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.

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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.

CLIP conference: Intellectual Property and Private International Law

As we announced in the last posting concerning the CLIP group, they are preparing an international conference on issues arising where in the intersection of intellectual property law and private international law. The conference program includes the following topics and speakers:

Are there any Common European Principles of a Private International Law with regard
to Intellectual Property?
Prof. Dr. Annette Kur, Max Planck Institute for Intellectual Property Law, Munich

The ALI Principles Governing Jurisdiction, Choice of Law and Judgments in Transnational Intellectual Property Disputes
Prof. Dr. Rochelle C. Dreyfuss, New York University

"Contracts Relating to Intellectual or Industrial Property Rights" under the Rome I
Proposal
Prof. Dr. Matthias Leistner, University of Bonn

The Law Applicable to Non-Contractual Obligations Arising from an Infringement of
Registered IP Rights
Prof. Dr. Peter Mankowski, University of Hamburg

The Law Applicable to Infringements of Non-Registered IP Rights
Prof. Dr. Haimo Schack, University of Kiel

Extraterritorial Application of IP Law – An American View
Prof. Dr. Graeme B. Dinwoodie, Chicago-Kent College of Law

The Private International Law of IP and of Unfair Commercial Practices: Coherence or
Divergence?
Prof. Dr. Pedro Miguel de Asensio, University Complutense of Madrid

Cross Border IP Litigation – Still an Issue under the Brussels I Regulation?
Prof. Dr. Paul Torremans, University of Nottingham/University of Ghent

A Spider without a Web? Multiple Defendants in IP Litigation
Prof. Dr. Marcus Norrgård, Swedish School of Economics and Business Administration, Helsinki

The Future of Centralised Patent Litigation in Europe – Between EPLA and the Community Patent Regulation
Dr. Stefan Luginbühl, European Patent Office

Jurisdiction in Cases Concerning IP Infringements on the Internet
Dr. Axel Metzger, Max-Planck Institute for Comparative and International Private Law, Hamburg

The opening speach on behalf of the DFG Graduate School n. 1148 "Intellectual Property and the Public Domain", University of Bayreuth belongs to Prof. Dr. Diethelm Klippel, and the introduction into the conference has been entrusted to Prof. Dr. Stefan Leible and Prof. Dr. Ansgar Ohly of the University of Bayreuth. The conference will take place **in Bayreuth, Germany on 4 and 5 April 2008**.

The detailed program of the conference can be downloaded here.

Article: The Liberalization of the French Law of Foreign Judgments

An interesting article commenting some significant changes in the French rules on recognition of foreign judgments, as established by recent case law of the French *Cour de Cassation*, has been published in the latest issue of the

International and Comparative Law Quarterly (no. 4/2007: see our post here).

The note has been written by *Gilles Cuniberti* (University of Paris Val-de-Marne), editor of conflictoflaws.net for France, who has extensively reported on these landmark judgments for our site (see his posts on the *Prieur, Avianca* and *Fountaine Pajot* cases).

An abstract of the article ("The Liberalization of the French Law of Foreign Judgments", 56 INT'L & COMP. L. Q. 931 (2007)) has been kindly provided by the author:

> *The French highest court for private matters (the Cour de Cassation) has significantly liberalized the French law of foreign judgments between 2006 and 2007. In Prieur, it overruled a century-old precedent which had interpreted Article 15 of the Civil Code as preventing the recognition of foreign judgments when the defendant was a French citizen. In Avianca, it partly overruled a 45-year-old precedent which prohibited the recognition of foreign judgments which had not applied the law applicable pursuant to the French choice-of-law rule.*
>
> *The note presents this evolution and discusses its implications.*

The full article is available for download to *ICLQ* and *Westlaw* subscribers. Highly recommended.

The text of the judgments of the Cour de Cassation is available at the following links: Prieur, Avianca, Fountaine Pajot.

Fourth Issue of 2007's International and Comparative

Law Quarterly

The fourth issue 2007 of the ICLQ (Volume 56, Number 4, October 2007) has been recently published. The full TOC is available here. Contents dealing with PIL include:

- *TD Grant*, International Arbitration and English Courts:

> *The Court of Appeal, Civil Division, Longmore LJ, on 24 January 2007 handed down a decision in Fiona Trust v Privalov which clarifies the relation between sections 9 and 72 of the Arbitration Act 1996; affirms, again, in strong terms the separability (or severability) of an arbitration clause from the contract in which it is included; and, apparently for the first time in English courts, establishes that allegations of bribery may be subject to the jurisdiction of an arbitrator. The decision therefore holds interest in relation to the enforcement in the United Kingdom of agreements to arbitrate and, more generally, supports the position that arbitration has a role to play in international efforts to combat corruption.*

- *Gilles Cuniberti*, The Liberalization of the French Law of Foreign Judgments (see our dedicated post here);
- *Andrea Schulz*, The Accession of the European Community to the Hague Conference on Private International Law.

The articles are available for download to ICLQ and Westlaw subscribers.