless, it is criticised that non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation are excluded from the scope of application according to Art. 1 (2) (g) Rome II. However, according to Art. 30 (2) Rome II, the Commission shall submit a study on the situation in the field of the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality no later than 31 December 2008. Thus, there is still an option that Community rules on the law applicable to non-contractual obligations arising out of violations of rights relating to personality and in particular press offences will be adopted in the future.

See also our previous posts on the adoption of Rome II and on the publication in the Official Journal.

Cross-border Insolvency in New Zealand

An article in the latest *Insolvency Law Journal* addresses reforms to cross-border insolvency in New Zealand, including recent legislation on that subject: David Brown, 'Law Reform in New Zealand: Towards a Trans-Tasman Insolvency Law?' (2007) 15 *Insolvency Law Journal* 148.

The *Insolvency (Cross-border) Act 2006* (NZ) can be viewed here.

The Insolvency Law Journal is available online to Thomson/Lawbook Online subscribers.

Freeport v Arnoldsson: Art 6(1) of the Brussels I Regulation

(*This post was written by Jacco Bomhoff of Leiden University on his Comparative Law Blog, and is reproduced here with his permission*.)

It's official; dozens of private international law commentators, including such luminaries as professors Briggs (UK), Gaudemet-Tallon (France) and Geimer (Germany), have for years completely misread the ECJ. At least, that is what the Court's Third Chamber suggests in last week's ruling in Case C-98/06, *Freeport/Arnoldsson*. According to the new judgment, when the Court said, in its classic Brussels Convention decision in *Réunion Européenne and others* that:

> *two claims in one action for compensation, directed against different defendants and based in one instance on contractual liability and in the other on liability in tort or delict cannot be regarded as connected,*

it didn't actually mean that,

> *two claims in one action for compensation, directed against different defendants and based in one instance on contractual liability and in the other on liability in tort or delict cannot be regarded as connected.*

Right. Of course. So, what is really going on?

The heart of the controversy is a single paragraph in the ECJ's 1998 judgment *Réunion Européenne and others*. Although the questions referred to the ECJ by the French Cour de cassation in that case did, in fact, only concern articles 5(1) and 5(3), the ECJ, almost in passing, offered a sweeping statement on art. 6(1) of the (then) Brussels Convention on jurisdiction over multiple defendants at the domicile of one of them. The Cour de cassation's reference did not touch upon art. 6(1), probably because the court was keenly aware of the fact that as the relevant proceedings were not brought in the court of the domicile of one of the defendants, that article could never apply. The Cour de cassation did, however, want to ask the ECJ more generally to rethink its narrow conception of when a single court could take jurisdiction over several related claims, in particular as French private international law allowed joinder of claims in many more cases. 'We know', the French court seems to say, 'of the strict Convention requirements for jurisdiction over multiple defendants when cases are merely related, but could you allow an exception for cases where, quote: "the dispute is *indivisible*, rather than merely displaying *a connection*?"

The ECJ began by pithily remarking that "the Convention does not use the term `indivisible' in relation to disputes but only the term `related'" (par. 38). The Court went on to refer to art. 6(1) as one of the articles that allow defendants to be sued in the courts of another Contracting state than the one in which they are domiciled. This article could not apply because the proceedings in question had not been brought before the courts for the place where one of the defendants was domiciled (par. 44-45). The acknowledged inapplicability of art. 6(1), however, did not stand in the way of the following general statement on the provision:

> *"48 (…) the Court held in Kalfelis that, for Article 6(1) of the Convention to apply there must exist between the various actions brought by the same plaintiff against different defendants a connection of such a kind that it is expedient to determine the actions together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings.*

> *49 In that connection, the Court also held in Kalfelis that a court which has jurisdiction under Article 5(3) of the Convention over an action in so far as it is based on tort or delict does not have jurisdiction over that action in so far as it is not so based.*
>
> ***50 It follows that two claims in one action for compensation, directed against different defendants and based in one instance on contractual liability and in the other on liability in tort or delict cannot be regarded as connected**."*

The ruling in *Réunion* was condemned almost immediately and virtually universally. Briggs and Rees labeled the decision as "extraordinary and, one is driven to conclude, simply wrong" (*Civil Jurisdiction and Judgments* 2002, 175) and Gaudemet-Tallon called the Court's conclusion "*trop catégorique*" (*Rev. crit. Dr. int. priv.* 1999, 339). Courts in different Member States took divergent approaches to the unwelcome statement in *Réunion*. The English Court of Appeal, for example, in *Brian Watson v. First Choice Holidays* (25 june 2001, [2002] *I.L.Pr.* 1) said:

> *"It seems to us that, although paragraph 50 of Réunion Européenne is undoubtedly clear, the full implications of the position there set out may possibly not have been considered by the Court".*

The Court of Appeal did ultimately refer a question on *Réunion*'s paragraph 50 to the ECJ, but that reference was withdrawn. In other cases, courts took creative courses of action such as characterizing claims according to national law (rather than according to autonomous European standards, as usually required) (see English High Court, *Andrew Weir Shipping v. Wartsila UK and Another*, 11 june 2004, [2004] 2 *Lloyd's Rep.* 377). Other courts, such as the French *Cour de cassation* ignored Réunion completely (*Société Kalenborn Kalprotect v. Société Vicat and others,*). During all of this, only the Irish High Court, as far as I'm aware, at one point explicitly indicated that there was no suggestion that the ECJ in *Réunion* had had the "radical intention" of laying down a broad principle (*Daly v. Irish Group Travel*, 16 May 2003, [2003] *I.L.Pr.* 38). And now we have *Freeport/Arnoldsson*:

> *"43 As the Commission has rightly pointed out, that judgment [Réunion] has a*

factual and legal context different from that of the dispute in the present main proceedings. Firstly, it was the application of Article 5(1) and (3) of the Brussels Convention which was at issue in that judgment and not that of Article 6(1) of the Convention.

44 Secondly, that judgment, unlike the present case, concerned overlapping special jurisdiction based on Article 5(3) of the Brussels Convention to hear an action in tort or delict and special jurisdiction to hear an action based in contract, on the ground that there was a connection between the two actions. In other words, the judgment in Réunion Européenne and Others relates to an action brought before a court in a Member State where none of the defendants to the main proceedings was domiciled, whereas in the present case the action was brought, in application of Article 6(1) of Regulation No 44/2001, before the court for the place where one of the defendants in the main proceedings has its head office.

45 It was in the context of Article 5(3) of the Brussels Convention that the Court of Justice was able to conclude that two claims in one action, directed against different defendants and based in one instance on contractual liability and in the other on liability in tort or delict cannot be regarded as connected (Réunion Européenne and Others, paragraph 50).

47 Having regard to the foregoing considerations, the answer to the first question must be that Article 6(1) of Regulation No 44/2001 is to be interpreted as meaning that the fact that claims brought against a number of defendants have different legal bases does not preclude application of that provision."

I can only say, with all due respect: if you say so. Because this reading of *Réunion* seems to me, again with all due respect, fairly implausible. As to the substance, the clarification/reversal of the infamous paragraph 50 is, on the whole, to be welcomed. But *Freeport/Arnoldsson* does create new questions and leaves meany old ones still unanswered. If the contract/delict divide is abandoned (at least as a rigid rule), it would seem to follow that national courts will have significantly more leeway when assessing possible jurisdiction over multiple defendants, based on art. 6(1). This discretion seems all the more considerable given that the Court, elsewhere in its new judgment, rejects a basic notion of 'abuse'. This would seem to mean that a claim against a defendant potentially liable for 99% of all damages

at the domicile of a co-defendant potentially liable for the remaining 1% will be allowed under the Brussels Regulation. It seems likely that the Court will, over the coming years, have to revisit this vexed issue.

Contractual Choice of Law in Contracts of Adhesion and Party Autonomy

Mo Zhang (*Temple University*) has posted "**Contractual Choice of Law in Contracts of Adhesion and Party Autonomy**" on SSRN; it originally appeared in the *Akron Law Review*, Vol. 41, 2007.

> *Contractual choice of Law in contracts of adhesion is an issue that poses great challenge to the conflict of law theory. The issue is also practically important because the increasing use of form contracts in the traditional "paper world", and particularly in the Internet based business transactions. In the US, the enforceability of contracts of adhesion remains unsettled and the choice of law question in the contracts as such is left unanswered. The article analyzes the nature of contracts of adhesion as opposed to the party autonomy principle in contractual choice of law, and argues that contracts of adhesion do not conform to the basic notion of party autonomy. The article suggests that the choice of law clause in contracts of adhesion shall not take effect unless adherents meaningfully agree. The article proposes a "second chance" approach for contractual choice of law in contracts of adhesion. The approach is intended to set a general rule that a choice of law clause in an adhesive contract shall not be deemed enforceable prior to affirmation of the true assent of adherent.*

Download the article, free of charge, from **here**.

Alberta Court Analyzes Public Policy Defence

In *Bad Ass Coffee Company of Hawaii Inc. v. Bad Ass Enterprises Inc.*, [2007] A.J. No. 1080 (Q.B.) (QL), available here, an Alberta Master was asked to recognize and enforce a Utah judgment. The Master first analyzed the issue of whether the Utah court had jurisdiction, holding that the defendants had submitted to its jurisdiction by making arguments on the merits of the dispute. The Master also, correctly in my view, held that in light of the submission, there was no need for the Canadian court to consider whether there was a real and substantial connection between Utah and the dispute: the submission itself was conclusive on the jurisdiction issue.

Most of the decision deals with the defendants' argument that the Utah judgment was contrary to the public policy of Alberta, particularly that expressed in its legislation about franchise agreements. The Alberta legislation provided, in part, that the law of Alberta applied to franchise agreements. The agreement between the parties had been expressly governed by the law of Utah, and the court in Utah had used that law to resolve the dispute.

The Master, after a lengthy analysis, concluded that the defence of public policy must remain narrow in scope. In doing so the Master relied on the Supreme Court of Canada's decision in *Beals v. Saldanha*. As a result, the Master concluded that the application of Utah law to the agreement, while a violation of the local Alberta statute, was not contrary to the "fundamental morality" of the forum. Principles of international comity meant that the courts of Utah had to be given scope to apply Utah law to the contract.

Bad Ass Coffee Company of Hawaii Inc. is headquartered in Salt Lake City, Utah. For more, follow this link. The company's name has to do with hard-working donkeys.

EP on the Green Paper on the Attachment of Bank Accounts

The European Parliament issued 08/10/2007 its tabled non-legislative report on the Green Paper on improving the efficiency of the enforcement of judgments in the European Union: the attachment of bank accounts (2007/2026(INI)). The report can be read here and here. See our previous posts here, here and here.

Assignments and Choice of Law in Australia

Assignments of choses in action can raise difficult choice of law issues, and readers may be interested in two decisions of the Federal Court of Australia that shed some light on this area.

In *Salfinger v Niugini Mining (Australia) Pty Ltd (No. 3)* [2007] FCA 1532 (8 October 2007), Heerey J considered the validity of a purported assignment of causes of action arising under Australian law pursuant to deeds of assignment governed by Canadian law. His Honour held that:

> *"Whether the causes of action in tort or equity are assignable is to be determined by the law under which the right or cause of action was created … In consequence, although both assignments in the present case included 'governing law' clauses, and were purportedly entered into in Canada, those clauses are not relevant in deciding whether the causes of action in question are assignable. That question is to be decided by the law of the place where the causes of action arose. As the causes of action relied on arose in Australia, Australian law is applicable."*

There is an interesting parallel between the recent decision and the earlier Full Federal Court case of *Pacific Brands Sport Leisure Pty Ltd v Underworks Pty Ltd* (2006) 149 FCR 395; [2006] FCAFC 40, which concerned the assignment of contractual rights (not causes of action). There, the court was content to proceed on the assumption (without needing to decide) that such assignments are to be governed by the proper law of the underlying contract, rather than the proper law of the contract of assignment.

Saving the Hague Choice of Court Convention

William J Woodward Jr (Temple) has posted "Saving the Hague Choice of Court Convention" on SSRN. It is forthcoming in the *University of Pennsylvania Journal of International Law*, Vol. 29, 2008. Here's the abstract:

> *Developing an international regime that would require some level of international recognition or enforcement of the judgments of courts of other countries has been a goal for international lawyers, particularly those in the United States, for many years. Concluded in 2005, the Hague Choice of Court Convention may not be the gold ring, but it promises to make substantial improvements in international judicial dispute resolution and thereby add immensely to international economic well-being. Through the Convention, States will agree to recognize or enforce the judgments of other State parties, when those judgments follow valid choice of court agreements defined (and also regulated) in the treaty. Since most international trade begins with a contract, and since most of those contracts already contain dispute resolution provisions, the Convention may have delivered a great advance in this area. But it is obvious from the nature of the Convention that its success depends critically on widespread international acceptance of the Convention; if only a few States join it, the international system will not have become much better than it is now.*

Unfortunately, there have been no ratifications in more than two years since the Convention was concluded and it seems in danger of dying a slow death for lack of interest. Leadership by the United States, a primary advocate for an international accord, may be in order.

The problem is that the Convention, as drafted, will not find uniform, reliable enforcement within the United States. In two particular kinds of contracts covered by the Convention, franchise contracts and what I call mass market contracts, some choice of forum provisions are difficult or impossible to enforce in several U.S. states under current law. Some of this law has developed very quickly. The state of domestic law presents a compliance problem for the United States in the first instance if it joins the Convention, but that problem may be dwarfed by the very practical problem of leading other countries to join the Convention thereby ensuring its success. This will be very difficult if other States perceive the United States, owing to these developments, and the diversity in its state commercial law, making less of a commitment under the Convention than other States will make if they join the Convention.

After developing the state of the case law in the United States that will cause the problems, this article considers alternative solutions, concluding that the Convention itself supplies the best approach, one that the United States should embrace in its efforts to lead other countries in improving the international dispute resolution system.

Download the article, free of charge, from **here**.

Recognition and Res Judicata of US Class Action Judgments in

European Legal Systems

Andrea Pinna (*Erasmus University Rotterdam*) has posted "**Recognition and Res Judicata of U.S. Class Action Judgments in European Legal Systems**" on SSRN. The abstract reads:

> *Class actions are still a specificity of the U.S. law and allow individual plaintiffs to represent a group of others in a similar situation in a claim against a same defendant. Recently, transnational class actions, either against a foreign defendant or including foreign class members, have become popular. The author addresses the issue of the possibility of bringing such claims involving parties that are resident of a European country.*
>
> *United States that are traditionally known for the extraterritorial application of their laws and by easily retaining jurisdiction of their courts try to coordinate the legal systems involved by being concerned with the possibility of recognition in a foreign country of class action judgments. Therefore, the original question of the recognition and the Res Judicata effect of these judgments in European countries that do not know similar collective judicial procedures needs to be addressed.*

Download the article, for free, from **here**.

Same Sex Unions Within the Current Regulatory Framework of Serbian Private International Law

Gaso Knezevic and Vladimir Pavic (both at the University of Belgrade) have posted "**Same-Sex Unions Within the Current Regulatory Framework of Serbian Private International Law**" on SSRN (original citation: Y*ugoslav Law Year*, Vol. 3, 2006). Here's the abstract:

Recent introduction of fully-fledged homosexual marriages in certain countries like the Netherlands and Belgium have opened a range of issues which appear difficult to solve. This difficulty is, at least in case of Serbian law, compounded by inadequacy of existing regulation. While it is obvious that it would be impossible to, say, arrange a homosexual wedding in Serbia, grounding such contention in some clear-cut Serbian legislation appears to be a much harder task. This is due to the fact that relevant provisions of Serbian laws appear unclear or contradicting when they have to deal with homosexual marriages. While one should not doubt that Serbian legal system, as is, will reject homosexual marriages, it is impossible not to note the alarming level of legal insecurity surrounding relevant regulation. Unlikely explanations often appear to be the only way out, while technicalities are often more important than substance. While some of the problems have been solved through adoption of the new Serbian Constitution at the end of 2006, other can only be addressed through amendment of the PIL code.

Download the article from **here**.