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)

German Article on Rome II Regulation

Thomas Thiede and *Markus Kellner* (both Vienna) have written an article on **Forum Shopping between Rome II and the Hague Convention on the Law applicable to Traffic Accidents** in the legal journal Versicherungsrecht (VersR 2007, 1624 et seq.): *"'Forum shopping' zwischen dem Haager Übereinkommen über das auf Verkehrsunfälle anzuwendende Recht und der Rom-II-Verordnung".*

The authors argue that Article 28 (1) Rome II, which provides as a general rule

that the Regulation shall not prejudice the application of international conventions to which one or more Member States are parties and which lay down conflict-of-law rules relating to non-contractual obligations, leads to the precedence of the Hague Convention on the law applicable to traffic accidents since the exception clause of Article 28 (2) Rome II is – due to the fact that also Non-Member States are parties to the Hague Convention – not applicable.

It is submitted that the subsidiarity of the Rome II Regulation on the one side and the fact that the Hague Convention has not been ratified by some Member States on the other side entails the possibility of forum shopping. Thus, the authors argue, it would have been preferable to give priority to the Rome II Regulation over all Hague Conventions in order to ascertain – at least for intra-EU cases – the applicability of only one law.

BIICL event: 11th annual review of the Arbitration Act 1996 – Is English law really better?

The British Institute of International and Comparative Law (BIICL) organizes on Monday 21 January 2007, 09.00 -18.00 (at the Honourable Society of Lincoln's Inn, Lincoln's Inn, London, WC2A 3TL) the **11th annual review of the Arbitration Act 1996 titled "Is English law really better?"** The speakers will review the English Arbitration Act 1996. The 2007 annual review proposes a comparative look at developments in England as the courts now approach 1,000 decided cases since entry into force of the Act. This year's review takes place against the background of claims by the Law Society (England and Wales: The Jurisdiction of Choice, October 2007) that London as an arbitration venue and English law are superior to civil law jurisdictions in terms of quality of legal norms, certainty, predictability, arbitration friendliness, lawyers and infrastructure. Are the Law Society's claims legitimate or merely an expression of legal ethnocentrism by practitioners unfamiliar with systems of law other than

their own? The special after dinner speaker is M. Jean-Pierre Ancel Président de Chambre honoraire de la Cour de cassation, France who will give a speech titled “Les principes confirmés et les nouvelles avancées dans l’arbitrage international”. For a list of the speakers, have a look at the website.

Flying to California to Bypass the French Ban on Surrogacy – Update

A few weeks ago, I wrote a post on the story of a French couple who bypassed the French ban on surrogacy by resorting to a Californian surrogate mother. When the couple came back to France, French prosecutors took all available legal steps to deny them recognition of their parental status in France.

I am grateful to Kees Saarloos for forwarding me the judgment of the Paris court of appeal which ruled on the conflict issue on October 25, 2007. The judgment, however, is quite disappointing. It seems that French prosecutors were unable to analyze properly the conflict issues and thus to present a robust argumentation against the recognition of the parental status acquired in the U.S. This enabled the French court to reach a decision without truly addressing the issues. The judgment identified a few of them, but then stressed that they were not put forward by the plaintiff (i.e. the prosecutors), and that it did not need address them.

The judgment is more useful for the background it gives on what happened in California. The California Supreme Court had conferred the parental status to the French couple before the actual birth of the children, and ordered both the hospital in San Diego and the Californian Department of Public Health to mention the couple as the only parents on the hospital registry and the birth certificate. The couple could thus have sought recognition of a variety of foreign public acts. One was the Californian judgment, another was the birth certificate.

In a nutshell, the actual decision of the court can be summarized as follows:

> *As the plaintiffs have not challenged the recognition of either of these acts in France, their challenge of the transcription of the parental status on the French registries is inadmissible. The foreign acts govern.*
>
> *The plaintiffs did not challenge the accuracy of the content of the transcription, but only the transcription itself. The issue of whether the couple was actually the parents of the children was therefore not before the court.*
>
> *Finally, and in any case, failure to provide the couple with a parental status would result in the children having no parents legally speaking, which would not comport with the superior interest of the children.*

One issue which is addressed (very) implicitly by the court is whether the dispute ought to have been decided by application of a law or of a decision. In other words, the court could have ruled that the issue at stake was one of choice of law. It would have then applied its choice of law rule in order to determine the law governing parenthood. Indeed, this was argued by the defendants. Instead, the court finds that the issue is one of recognition. The foreign acts govern, because they were recognised. Arguably, this could have been different if the accuracy of the content of the transcription had been challenged, and this is maybe what the court rules implicitly by noting that there was no such challenge.

Finally, the central issues of whether the foreign acts were contrary to French public policy and whether there had been a *fraude à la loi* are not addressed (on these ground for denial of recognition, see my previous post).

UPDATE: The French text of the decision can be found here (thanks to Esurnir). Various comments of the decision can be found on French blogs (see here and here) Finally, a personal reaction of the father of the children can be found here (in French). The couple has also created its own website.