Studies on Brussels I Regulation – National Reports available

The national reports which have been compiled for the **Study on the Application of Regulation Brussels I in the Member States** and for the **Study on Residual Jurisdiction** are now available at the website of the European Commission.

The general reports of both studies as well as the national reports can be found here.

Further, the reports of the Study on the Application of Regulation Brussels I in the Member States (Study JLS/C4/2005/03) can also be found at the website of the Institute for Private International Law, Heidelberg.

See regarding the Study on the Application of Regulation Brussels I our previous posts which can be found here and here.

Choice of Law In Convention Establishing Louvre Museum in Abu Dhabi

Which law governs the establishment of a Louvre museum in Abu Dhabi? The answer can be found in an international agreement concluded in March 2007 between the French state and the United Arab Emirates to that effect (the Agreement). The French Parliament has ratified the Agreement on 9 October 2007. The French text of the Agreement can be found here.

Although the Agreement was concluded between the two States, more actors are involved. One is the Louvre Museum. The Louvre Museum controls the use of the name *Louvre* and thus granted the United Arab Emirates (UAE) permission to use

its name. Another actor is a new French agency established for the occasion, the International Agency for French Museums. The Agreement provides that the agency will advise the UAE on a variety of issues regarding the creation of the museum. Each of these two entities are autonomous and have legal personality under French law.

This background is necessary to understand the provisions of the Agreement dealing with choice of law (articles 17, 18 and 19). These provisions provide for a different choice of law depending on which of these entities is involved.

1) As between the States, article 17 provides that disputes ought to be resolved amicably. No rules of decision are provided.

2) As far as the Louvre is concerned, article 18 provides that any dispute regarding the use of the name *Louvre* shall be decided by French courts pursuant to French law.

3) Finally, article 18 provides that disputes between the agency and the UAE shall be resolved by way of arbitration, and article 19 provides that arbitral tribunals shall decide such disputes pursuant to English law. Interestingly enough, article 19 also provides that the contracting parties (i.e. the States) owe a duty of good faith to each other, and that so do the agency and the UAE.

These provisions raise several issues. First, why did the negotiators choose to distinguish between the Louvre Museum and the newly created agency? One possibility is that the subject matter of the potential dispute (use of the name *Louvre*) was perceived as belonging exclusively to courts and as being unarbitrable, as under the French law of arbitration, intellectual property is regarded as partly unarbitrable. Second, why did the negotiators choose English law, and why did they then add on a duty of good faith? It seems to me that the only reasonable answer to the first part of this second question is that they were looking for a law which was both sophisticated and "neutral". But then they decided to add on a duty of good faith. Were they scared of the consequences of the application of a law which was perceived as not including such a duty? What will it mean, however, from a practical perspective, for the tribunal to apply English law with a duty of good faith? All comments welcome!

EU Draft Reform Treaty: Agreement Reached by the Member States in the Lisbon Informal Meeting

As stated on the website of the Portuguese Presidency, the Member States reached last night a **political agreement on the Draft Reform Treaty**, during the informal meeting of the Heads of State and Government being held in Lisbon. The Reform Treaty will be **officially signed on 13 December 2007, in Lisbon**.

The latest text (October 2007) of the Draft Reform Treaty, as resulting from the work of the Intergovernmental Conference, is available on the IGC dedicated section of the Council's website. As regards the judicial cooperation in civil matters, see our post on the changes made by the new Treaty on the Functioning of the European Union (TFEU) to current provisions of the Title IV of the EC Treaty. For an analysis of the entire text of the Treaties, see the external links provided in our previous post here.

Norwegian Court of Appeal on the Lugano Convention Art 27

The Norwegian Court of Appeal (Borgarting lagmannsrett) recently handed down a decision on the question of recognition in Norway of a Swedish judgment, on a distress warrant against the defendant, in accordance with the Lugano Convention. The decision (Borgarting lagmannsrett (kjennelse)) is dated 2007-07-11, has case number LB-2007-71963, is published in LB-2007-71963, and

is retrievable from here.

Parties, facts, contentions and court conclusions

The plaintiff and distrainer, Truck Parts AB, domiciled in Sweden, served the defendant and distrainee A, domiciled in Sweden, with a subpoena in a Swedish Court (Kronofogdemyndigheten i Göteborg), with the object of action to ask the court to force the defendant, by the seizure and detention of personal property, to perform an obligation to pay overdue loan of money, where upon the Swedish Court in default of A´s appearance gave a judgment on a distress warrant against the defendant A. Later, the defendant moved to Norway where the plaintiff before the Norwegian Court of First Instance sought recognition and enforcement of the Swedish judgment.

The defendant gave two arguments for refusing recognition of the Swedish judgment in Norway. **First**, the defendant contended that since, first, the plaintiff´s claim derived from an agreement a third person B had made in A´s name with the plaintiff, but without A´s knowledge and authorisation, and, second, since the plaintiff knew or should have known B´s misrepresentation of A, that contract would by consequence be considered as invalid and give no claim-right to the plaintiff, and it would therefore, in accordance with the Lugano Convention Article 27 nr. 1, be contrary to Norwegian public policy to recognize the Swedish judgment in Norway. **Second**, the defendant contended that since it had not been proven that the defendant had been duly served with the document, which instituted the Swedish proceedings in sufficient time to enable the defendant to arrange for his defense, the Swedish judgment should not be recognized in accordance with the Lugano Convention Article 27 nr.2.

Responding the defendant´s contentions, the plaintiff contended **first** that the Swedish judgment could be recognised and enforced in Norway, and that Norwegian courts lacked competence to review the Swedish judgment as to its substance in accordance with the Lugano Convention Article 29. **Second**, the plaintiff contended that the Norwegian court had to trust and accept the date the Swedish Court had stated it had served the defendant with the document, which instituted the Swedish proceedings, and that this provision of document had given the defendant sufficient time to enable the defendant to arrange for his defense.

This case note will solely venture into the two above stated questions pertaining

to recognition of judgment, and will not elucidate the point on which the disputing parties agreed, namely that Swedish (and not Norwegian) law on the limitation period for money claims was the applicable law (whereas the parties disagreed on the question whether the Swedish limitation period had been cancelled).

Both the Norwegian Court of First Instance and the Norwegian Court of Appeal recognised the Swedish judgment.

Ratio decidendi of the Norwegian Court of Appeal

The Norwegian Court of Appeal introduced its judgment by inquiring whether the conditions for enforcement in accordance with the Norwegian law on coercive enforcement 1992-06-26-86 (tvangsfullbyrdelsesloven) were fulfilled. **First**, the Norwegian Court of Appeal introduced the parties´ points of agreement, namely that judgments given by the Swedish Court, Kronofogdemyndigheten, was to be considered as legal coercive basis within the meaning of the Norwegian law on coercive enforcement 1992-06-26-86, § 4-1 second paragraph (tvangsfullbyrdelsesloven). **Second**, the Norwegian Court of Appeal remarked that as far as the arguments of the defendant and distrainee A pursuant to the plaintiff´s claim did not relate to circumstances having occurred so late that they could not have been pleaded in support of A´s legal position before the Swedish Court gave its judgment, those arguments were irrelevant for the enforcement in Norway, in accordance with the Norwegian law on coercive enforcement 1992-06-26-86, § 4-2 second paragraph (tvangsfullbyrdelsesloven). The Norwegian Court of Appeal referred to the Swedish judgment where it was stated that A had been served with the document, which instituted the Swedish proceedings 13 days before the Swedish Court gave its judgment, where upon A would have had time to serve the Swedish Court with its arguments directed against the plaintiff´s claim. **Third**, the Norwegian Court of Appeal remarked that since the Swedish judgment had not been appealed to the Swedish Court of First Instance in accordance with Swedish law (lag om betalningsföreläggande och handsräkning (SFS 1990: 746) § 55), the Swedish judgment was legally binding.

Having established that there was legal basis in Norwegian law on coercive enforcement 1992-06-26-86 (tvangsfullbyrdelsesloven) to enforce the Swedish judgment, the Norwegian Court of Appeal inquired whether the Lugano Convention Article 27 nr.1 was applicable where upon the Swedish judgment should not be recognised. The Norwegian Court of Appeal concluded that the

Lugano Convention Article 27 nr.1 was inapplicable by way of the following reasoning: With reference to a Norwegian commentary to the Lugano Convention (Norsk lovkommentar 2005 p. 2305, note 108), which in turn referred to the ECJ in Case 145/86 Hoffmann v Krieg [1988] ECR 645, the Norwegian Court of Appeal stated that the Lugano Convention Article 27 nr.1 is applicable only in few exceptional circumstances when recognition very strongly would oppose fundamental legal principles in the State of recognition with a special view to fundamental ethical and social conceptions. With reference to legal theory (Rognlien, kommentarutgave til Luganokonvensjonen, 1993, p. 236-237), the Court assumed that the more severe legal grounds for invalidating agreements, such as fraud, would be considered as falling under the scope of the notion of ordre public in the Lugano Convention Article 27 nr.1, but that the legal grounds for invalidation of agreements would be considered less practical in justifying ordre public since these grounds under no circumstance could be used to review the judgment as to its substance in accordance with the Lugano Convention Article 29. Article 29, the Court stated with reference to legal theory (Norsk lovkommentar 2005 p. 2306, note 118, and p. 2305, note 108), is absolute and implies that the Court is excluded from reviewing whether the judgment is materially correct with a view to the taking of evidence as well as the application of the rule of law. Supporting that interpretation, the Court referred to legal theory (Rognlien, kommentarutgave til Luganokonvensjonen, 1993, p. 245), which stated that a judgment can never be refused recognition on the sole ground that it is materially incorrect, regardless of whether the foreign adjudicating Court erred in its test of evidence or erred in its application of the law. The Norwegian Court of Appeal pertained to the opinions in legal theory and concluded that there was no legal basis for refusing the recognition of the Swedish judgment in accordance with the Lugano Convention Article 27 nr. 1.

Having established that the Lugano Convention Article 27 nr.1 was inapplicable, the Norwegian Court of Appeal questioned whether the Lugano Convention Article 27 nr.2 was applicable where upon the Swedish decision should not be recognised. The Norwegian Court of Appeal concluded the Lugano Convention Article 27 nr.2 was inapplicable by way of the following reasoning: With reference to the question of whether the conditions for enforcement in accordance with the Norwegian law on coercive enforcement 1992-06-26-86 (tvangsfullbyrdelsesloven) were fulfilled, where the Norwegian Court of Appeal had referred to the Swedish judgment, where it was stated that A had been served with the document, which

instituted the Swedish proceedings 13 days before the Swedish Court gave its judgment, where upon A did not respond and therefore did not deny the correctness of the plaintiff´s claims to the Swedish Court. Further, there were no grounds to assume that the document, which instituted the proceedings, had not been served in accordance with Swedish law. Consequently, the Norwegian Court of Appeal concluded that the conditions for refusing recognition in accordance with the Lugano Convention Article 27 nr. 2 were not fulfilled.

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.