Two CLIP Articles Published in German Periodicals

The conclusions included in the CLIP papers on Intellectual Property in Brussels I and Rome I Regulations posted on the web site of the Max Planck Institute for Comparative and International Private Law and previously reported at the conflict of laws.net have been published in two law journals.

First is the publication of the comments on Rome I Proposal in the *International Review of Intellectual Property and Competition Law*, Vol. 38, No. 4, 2007, pp. 471-477.

Second published is the article titled "Intellectual Property and the Reform of Private International Law – Sparks from a Difficult Relationship" that an be found in the July 2007 edition of the *Praxis des Internationalen Privat- und Verfahrensrechts* at pages 284-290.

Setting Aside Foreign Judgments in Australia

A recent judgment of the Supreme Court of South Australia provides a useful summary of the Australian common law authorities about when the enforcement of a foreign judgment can be set aside.

The judge concluded:

> *a foreign judgment is only binding and conclusive so long as it stands. A corollary of this principle is that where a judgment is made entirely on the basis of a foreign judgment, and the foreign judgment is later overturned and set aside, good reason exists to set aside the judgment that relied on it.*

French Judgment on Article 5 (1) b of the Brussels I Regulation, Part III

On March 27, 2007, the French supreme court for private matters (*Cour de cassation*) delivered yet another judgment on Article 5 (1) b of the Brussels I Regulation (for previous judgments on the issue, see here and here). In *SA ND Conseil v. Le Méridien Hotels et Resorts World Headquarters*, the *Cour de cassation* held that, first, the combination of the conception, the making and the delivery of documents could be regarded as a single operation, and that, second, the operation had to be characterised as a provision of service.

In *SA ND Conseil v. Le Méridien Hotels et Resorts World Headquarters*, English company Le Meridien Hotels had hired French advertisement company ND Conseil. Under the contract, which had been concluded on June 5, 2002, ND Conseil was to promote the Le Meridien hotel chain by designing and making advertisement documents to that effect, to be delivered to Le Méridien Hotel company. The judgment of the *Cour de cassation* is not very detailed on the facts, nor on the arguments of the parties, but it seems that it was argued that the design of the documents took place in France, while the delivery took place in England. Eventually, Le Méridien Hotel terminated the contract, and ND Conseil sued for wrongful termination before French courts.

The first instance court (the commercial court of Nanterre, in the suburbia of Paris) retained jurisdiction in a judgment of December 2004. The Court of appeal of Versailles reversed and declined jurisdiction in March 2006. ND Conseil appealed to the *Cour de cassation*.

The *Cour de cassation* confirmed the judgment of the court of appeal and held that French courts did not have jurisdiction under the article 5 of the Brussels I

Regulation. The judgment of the French highest court can be summarized as follows. First, ND Conseil had undertaken to perform two series of obligations. On the one hand, designing the documents. On the other hand, making them physically and delivering them. Second, under the contract, the making and the delivery of the documents were not only ancillary to their design, but also intertwined with it. As a consequence, there was one single contractual operation. Third, this operation was a provision of service in the meaning of article 5. Fourth, this service was provided in London.

The case raises many issues. As usual, the judgment of the *Cour de cassation* is so short that it could be interpreted in many ways. Here are a few of them.

First, no explanation is clearly given as to why the single operation is a provision of services, and not a sale of goods, or neither of the above. Indeed, one would have rather expected, after recent decisions of the court, that it would easily find that a given contract was neither a provision of services, nor a sale of goods. The judgment could be interpreted as meaning that the court is of the opinion that it should be a provision of services because the sale was ancillary to the services.

Second, the judgment insists on the fact that the operation was a single one under the contract. This may mean that the architecture of the contract will matter, but again this is unclear.

Third, no explanation is given on why the global service was performed in London.

Final Round for Rome II: Adoption by the Council, Commission's Statements on the Review Clause

and Parliament's Report on the Joint Text

The Council, in the meeting held by the "Environment" configuration in Luxembourg on 28 June 2007, **has adopted the Rome II joint text** approved by the Conciliation Committee, **with the Latvian and Estonian delegations voting against** (see the concerns regarding the conflict rule on industrial action – art. 9 – that these Member States had expressed in a joint declaration issued in the Council's vote on the Common position).

An addendum to the minutes of the Council's meeting contains **three statements by the Commission on the studies regarding the controversial issues** that were set aside in the conciliation (violations of privacy and rights relating to personality, level of compensation awarded to victims of road traffic accidents, treatment of foreign law), to be submitted in the frame of the review clause of Art. 30. These statements will be published in the Official Journal with the legislative act.

The **Parliament's vote** on the joint text, that will formally end the codecision procedure by adopting the Rome II Regulation, is scheduled **on 9 July 2007**. With a view to the final vote, **Rapporteur Diana Wallis** has prepared a **Report of the EP Delegation to the Conciliation Committee**, summarizing the legislative procedure and presenting to the Parliament's plenary the agreement reached with the Council.

Here's a substantial part of the EP's Report (for further details on the previous stages of the procedure, see the Rome II section of our site):

> ***The codecision and conciliation procedure***
>
> *The Commission submitted on 22 July 2003 a proposal for a Regulation on the Law Applicable on Non-Contractual Obligations. Following Parliament's first reading on 6 July 2005 (54 amendments adopted) the Council adopted its common position on 25 September 2006. Parliament then concluded its second reading on 18 January 2007 adopting 19 amendments to the Council's common position. The main issues at stake were: violation of personality rights ("defamation"); road traffic accidents; unfair competition; the definition of*

"environmental damage" the relationship with other Community instruments; the treatment of foreign law; the review clause.

The Council informed with letter from 19 April 2007 that it could not accept all of Parliament's amendments and that conciliation was necessary. Conciliation was then formally opened on 15 May 2007. […]

Three trilogues held between 6 March and 24 April 2007 […], followed by subsequent meetings of the EP Delegation […], lead to provisional agreement on 5 amendments. The Conciliation Committee met then in the evening of 15 May 2007 in the European Parliament with a view to formally opening the conciliation procedure and possibly reaching agreement on the outstanding issues. After several hours of deliberations an overall agreement was reached at midnight. It was unanimously confirmed by the EP Delegation with 17 votes in favour.

The main points of the agreement reached can be summarised as follows:

Road traffic accidents

[…] One of the EP Delegation's main priorities was […] to ensure that the individual victim's actual circumstances are taken into consideration by the court seized when deciding on the level of the compensation to be awarded.

For the short term, the EP Delegation succeeded in including a reference in the recitals of the Regulation whereby judges when quantifying personal injuries will take account of all relevant actual circumstances of the specific victim, including in particular the actual losses and cost of after-care and medical attention.

For the long term, the EP Delegation succeeded in securing a public commitment by the Commission for a detailed study on all options, including insurance aspects, on the specific problems faced by victims of cross-border road traffic accidents. The study will be presented by 2008 the latest and would pave the way for a Green Paper. […]

Unfair competition

On the EP Delegation's insistence the Council agreed to the Commission's proposal for a specific rule on unfair competition that respects the principle of

the application of one single national law (an important point for judges and lawyers) while at the same time limiting to a large extent the danger of "forum shopping" (the possibility for plaintiffs to raise their law suit in the Member State of their choice).

Environmental damage

The EP Delegation succeeded in obtaining a definition on "environmental damage" – a term used but not defined in the common position. The definition is in line with other EU instruments, such as the Directive on Environmental Liability.

Violation of personal rights ("defamation")

In view of an overall compromise the EP Delegation had to withdraw its amendments on the inclusion of rules on the violation of personal rights, particularly defamation in the press. Though Parliament managed to overcome the national differences and various conflicts of interests and to adopt its amendments by a large majority, the Member States were unable until the very end to agree on a common approach. The issue however is considered as a "left-over": as part of the review of the Regulation the Commission will draw up a study by 2008 on the situation in this specific field. The findings of the study can serve as a basis for the adoption of relevant rules at a later stage.

Relationship with other Community instruments

On the controversial issue of the relationship between the "Rome II" Regulation and other provisions of Community law it was agreed that the application of provisions of the applicable law designated by the rules of this Regulation should not restrict the free movement of goods and services as regulated by Community instruments such as the e-Commerce Directive.

Treatment of foreign law

The issue of the treatment of foreign law by national courts – especially how often and how well national courts apply the law of another country – is also settled on the basis of a detailed study to be carried out by the Commission as part of its report on the application of the Regulation. […]

Review clause

> *On the insistence of the EP Delegation the review clause was split into a special section with a shorter timetable by 2008 as regards violation of privacy rights ("defamation") and a general section with the standard timetable whereby the Commission will present a report on the application of the Regulation four years after its entry into force. As part of the general review clause the Commission will also carry out a study on the treatment and application of foreign law by the courts of the Member States and a second study on the effects of Article 28 of the Regulation ("Relationship with existing international conventions") with regard to the Hague Convention of 4 May 1971 on the law applicable to traffic accidents.*

[Update: following a comment by M. Winkler on a previous item on Rome II, ***Mrs Wallis has posted on our site a reply*** *providing some clarifications on the Parliament's approach to the conflict rule* ***on environmental damage****. Any further comment, on this or other provisions of the Regulation, is welcome]*

McNeilly v Imbree [2007] NSWCA 156

The decision of the New South Wales Court of Appeal in *McNeilly v Imbree* [2007] NSWCA 156 may be of interest to those in the United Kingdom (and elsewhere) because it raises the private international law dimensions of the same New South Wales statute as was considered by the House of Lords in *Harding v Wealands* [2006] UKHL 32; [2006] 4 All ER 1; [2006] 3 WLR 83, namely the New South Wales *Motor Accidents Compensation Act 1999* (the ***MACA***).

McNeilly concerned a plaintiff who was seriously injured in a car accident that occurred in the Northern Territory. The plaintiff took action in New South Wales against the driver of the car for negligence. One issue in the case was whether the assessment of damages was governed by the MACA or the equivalent Northern Territory statute, the MACA providing a lower discount rate for damages for future economic loss. The Court of Appeal concluded that the

Northern Territory statute applied on the basis that the assessment of damages was a question of substance governed by the law of the Northern Territory as the place of the tort, pursuant to the Australian common law choice of law rule for torts (the *lex loci delicti* rule). It was not argued that the *lex loci delicti* rule was excluded by s 123 of the MACA as a mandatory law of the forum, which provides: "A Court cannot award damages to a person in respect of a motor accident contrary to this Chapter."

McNeilly may be contrasted with *Harding*, which concerned a claim before the English courts arising out of a car accident in New South Wales. The House of Lords characterised the question of damages as a question of procedure and therefore applied English law as the law of the forum, rather than the MACA. Section 123 of the MACA could not affect this conclusion: even if it had the effect of a mandatory law of the forum in a case before the New South Wales courts, it could not have that effect in a case before the English courts.

Article on the Enforcement of Foreign Registered IP Rights in Australia

Richard Baddeley has written an article entitled "Out of Africa: The *Moçambique* Rule and Obstacles to Suits for Enforcement of Foreign Registered Intellectual Property Rights in Australia" in the June 2007 edition of *The Intellectual Property Forum* (pp 36-47). The introduction reads, in part:

> *This article challenges the prevailing view that registered intellectual property rights may only be protected through local actions. An Australian court cannot entertain an action for infringement of a foreign registered intellectual property right because it lacks "subject matter jurisdiction" even though it may exercise personal jurisdiction under relevant court rules. What barriers prevent subject matter jurisdiction? The Moçambique rule, based on respect for international*

comity and sovereignty, has been a major barrier preventing such actions. Another obstructive rule has been the "double actionability" (or lex fori rule). However, the basis for the Moçambique and "double actionability" rules seems to be eroding to the point where it now seems possible that Australian courts could decide actions involving the infringement of foreign registered intellectual property rights.

The Intellectual Property Forum is the journal of the Intellectual Property Society of Australia and New Zealand Inc. The article is not available online.

West Tankers Case: Articles by Max Planck Institute's Scholars

Following the **reference to the ECJ of the *West Tankers* case by the House of Lords**, first comments on the subject-matter of the preliminary question are provided by three articles written by scholars affiliated to the Max Planck Institute for Comparative and International Private Law (Hamburg).

Here's a presentation of the articles, from the Institute's website:

On the occasion of the House of Lords referral, Institute researchers have renewed their engagement with the question of the reconciliability of the English anti-suit injunction in support of arbitration agreements with European procedural law. Their opinions conclude that the ECJ in continuance of the judicature it has thus far developed is also likely to declare that anti-suit injunctions supporting the implementation of arbitration agreements are incompatible with EC Regulation 44/2001 and other fundamental European laws.

*As such, **Martin Illmer** and **Ingrid Naumann** explain in their article, appearing in Internationales Handelsrecht 2007, 64, that the rationale in the ECJ Turner decision is equally applicable to the legal context of arbitration*

agreements and that the economic considerations set forward by the House of Lords represent unjustified protectionism in favour of London arbitral settings.

In a continuation of their earlier published work on anti-suit injunctions, ***Anatol Dutta*** *and* ***Christian Heinze*** *consider the English legal regulations and, moreover, comprehensively examine the legality of anti-suit injunctions in protection of arbitration agreements from a European legal perspective in light of EC Regulation 44/2001. In their article "Anti-suit injunctions zum Schutz von Schiedsvereinbarungen", Recht der Internationalen Wirtschaft 2007, 411, they similarly argue for applying the principles of the ECJ decision in Turner and thereby conclude a breach of EC Regulation 44/2001.*

Finally, in "The Impact of EU Law on Anti-suit Injunctions in aid of English Arbitration Proceedings", Civil Justice Quarterly 2007, 358, ***Ben Steinbrück*** *adopts the specific perspective of arbitration law and reasons why the decision as to the effects and scope of English arbitration agreements may not permissibly be monopolised by English courts.*

Comments on the Commission's Green Paper on the Attachment of Bank Accounts

The European Commission (DG Freedom, Security and Justice) has published on its website the whole set of contributions (more than 60 papers) received in response to the public consultation launched by the **"Green Paper on improving the efficiency of the enforcement of judgments in the European Union: the attachment of bank accounts"** (COM(2006) 618 final), released in October 2006 (see our previous posts here, presenting the Green Paper and related documents, and here, on the comments by the Max Planck Working Group).

Contributors include the European Central Bank, governments of the Member

States and other national authorities, academics and private parties (banking associations, non-governmental organizations, bar associations, law firms, etc.).

Rome II: Final Version of the Joint Text

A final version of the Rome II joint text, resulting from the legal and linguistic revision, is available in all languages of the EU in the Register of the Council (doc. PE-CONS 3619/07).

According to current forecasts (see the Rome II OEIL page), the joint text should be officially approved today (25 June 2007) by the Conciliation Committee. Pursuant to Art. 251(5) of the EC Treaty, the Parliament and the Council shall adopt the Regulation in accordance with the joint text within a period of six weeks (that can be extended to eight weeks) from this approval.

Further details on the joint text and the conciliation stage are available on the Rome II section of our site.

Liberalization of Enforcement of US Judgments in France

In a previous post, I had reported that the French supreme court for private matters (*Cour de cassation*) overruled last year a century old precedent limiting the enforcement of foreign judgments against French nationals. In *Prieur*, the *Cour de cassation* held that Article 15 of the Civil Code should not be construed anymore as giving exclusive jurisdiction to French courts to decide disputes

involving French nationals. As a consequence, foreign judgments made against French nationals should be enforced in they meet the other liberal standards of the French law of judgments (as further liberalized by the *Cour de cassation* in *Avianca*).

On May 22, 2007, the *Cour de cassation* confirmed its *Prieur* decision by applying it to a US judgment. The Superior Court of Alameda County, California, had ordered French company Fontaine Pajot to pay damages to two US nationals. The French company resisted enforcement of the Californian judgment in France on the ground that they had not waived their "jurisdictional priviledge" (as Article 15 of the Civil code was sometimes known) to be tried by a French court. In other words, the French company was arguing that the foreign court lacked jurisdiction from the French perspective since one of the parties was French, and French courts had exclusive jurisdiction over disputes involving French nationals. The appeal is dimissed by the *Cour de cassation* on the ground that Article 15 only gives optional jurisdiction to French courts, and that it is now irrelevant to determine the jurisdiction of foreign courts, for the purpose of the enforcement of judgments in France.

Eventually, the *Cour de cassation* held that it was for the trial judges to determine whether there was a significant connection between the foreign court and the dispute, and thus jurisdiction of the foreign court.

For those of you who read French, I quote the important part of the decision (it is also available on legifrance.gouv.fr, but I have been unable to make a link to the decision):

> *Vu l'article 15 du Code civil; attendu que ce texte ne consacre qu'une compétence facultative de la juridiction francaise, impropre a exclure la compétence indirecte d'un tribunal étranger, des lors que le litige se rattache de maniere caractérisée a l'Etat dont la juridiction est saisie, et que le choix de la juridiction n'est pas frauduleux.*

Two conclusions can be drawn from this case. First and most importantly, *Prieur* is confirmed. Second, denial of enforcement of US judgments will require the identification of a specific issue with the foreign judgment, such as a violation of French public policy for judgments awarding punitive damages. Finally, the new paradigm is doing fine when coping with decisions from jurisdictions where the

judiciary is not notoriously corrupt, but a time will come when that will not be the case.