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The October 2007 issue (Vol. 3, Issue 2) of the **Journal of Private International Law** has just been published. The contents are (click on the links to view the abstracts on the Hart Publishing website):

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Jurisdiction and Class Actions

To what extent should a country's traditional rules for taking jurisdiction be modified to address some of the unique elements of class actions? This issue was recently considered by the Manitoba Court of Appeal in *Ward v. Canada (Attorney General)* (available here).

In *Ward* the plaintiff lived in Manitoba but in the 1970s he had been stationed in New Brunswick, where, he alleged, his employer had exposed him to Agent Orange. In one sense his claim was very much tied to Manitoba: he was there as the plaintiff, suffering damages there, and seeking to sue the Federal Crown which, by being present in every Canadian province, was present there. But he proposed, in due course, to move to have his claim certified as a class action, with a class that could cover both residents and non-residents of Manitoba.

The Crown opposed Manitoba's jurisdiction. It argued that the traditional approach to jurisdiction had to be modified in class actions, and that notwithstanding its presence as a defendant in Manitoba the plaintiff should still have to show a real and substantial connection between the action and Manitoba.

The Court of Appeal did not accept this argument. It held that the Crown's presence was sufficient for jurisdiction. The fact that a subsequent certification motion could lead to the action becoming a class action did not change, at this stage, the jurisdictional analysis.

This decision is particularly important for the guidance it provides on where, as a matter of jurisdiction, a class action can be started and the attempt made for certification. In this case, the plaintiff faced significant downside costs exposure in New Brunswick if a motion for certification was unsuccessful there, whereas in Manitoba costs are only awarded against the party moving unsuccessfully for certification in limited circumstances. This created an advantage for the plaintiff to commence putative class proceedings in Manitoba rather than in New Brunswick.

Proof of Foreign Law in Australia

In Australia, as in England, foreign law is treated as a matter of fact, not law, and its content must therefore be pleaded and proved if a party wishes to rely on it. On the other hand, the principle traditionally known as the "presumption of similarity" (or "presumption identity") means that foreign law will be assumed to be the same as local law unless the contrary is demonstrated. For this reason, local law is generally applied by default even in cases otherwise governed by foreign law, as it is usually in neither party's interests to go to the trouble of researching and proving foreign law. However, in rare cases Australian judges have declined to apply Australian law by default, the leading example being *Damberg v Damberg* (2001) 52 NSWLR 492.

Now, in *National Auto Glass Supplies (Australia) Pty Ltd v Nielsen & Moller Autoglass (NSW) Pty Ltd* [2007] FCA 1625 (26 October 2007), Graham J of the Federal Court of Australia doubted the applicability of the New South Wales law of defamation to a case otherwise governed by Hong Kong and mainland Chinese law, and denied the applicants relief because they failed to prove the relevant foreign law. The case concerned (among other things) an allegedly defamatory email read by recipients in Hong Kong and mainland China. His Honour observed that:

> *"In making these findings [about the allegedly defamatory] email I have assumed that the defamation law in the Special Administrative Region of Hong Kong and in the remainder of the People's Republic of China is the same as it is New South Wales. However, as I said [earlier in the judgment, after discussing Damberg v Damberg and other cases on the presumption of identity]:*
>
> *'… the general presumption that, in the absence of evidence to the contrary, foreign law is the same as Australian law is not inflexible. Where the law of the forum is governed by a statute and the law within Australia is itself lacking in uniformity, I doubt whether it could be presumed that the defamation law in China, including the Special Administrative Region of Hong Kong, is the same*

> *as it is in New South Wales.'*
>
> *In the absence of evidence as to the relevant defamation law in the Special Administrative Region of Hong Kong and in the remainder of the People's Republic of China or at least that part where [the recipient] was located at the time when he received the … email, I do not consider that any award of damages should be made referable to the transmission of the … email to [the recipients in Hong Kong and China]. The relevant defamation law (if any) has not been proven."*

While the default application of Australian law is usually just and convenient, there are certain areas of law in which this default application should be overridden because it would be unfair or anomalous, especially so when local law is idiosyncratic. Although some judges have applied Australian defamation law by default in other cases governed by foreign law, defamation is an area of law which differs markedly around the world, and until the recent uniform Defamation Acts, the law of NSW was particularly idiosyncratic even in comparison with the other Australian States. Thus, it could hardly be said that the "presumption of similarity" was a realistic or fair approximation of the actual content of foreign law in this case.

Note: Although the common law "place of publication" choice of law rule continues to apply in Australia regarding defamatory material published overseas (see *Dow Jones v Gutnick*), the uniform Defamation Acts altered the rule applicable to material published within Australia so as to apply the law of the "Australian jurisdictional area with which the harm occasioned by the publication as a whole has its closest connection".

Paying Here, Seeking Restitution

There.

A negative consequence of the availability of multiple fora in international litigation is the risk of conflicting decisions. Several adjudicators can retain jurisdiction and then reach conflicting, if not opposite, results on the merits. Is it a problem? It could be argued that it is for two different reasons. The first is that the legitimacy of the legal process is undermined when inconsistencies are produced. This is certainly true when this happens in one given legal order. However, when it happens in different legal orders, it seems to be the sad consequence of the autonomy of the legal orders involved. Arguably, there is no real inconsistency when autonomous legal orders adopt different solutions. The second reason why conflicting decisions can be a problem is because the parties may be ordered to take inconsistent actions. If a party is enjoined to do something by one court and ordered to refrain from doing it by another court, the position of that party becomes unbearable.

An interesting example of this last hypothesis is the case of a party being ordered to pay a sum of money in one jurisdiction, but being also able to successfuly seek restitution of that sum of money in another jurisdiction. I am not aware of many cases where this actually happened. Here is an interesting one involving a court and an arbitral tribunal.

The debtor was the State of Congo, which had borrowed money from a Libanese construction company, Groupe Tabet. Congo did not make the instalments repayment itself but ask Elf Congo, the Congolese subsidiary of the French oil company Elf, to do so, and to commit to do so to the lender. There were thus two different sets of contracts, the borrowing contracts between Congo and Tabet, and the repayment contract between Elf Congo and Tabet. There was certainly a third contractual relationship between Congo and Elf Congo, which explains why Elf Congo agreed to commit to the lender, but I do not have information on it, and it is not directly relevant.

Five years later, the State of Congo argued that the lender had received too much money and Elf Congo stopped paying back, probably after being instructed to do so by the State. The lender then decided to sue Elf Congo under the repayment contract before Swiss courts (I do not know whether this venue was chosen because the contract contained a clause providing for the jurisdiction of Swiss

courts). A Geneva court ordered Elf Congo to pay 64 million Swiss francs (EUR 38 million) in 2001. The Swiss Federal Tribunal eventually confirmed the judgement in 2003. The Swiss decisions were declared enforceable in France in 2003 or in 2004. The State of Congo counter attacked by initiating arbitral proceedings under the borrowing contracts against the lender, as those contracts contained a clause providing for ICC arbitration in Paris, France. The arbitral tribunal did not rule completely in the State of Congo's favour, as it found in a first award that the State still owned EUR 16 million. But the tribunal found that the remaining EUR 22 million were not owned. In a second award made in 2003, it thus ordered the lender to enter into an escrow account agreement with Elf Congo, and to put on this account any monies that it would have to pay as a consequence of the Swiss judgment beyond EUR 16 million.

A dispute concerning the enforcement of the second award was then brought before French courts. On the one hand, the lender decided to challenge the second award and sought to have it set aside. On the other hand, the State of Congo was applying for a court order to comply with the same second award *sous astreinte*, i.e. for a judgement ordering the performance of the award and providing that the lender would have to pay a certain sum for each day of non-compliance. French courts refused to issue such order, as the proceedings challenging the award suspended its enforceability. A debate arose as to whether an exception existed in the case in hand, making the award immediately enforceable. The French supreme court for private and criminal matters (*Cour de cassation*) eventually ruled in a judgement of July 4th, 2007 that the enforcement of the award was suspended and that its performance could not be ordered judicially.

The case raises many issues of international arbitration. As far as the conflict of laws is concerned, the issue is whether there is a way to prevent the two adjudicators involved (i.e. Swiss courts and the ICC arbitral tribunal) from further ruling the contrary of each other.

German Article on Abusive Choice of Court Clauses in European Law

Stefan Leible and Erik Roeder (both Bayreuth) have published an article on abusive choice of court clauses in European law in the German legal journal *Recht der Internationalen Wirtschaft* (RIW 2007, 481-487):
Missbrauchskontrolle von Gerichtsstandsvereinbarungen im Europäischen Zivilprozessrecht

An abstract has been kindly provided by the authors:

> *In their article, Leible and Roeder analyze whether and to what extent the European Procedural Law allows to review unfair forum selection agreements. In particular, the authors try to answer the question whether an agreement under Art. 23 of the Brussels I Regulation (Council Regulation 44/2001) may be declared void by a national court because in concluding the agreement one party has abused its dominant economic position.*
>
> *In the first part of the article, Leible and Roeder refute the arguments put forward to reject any review of jurisdiction agreements. As the authors show, the competence of the ECJ to interpret the Brussels Regulation does not foreclose such a review because the ECJ has not decided on the issue so far. A review of choice of forum-clauses would neither put legal certainty at risk, nor would it discriminate against courts of other Member States.*
>
> *In the second part of the article, Leible and Roeder argue for a review of forum selection clauses within the scope of Art. 23 of the Brussels I Regulation. An agreement on jurisdiction that was obtained by abuse of economic predominance does not truly reflect the autonomous will of the parties. The possibility of a review by the courts of the Member States allows to settle individual cases in accordance with equity. In order to ensure legal certainty, the notion of "abuse of economic predominance" must be defined autonomously by the ECJ.*

Conflict of Law Symposium

The Tulane Law Review and the Duke Center for International and Comparative Law organise a symposium entitled***:***

The European Choice-of-Law Revolution — A Chance for the United States?

Confirmed participants for this symposium include:

- *Bernard Audit (*Paris I), *Richard Fentiman* (Cambridge), and *Ralf Michaels* (Duke) discussing methods
- *Stephanie Francq* (Louvain-la-Neuve), *Mathias Reimann* (Michigan), and *Larry Ribstein* (Illinois) discussing federal unification and the dichotomy of internal and external conflicts
- *Horatia Muir-Watt* (Paris I) and *Jurgen Basedow* (Max Planck) discussing interstate market regulation
- *Jens Dammann* (Texas) and *Onnig Dombalagian* (Tulane) discussing conflicts in corporate law
- *Jan von Hein* (Max Planck) and *Symeon Symeonides* (Willamette) discussing conflicts in tort law
- *Dennis Solomon* (Tubingen), *Bill Richman* (Toledo), and *Patrick Borchers* (Creighton) discussing conflicts in contract law

The symposium will take place on **9 February 2008** in Durham, NC

More information can be found at the website of the Tulane Law Review.

(Thanks to Prof. Jan von Hein (Trier) for the tip-off.)

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.