Private International Law in Africa: Past, Present and Future

Richard Oppong (*Lancaster Law School*) has written an article on "**Private International Law in Africa: Past, Present and Future**" in the latest issue of the *American Journal of Comparative Law* ((2007) 55 AJCL 677-719.) Here's the abstract:

> *The development of private international law has stagnated in Africa for some time now. This is reflected in the neglected and undeveloped state of the subject, and the near absence of Africa in international processes, academic forums, writings, and institutions that have significance for the subject. This article explores the present and future state of the subject in Africa by situating it in a historical context. It challenges the often unarticulated assumption of writers on private international law in Africa that the subject and issues it addresses came to Africa only after the advent of colonization. It suggests that although the specific rules may be difficult to ascertain, conflict of laws problems existed in pre-colonial Africa and were, consistent with current theories on pre-modern societies, addressed by a mixture of practices and mechanisms that tended towards conflicts avoidance and lex forism. It notes that during the colonial period the subject developed without any clear theoretical underpinnings, was deployed to fulfil narrow political and commercial goals, and was largely insulated from international developments. The article argues that a new dawn is rising in which the subject will occupy a prominent place with regard to many issues in Africa. It examines how an emerging academic interest in the subject, current economic integration initiatives, harmonization of laws, drive to promote trade and investment, constitutionalism and human rights, and other developments will impact private international law in Africa.*

Available to *AJCL* subscribers.

German Article: The Law Applicable to Voluntary Agency in a Comparative Perspective

Simon Schwarz (Hamburg) has published a comprehensive article on **"The Law Applicable to Voluntary Agency in a Comparative Perspective"** (*"Das Internationale Stellvertretungsrecht im Spiegel nationaler und supranationaler Kodifikationen"*) in the latest issue of the "Rabels Zeitschrift für ausländisches und internationales Privatrecht" (RabelsZ 71 (2007) pp. 729-801).

Here is the English summary:

Questions relating to an agent's authority represent a basic problem of contract law and are of considerable practical importance in international market transactions. The article analyses which law should govern the powers of an agent to bind his principal vis-à-vis a third party. To this end, the article examines, systemises, and evaluates the pertinent solutions adopted in more than twenty jurisdictions as well as in the European Commission's Proposal for a Rome I-Regulation of December 2005. The findings may be summarised as follows:

1. Due to the characteristic triangular relationship of the agency situation there is a clear need for a separate conflicts rule dealing with the agent's authority.

2. The agent's place of business and the place where the agent acted represent the most commonly accepted and best founded connecting factors in this respect while the place of the habitual residence of the agent should not be taken into account. As to the question which law should prevail if the agent actually does not act in the country of his business establishment, the solutions differ considerably among the various legal systems. Basically, applying the law of the place of business of a professional agent constitutes a sound and sensible solution which particularly meets the needs of international trade. Therefore, this connecting factor should generally take precedence over the lex loci actus provided that the agent's place of business was actually foreseeable to the third party.

3. Most of the legal systems recognise party autonomy with regard to the law governing the agent's authority, which appears to be a particularly reasonable concept. As to its implementation, however, there are some variations in detail. Both as a matter of principle and of business practice the most appropriate approach seems to be to allow the principal to designate the law applicable to the agent's powers unilaterally, i.e., without the consent of the agent or the third party, provided that this designation is in writing and is foreseeable to the third party. Since the ambit of the law chosen by the principal also extends the possible liability of the agent as falsus procurator the choice must be foreseeable to the agent as well.

4. The scope of the conflict rule on agency should be designed comprehensively rather than restrictively in order to avoid difficult problems of characterisation. Hence, the rule should not merely adjudicate the existence and the extend of the agent's actual or apparent authority but should encompass the legal consequences of the exercise of the agent's powers with regard the principal/third party relation as well as the agent/third party relation, including the liability of the falsus procurator and the effects of an undisclosed agency.

Flying to California to Bypass the French Ban on Surrogacy

You are a French couple and you cannot have a baby? One option is to fly to San Diego and to find a surrogate mother. Now, you should really want it, because 1) California is almost on the other side of the world, 2) it can get pretty warm out there, especially when half of the state is burning and 3) French authorities will give you a really hard time when you will come back.

The French press reports this week-end on how French authorities have been doing everything they could to prevent a French couple who resorted to a Californian surrogate mother from gaining recognition in France of their parental status. The Paris Court of appeal has just ruled in their favour, but I could not see

the decision. The article of *Liberation* can be found here (in French).

Californian dream

Meet Dominique and Sylvie. In 1998, they learned that they could not have a baby, as Sylvie discovered she had no uterus. They did not want to adopt, but knew that surrogacy was legal in California (*Liberation* reports that they understood that it was even viewed with favor). They flew there, found a francophile surrogate mother, Mary. Eventually, two girls were born on October 25, 2000. Dominique and Sylvie say that their experience was great. Californian authorities delivered a birth certificate providing that they were the parents. Time to go back home.

Problems began on American soil. Dominique and Sylvie sought to establish a French passport for the children. At the French consulate, they were told that it would not be easy. Several comparable requests were on hold. A French officer told them off the record that the best was probably to get a U.S. passport. They got one easily, and "with big smiles" (i.e. the Americans were happy to deliver the passport).

Welcome back

But that was only the beginning. French consular authorities had liaised with French prosecutors. Upon arrival in France, the couple was investigated by the French police, who searched their home, their offices, even her doctor's office. In 2001, they were charged with a variety of French criminal offences, including attempt to fraud civil registries (because they wanted to have the children registered in France as theirs, i.e. have the American birth certificate recognized in France) and facilitating the dealing of children between a parent willing to adopt and a parent willing to abandon his/her child. In 2004, a French investigating judge dismissed the charges on the ground that French criminal law did not apply to acts which took place abroad, in a jurisdiction where they were legal.

In the meantime, prosecutors had also initiated civil proceedings. The point was to set aside the transcription on the French registries of the parental relationship, and get a judicial declaration that Dominique and Sylvie were not the parents of the children. The Paris court of appeal has just dismissed the proceedings a few days ago. Although I could not read the decision, I understand that it rules that

the children should be considered for all purposes as the daughters of the couple.

Recognition of foreign birth certificates

From the perspective of the conflict of laws, the case raises the very interesting issue of the recognition of foreign birth certificates. These are typically not judicial decisions, and I guess that Californian ones are not either. The issue is therefore whether to apply the law of foreign judgments to them, or at least similar rules. Under French law, the answer is clearly that you should apply similar rules. However, there are very few precedents, and French writers do not agree on the requirements that foreign public acts ought to meet to be recognized in France. Yet, most of them would agree on the three following propositions:

1) the foreign public act may not be reviewed on the merits,

2) however, it should not be contrary to public policy (i.e. its solution should not be shocking from a French perspective),

3) there should be no *fraude à la loi* (i.e. it should not have been obtained for the sole purpose of avoiding the application of French law).

In the present case, two arguments could be made against the recognition of the Californian certificate. First, even though the certificate was not to be reviewed on the merits, it could have been argued that it was contrary to French public policy. The issue here was how badly surrogacy is perceived in France. Is it only a remarkable foreign practice, or is it a practice which is repugnant to the French society? The story of Dominique and Sylvie made the front page of *Liberation*, with the following headline: *Ca vient* ("It is coming"). The French law prohibiting surrogacy dates back to 1994, but is meant to be revised in 2009, and it is *Liberation*'s hope that the ban will end then (See the editorial here). It may be, then, that the French society has reached the point where, although it is not a legal practice yet, it is not anymore contrary to French public policy.

However, the second argument which could be made was much stronger. It seems that the French couple had indeed flown to San Diego for the sole purpose of avoiding the French ban. The practice remains illegal in France. Going abroad for no other reason than obtaining the application of another law is a *fraude à la loi*. It will be interesting to see how the court responded to that argument, if the

argument was put forward at all.

New Lugano Convention Signed

According to a statement by the Portuguese Presidency, and a press release by the European Commission (DG Freedom, Security and Justice), **the new Lugano Convention** on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters **was signed by the EC, Denmark and the three EFTA States** which are party to the old Lugano Convention (Switzerland, Norway and Iceland) **in a ceremony held on 30 October 2007 in Lugano**. The text was signed on behalf of the European Community by *Alberto Costa*, Portuguese Minister of Justice.

On the negotiating process of the convention, and the Council's decision on its signing on behalf of the Community, see our previous posts here and here. The text of the new convention is attached to the Council's decision: pursuant to Art. 300(2) of the EC Treaty, it is subject to its possible conclusion, by another Council's decision, at a later date.

According to Art. 73 of the convention, the instruments of ratification shall be deposited with the Swiss Federal Council, which shall act as Depositary. The convention will enter into force on the first day of the sixth month following the date on which the European Community and a Member of the European Free Trade Association deposit their instruments of ratification.

On the **jurisdiction of the European Court of Justice** for the interpretation of the provisions of the convention, which becomes part of Community rules, see Protocol no. 2 annexed to the convention, which sets up also a system of exchange of information similar to the one adopted for the 1988 Lugano convention. See also the Swiss Federal Council's website for the annual reports on national case law relating to the old Lugano convention.

Seminar: Recognition of Foreign Insolvency Proceedings in the US

The British Institute of International and Comparative Law holds on Monday 26 November 2007, 17:30 to 19:30 a seminar on Recognition of Foreign Insolvency Proceedings in the US. This seminar is part of the British Institute's 2007-2008 Seminar Series on Private International Law. For further information, have a look at the Institute´s seminar website.

Matrimonial Property: Harmony in Europe?

Chris Clarkson (*Leicester*) and Elizabeth Cooke (*Reading*) have written a short article in the new issue of *Family Law* entitled, "Matrimonial Property: Harmony in Europe?" (Fam. Law 2007, 37(Oct), 920-923.)

Here's the abstract:

> *This article assesses the potential impact on the divorce of married couples of the introduction of uniform choice of law and mutual recognition rules throughout the EU in disputes concerning matrimonial property, as envisaged by the EU Green Paper on conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition (COM (2006) 400 final). It considers the advantages and disadvantages of the UK opting into such a proposal.*

There is also a short casenote in the same issue by Gillian Douglas, that discusses the Family Division decision in *Re N (Jurisdiction)* [2007] EWHC 1274 on whether

the courts in France or in Wales had jurisdiction to hear divorce proceedings between British spouses, where the wife returned to Wales after the marriage broke down, the husband remaining in France, and both filed petitions in their countries of residence. It comments on the test for domicile of choice.

See all of our posts relating to private international family law **here**.

Arbitration Agreements, Anti-Suit Injunctions and the Brussels Regulation

Martin Illmer (*Hamburg*) and Ingrid Naumann (*Berlin, currently New York*) have published a very interesting analysis of the compatibility of anti-suit injunctions in aid of arbitration agreements with the Brussels Regulation in *International Arbitration Law Review* (Int. A.L.R. 2007, 10(5), 147-159): **Yet another blow – anti-suit injunctions in support of arbitration agreements within the European Union**.

An abstract has been kindly provided by the authors:

Following the ECJ's judgment in *Turner* the issue of the compatibility of anti-suit injunctions with the regime of the Brussels Regulation has again attracted much attention due to the reference by the House of Lords to the ECJ in the *West Tankers* case. By virtue of the eagerly awaited judgment of the ECJ anti-suit injunctions in support of arbitration agreements are at risk to fall within the European Union. Illmer and Naumann provide a thorough and detailed analysis of whether anti-suit injunctions in support of arbitration agreements are compatible with the Brussels Regulation (Regulation 44/2001) and general principles of EU law. Weighing and assessing the arguments put forward in both directions they reach the compelling conclusion that anti-suit injunctions in support of arbitration agreements are incompatible not only with the Brussels Regulation but with general principles of European law. This conclusion based on legal reasoning

cannot be overcome by reference to an alleged practical reality of arbitration which the authors unveil as disguised protectionism for the arbitral seat London.

In the first part of their article, Illmer and Naumann provide a detailed analysis of the scope of the arbitration exception of Art. 1(2)(d) of Regulation 44/2001 with regard to anti-suit injunctions. This comprises of an analysis of the ECJ's former judgments in *Marc Rich* and *van Uden*, the English courts' understanding and interpretation of Art. 1(2)(d) which the authors criticise as a cherry picking exercise and finally a thorough construction of the arbitration exception based on the canon of interpretation tools generally applied by the ECJ. They conclude that the arbitration exception does not cover anti-suit injunctions in support of arbitration agreements. Caught by the the regime of the Brussels Regulation they are incompatible with it as follows inevitably from the ECJ's judgment in *Turner*.

In the second part of the article, the authors continue their analysis under the presumption that the anti-suit proceedings are covered by the arbitration exception and thus do not fall under the Brussels Regulation. Whereas one may take the view that principles underlying the Regulation, in particular the notion of mutual trust, cannot be applied to anti-suit proceedings falling outside the scope of the Regulation, one cannot bypass the general principle of *effet utile*: Even proceedings in national state courts that do not fall under the Brussels Regulation by virtue of the arbitration exception must not impair proceedings that come within the scope of the Brussels Regulation (i.e. the proceedings which are intended to be restrained by the anti-suit injunction) and thus distort the effective functioning of European law.

In a third, complementary part the authors rebut the arguments put forward by the House of Lords in the *West Tankers* reference concerning the so-called practical reality of arbitration. They show that the truth behind this argument is a protection of London as an arbitral seat vis-à-vis its European competitors in the fierce competition for arbitration amongst arbitral seats. Furthermore, the authors hint at alternatives to anti-suit injunctions in protecting the undeniable interest of the parties to an arbitration agreement in avoiding a breach or circumvention of it.

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts"

The latest issue of the German legal journal ***Praxis des Internationalen Privat- und Verfahrensrecht*** (IPRax) has been published.

Here is the contents:

- ***Erik Jayme*** and ***Christian Kohler***: European Private International Law 2007 (*Europäisches Kollisionsrecht 2007: Windstille im Erntefeld der Integration)*
- ***Peter Arnt Nielsen***: Brussels I and Denmark
- ***Robert Freitag***: Remedies of the debtor against the European order for payment according to the Regulation creating a European order for payment procedure (*Rechtsschutz des Schuldners gegen den Europäischen Zahlungsbefehl nach der EuMahnVO)*
- ***Christoph Althammer***: PIL issues in case of the application of foreign law by local courts according to § 119 (1) No. 1c Judicature Act (*Kollisionsrechtliche Fragestellungen bei der Anwendung ausländischen Rechts durch die Amtsgerichte gemäß § 119 Abs. 1 Nr. 1c GVG*)
- ***Christoph Thole***: International jurisdiction of German courts regarding claims against foreign shell companies (*Die internationale Zuständigkeit deutscher Gerichte bei Klagen gegen Scheinauslandsgesellschaften*)
- ***Timo Rosenkranz***: Limits of the copyright infringement liability of the foreign operator of an online marketplace (*Grenzen der urheberrechtlichen Störerhaftung des ausländischen Betreibers einer Online-Handelsplattform*)
- ***Nina Adelmann***: The exclusion of liability regarding cross-border employment relationships between the poles of choice of law rules in labour law and the rules concerning the posting of workers (*Das Haftungsprivileg bei grenzüberschreitenden Arbeitsverhältnissen im*

Spannungsfeld zwischen Arbeitskollisions- und Arbeitnehmerentsenderecht – Ein Problemaufriss dargestellt am Beispiel des niederländischen Wet Arbeidsvoorwaarden Grensoverschrijdende Arbeid)

- ***Hilmar Krüger***: Recognition and enforcement of German judgments in the Sultanate of Oman (*Zur Anerkennung und Vollstreckung deutscher Urteile im Sultanat Oman*)
- ***Dietrich Nelle***: New choice of law rules in Algeria (*Neues Kollisionsrecht in Algerien*)
- ***Yuko Nishitani*:** PIL reform in Japan (*Die Reform des internationalen Privatrechts in Japan*)

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- **Edwin Peel**, Fellow of Keble College and a Consultant to the firm in London, convenes the conflict of laws course for the Bachelor of Civil Law degree at Oxford University.
- Dr **Hendrik Verhagen**, Professor of private international law, comparative law and civil law at Radboud University, Nijmegen, is an Advocate at the firm's Amsterdam office.

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Needless to say, this is a very exciting time for CONFLICT OF LAWS .NET, and there is a lot more news to come in the next couple of weeks as a direct result of this new sponsorship. We're very pleased to be working

with a world-class law firm *and* a world-class publishing house, and we will be utilising those relationships for the benefit of private international law scholars and students around the world.

October 2007 Round-Up: International Tort Claims, "Forum Non" Dismissals and Punitive Damages

This installment of significant developments will focus on salient issues that have been the subject of frequent, past posts on this website.

First, the United States Court of Appeals for the Second Circuit decided a compendium of Alien Tort Claim cases that raise an interesting question at the intersection of domestic and international law: that is, when determining whether a corporate defendant has "aided and abetted" a violation of international law, what law defines the test for "aiding and abetting." *Khulumani v. Barclay National Bank* and *Ntsebeza v. DaimlerChrysler* (available here) concern the tort claims of a class of persons alive in South Africa between 1948 and 1993 who were affected by the apartheid regime. The defendants are 50 multinational corporations, and the claimed damages total over $400 billion. The basic theory of the case is that defendants' indirectly caused plaintiffs' injuries by perpetuating the apartheid system (e.g. by providing loans to a "desperate South African government"), and that they indirectly profited from those acts which violated recognized human rights standards, but not necessarily the law of the place where those acts took place. The District Court dismissed the case as a non-justiciable political question, but also because "aiding and abetting" human rights violations – the gravamen of the indirect causation and indirect harm claims – provided no basis for ATCA liability. A split panel of the Second circuit reversed. Amongst the other decisions intertwined in the 146 page opinion, the court determined that the appropriate

test for aiding and abetting liability under the ATCA is set out in the Rome Statute of the International Criminal Court – that is, one is guilty if one renders aid "for the purpose of facilitating the commissions of a . . . crime." This is a far more stringent test than the one argued by Plaintiffs, founded on the Restatement (Second) of Torts § 876(b), which pins liability if one "gives substantial assistance or encouragement" to another's actions which he "knows" to "constitute a breach of duty." While the case was kept alive and remanded for further consideration, commentators have begun to wonder whether Plaintiffs have won a pyrrhic victory: "[i]f the Rome Statute test for aiding and abetting is broadly adopted, few ATCA cases against corporations may clear summary judgment and go on trial."

In a second notable case, the United States Court of Appeals for the Eleventh Circuit considered does a forum non conveniens dismissal of foreign plaintiffs in favor of Italian courts put the remaining American plaintiffs "effectively out of court" so as to justify appellate review of the dismissal? The panel held that it does. In *King v. Cessna Aircraft Co.*, the personal estates of 70 deceased individuals sued defendant for a tragic air accident in Milan, Italy. Sixty-nine of those plaintiffs were European, with one being American. The district court dismissed the claims of the European plaintiffs on forum non conveniens grounds, and stayed the action of the American plaintiff pending resolution by the Italian courts (because, it is view, the American plaintiff was entitled to "a presumption in favor of its chosen forum"). All plaintiffs appealed. Because one may not generally appeal a decision to stay proceedings, appellate jurisdiction turned on whether the American plaintiff was "effectively out of court" by the imposition of the stay. The Court held that that plaintiff:

> *"has for all practical effects been put out of court indefinitely while litigation whose nature, extent, and duration are unknown, is pending in Italy. The district court has held its hand while Italian courts assume or continue what amounts to jurisdiction over the merits of the lawsuit. Their decision of Italian law issues will be followed by the district court. The stay order does have the legal effect of preventing [the American plaintiff] from proceeding with his claims in federal court for an indefinite period of time, potentially for years. Because he has been effectively put out of court, we have jurisdiction to review the order that did put him out. We do not mean that there are no differences between federalism and international comity for purposes of evaluating the merits of a stay order, as distinguished from deciding whether appellate*

> *jurisdiction exists to review the stay order . . . : "The relationship between the federal courts and the states (grounded in federalism and the Constitution) is different from the relationship between federal courts and foreign nations (grounded in the historical notion of comity)." . . . Those important differences do not, however, affect the extent to which a plaintiff is placed "effectively out of court," which is the measure that defines our appellate jurisdiction over stay orders."*

On the merits, the court vacated the stay as improvident because "there is no indication when, if ever, the Italian litigation will resolve the claims raised in this case, and whether [the American plaintiff] will have a meaningful opportunity to participate in those proceedings." The court did not consider the merits of the European plaintiff's appeal of the forum non conveniens decision, preferring instead to remand the entire case for reconsideration in the event that the vacation of the stay, and the continuation of the lone American case here in the U.S., affects that decision.

Finally, in the latest salvo into the propriety and extent of punitive damage awards, the Supreme Court just granted certiorari in *Exxon Shipping Co., et al., v. Baker, et al*. (07-219). This case concerns a $2.5 billion punitive damages award against Exxon Mobil Corp. and its shipping subsidiary for the massive oil spill in Alaska's Prince William Sound in 1989. In agreeing to hear Exxon's appeal, the Court will decide whether the company should be subject to punitive damages solely upon judge-made maritime law, which is in apparent contradiction of decades of legal history and subject to considerable discordance in the federal courts. The case also raises the question of whether, if maritime law does govern, this specific award is too high because it is said to be "larger than the total of all punitive damages awards affirmed by all federal appellate courts in our history." The appeal also included the question of whether a verdict of that size was unconstitutional; separating this case from recent ones (see here), the Court did not agree to hear that last question. Nevertheless, this decision will have significant ramifications for international maritime concerns. Early reactions can be found here, here, and here. SCOTUSblog has a brief discussion and links to the briefs as well here.