Assignments and Choice of Law in Australia

Assignments of choses in action can raise difficult choice of law issues, and readers may be interested in two decisions of the Federal Court of Australia that shed some light on this area.

In *Salfinger v Niugini Mining (Australia) Pty Ltd (No. 3)* [2007] FCA 1532 (8 October 2007), Heerey J considered the validity of a purported assignment of causes of action arising under Australian law pursuant to deeds of assignment governed by Canadian law. His Honour held that:

> *"Whether the causes of action in tort or equity are assignable is to be determined by the law under which the right or cause of action was created … In consequence, although both assignments in the present case included 'governing law' clauses, and were purportedly entered into in Canada, those clauses are not relevant in deciding whether the causes of action in question are assignable. That question is to be decided by the law of the place where the causes of action arose. As the causes of action relied on arose in Australia, Australian law is applicable."*

There is an interesting parallel between the recent decision and the earlier Full Federal Court case of *Pacific Brands Sport Leisure Pty Ltd v Underworks Pty Ltd* (2006) 149 FCR 395; [2006] FCAFC 40, which concerned the assignment of contractual rights (not causes of action). There, the court was content to proceed on the assumption (without needing to decide) that such assignments are to be governed by the proper law of the underlying contract, rather than the proper law of the contract of assignment.

Saving the Hague Choice of Court Convention

William J Woodward Jr (Temple) has posted "Saving the Hague Choice of Court Convention" on SSRN. It is forthcoming in the *University of Pennsylvania Journal of International Law*, Vol. 29, 2008. Here's the abstract:

> *Developing an international regime that would require some level of international recognition or enforcement of the judgments of courts of other countries has been a goal for international lawyers, particularly those in the United States, for many years. Concluded in 2005, the Hague Choice of Court Convention may not be the gold ring, but it promises to make substantial improvements in international judicial dispute resolution and thereby add immensely to international economic well-being. Through the Convention, States will agree to recognize or enforce the judgments of other State parties, when those judgments follow valid choice of court agreements defined (and also regulated) in the treaty. Since most international trade begins with a contract, and since most of those contracts already contain dispute resolution provisions, the Convention may have delivered a great advance in this area. But it is obvious from the nature of the Convention that its success depends critically on widespread international acceptance of the Convention; if only a few States join it, the international system will not have become much better than it is now.*
>
> *Unfortunately, there have been no ratifications in more than two years since the Convention was concluded and it seems in danger of dying a slow death for lack of interest. Leadership by the United States, a primary advocate for an international accord, may be in order.*
>
> *The problem is that the Convention, as drafted, will not find uniform, reliable enforcement within the United States. In two particular kinds of contracts covered by the Convention, franchise contracts and what I call mass market contracts, some choice of forum provisions are difficult or impossible to enforce in several U.S. states under current law. Some of this law has developed very quickly. The state of domestic law presents a compliance problem for the United States in the first instance if it joins the Convention, but*

that problem may be dwarfed by the very practical problem of leading other countries to join the Convention thereby ensuring its success. This will be very difficult if other States perceive the United States, owing to these developments, and the diversity in its state commercial law, making less of a commitment under the Convention than other States will make if they join the Convention.

After developing the state of the case law in the United States that will cause the problems, this article considers alternative solutions, concluding that the Convention itself supplies the best approach, one that the United States should embrace in its efforts to lead other countries in improving the international dispute resolution system.

Download the article, free of charge, from **here**.

Recognition and Res Judicata of US Class Action Judgments in European Legal Systems

Andrea Pinna (*Erasmus University Rotterdam*) has posted "**Recognition and Res Judicata of U.S. Class Action Judgments in European Legal Systems**" on SSRN. The abstract reads:

Class actions are still a specificity of the U.S. law and allow individual plaintiffs to represent a group of others in a similar situation in a claim against a same defendant. Recently, transnational class actions, either against a foreign defendant or including foreign class members, have become popular. The author addresses the issue of the possibility of bringing such claims involving parties that are resident of a European country.

United States that are traditionally known for the extraterritorial application of

their laws and by easily retaining jurisdiction of their courts try to coordinate the legal systems involved by being concerned with the possibility of recognition in a foreign country of class action judgments. Therefore, the original question of the recognition and the Res Judicata effect of these judgments in European countries that do not know similar collective judicial procedures needs to be addressed.

Download the article, for free, from **here**.

Same Sex Unions Within the Current Regulatory Framework of Serbian Private International Law

Gaso Knezevic and Vladimir Pavic (both at the University of Belgrade) have posted "**Same-Sex Unions Within the Current Regulatory Framework of Serbian Private International Law**" on SSRN (original citation: Y*ugoslav Law Year*, Vol. 3, 2006). Here's the abstract:

Recent introduction of fully-fledged homosexual marriages in certain countries like the Netherlands and Belgium have opened a range of issues which appear difficult to solve. This difficulty is, at least in case of Serbian law, compounded by inadequacy of existing regulation. While it is obvious that it would be impossible to, say, arrange a homosexual wedding in Serbia, grounding such contention in some clear-cut Serbian legislation appears to be a much harder task. This is due to the fact that relevant provisions of Serbian laws appear unclear or contradicting when they have to deal with homosexual marriages. While one should not doubt that Serbian legal system, as is, will reject homosexual marriages, it is impossible not to note the alarming level of legal insecurity surrounding relevant regulation. Unlikely explanations often appear to be the only way out, while technicalities are often more important than substance. While some of the problems have been solved through adoption of

the new Serbian Constitution at the end of 2006, other can only be addressed through amendment of the PIL code.

Download the article from **here**.

German Federal Constitutional Court on the Service of Statements of Claim in American Class Actions

With order of 14 June 2007 the **German Federal Constitutional Court** (*Bundesverfassungsgericht*) decided not to admit constitutional complaints concerning the **service of statements of claim** in **American class actions** pursuant to the **Hague Service Convention**.

The facts of the case are as follows:

Against the complainant, an automobile manufacturer with its registered office in Germany, lawsuits were brought on the basis of the allegation that they had made agreements in violation of competition law preventing the import of motor vehicles from Canada to the US in order to keep the price level in the US market high. Based on the alleged violations of competition law, several class-action lawsuits were filed in the US. In three of these actions, the plaintiffs requested the President of the competent German court as the central authority pursuant to Art. 2 Hague Service Convention to serve the statements of claim on the complainant according to Art. 5 Hague Service Convention.

After the orders for service had been made, the complainant asserted that the service of the statements of claim should not have been ordered because the objectives of the class actions violated the essential principles of a free state governed by the rule of law. Consequently, service should have been refused according to Art.13 (1) Hague Service Convention (para. 5). After legal remedies

had failed before the Higher Regional Court (*Oberlandesgericht*) and the Federal Supreme Court (*Bundesgerichtshof*), the complainant filed constitutional complaints (that were consolidated for joint adjudication) alleging a violation of Art. 2 (1) Basic Law (*Grundgesetz*) in conjunction with the rule of law based on the assertion that the subject-matter of the domestic service are statements of claims in actions which were brought before the American courts without any basis and only for non-legal purposes. Thus, the service of such statements of claim should be rejected on the basis of Art. 13 Hague Service Convention for constitutional reasons. Further, the complainant asserts a violation of Art. 14 Basic Law (guarantee of property) since the service of a statement of claim was an encroachment on the asset base of the company due to the burden of costs associated with proceedings. In addition, a violation of Art. 12 (1) Basic Law (occupational freedom) is alleged since also the complainant's gainful activity were affected. Finally, the complainant argues that also its right to a hearing in court (Art. 103 (1) Basic Law) had been violated

The Federal Constitutional Court **did not admit** the constitutional claims for decision and held that

> *[t]he decisions of German state bodies which effectuate domestic service of foreign statements of claim may violate Article 2.1 of the Basic Law in conjunction with the rule of law principle if the objective pursued by the statement of claims violates essential principles of a free state governed by the rule of law. However, the class actions in this case do not satisfy this requirement. (para.13)*

The Court went on by stating that service may only be refused on the basis of Art. 13 Hague Service Convention under narrow circumstances.

> *According to the case-law of the Federal Constitutional Court, a limit might be reached where the objective pursued by the action "obviously violates essential principles of a free state governed by the rule of law" (BVerfGE 91, 335 (343); 108, 238 (247)). It is true that the First Senate of the Federal Constitutional Court has decided that the mere possibility of imposing punitive damages does not amount to a violation of essential rule of law principles (BVerfGE 91, 335 (343-344)). If, however, damages claims appear from the outset to violate the abuse of law principle, the possibility that the service of a statement of claim*

may be incompatible with the essential principles of a free state governed by the rule of law is no longer excluded. In such a case, it is possible that a German state body could through its application and interpretation of the reservation clause in Article 13.1 of the Hague Service Convention fundamentally misjudge and disproportionately limit the rights of a complainant. The standard which applies in this case is Article 2.1 of the Basic Law in conjunction with the rule of law. However, the Federal Constitutional Court has not yet conclusively determined whether the responsible state body may for constitutional reasons refuse service of a statement of claim whose purpose conflicts with essential principles of a free state governed by the rule of law (see BVerfGE 91, 335 (343); 108, 238 (248-249)). (para. 19)

The Court held that in the present case this question had not to be answered since there was no violation of essential principles of a free state governed by the rule of law.

It is indeed true from the point of view of the German legal system that a defendant is subject to added burdens in an American class-action lawsuit. If, however, from the German perspective a plaintiff exploits the weaker position of a defendant to enforce his or her own rights, this alone will not be sufficient to substantiate an allegation that the plaintiff has committed an abuse of law; instead the objective and the specific circumstances of the legal action must indicate that there has been an obvious abuse of law – this is missing in the present case. (para. 20).

The order of the First Chamber of the Second Senate (2 BvR 2247-2249/06) is available in English at the website of the Federal Constitutional Court.

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

A New Mandatory Rule in the French Law of Torts

The French Supreme Court for private and criminal matters (*Cour de cassation*) has recognised a new mandatory rule in the French law of torts. As a consequence, the Court held that it applied necessarily, and that it was an exception to the applicable choice of law rule, i.e. the law of the place were the tort was committed.

Background

This new mandatory rule is in fact an entire scheme allowing victims of certain criminal offences (basically those resulting in personal injury) to claim compensation from a public fund. The fund compensates victims irrespective of any negligence committed by the tortfeasor. After payment, the fund is subrogated in the rights of the victim and may sue the torfeasor to recover the monies paid to the victim, but on condition that the torfeasor was liable to the victim in the first place.

The fund is obviously a French public fund. But it does not only protect French victims. It also protect foreigners when the offence was committed in France. For French victims, however, the statute does not lay down any territorial condition. It seems to follow that French nationals are eligible even when the offence was committed abroad.

The translation of the provisions of the French Code of Criminal Procedure which govern the scheme can be found here.

The case

In this case, the plaintiff was a French national who had suffered a loss in the United States. While jet-skiing, he was hurt by another jet-ski from behind. He sought recovery in France before the special body set up in each first instance court to rule on the eligibility of plaintiffs. What happened before this body is not known, but the Versailles court of appeal denied compensation. It held that the plaintiff had not demonstrated that the conduct which caused him harm could be characterised as a criminal offence under American law. In a judgment of 22

January 2007, the *Cour de cassation* reversed. It ruled that the content of American law was irrelevant, as the French rule was "of necessary application" (*loi d'application nécessaire*) and thus governed.

French conflict lawyers have traditionnally used several terms to refer to mandatory rules. The most famous internationally is certainly *lois de police*, but they have also been called rules of necessary application, or of immediate application. The concept, however, has always been the same. *Lois de police* are applied necessarily and immediately, as opposed to after determining whether the applicable choice of law rule provides for the application of French law. *Lois de police* are thus exceptions to the normal operation of the traditional choice of law rule, here the *lex loci delicti*.

The judgment justifies the characterization of the French scheme by stating that the rationale of the scheme is to establish a mechanism of national solidarity for victims of criminal offences, which compensates victims because of the existence of a specific social risk (criminality).

Comment

The characterization of the scheme as a mandatory set of rules is only partly convincing. Under the French theory of mandatory rules, a rule is considered mandatory when it is so important that the French legal order could not tolerate the application of any other rule. Here, it seems that the reason why French law must govern is different. The scheme does not really belong to the law of torts. It is a public scheme playing with French money. As with any public law, it is only for the State which instituted such fund to determine the conditions of its application. The application of French law is no exception to the choice of law rule governing torts. The issue of whether a French public fund should compensate a victim is not an issue of tort in the first place, but rather an issue of public law.

Norwegian Court of Appeal on Choice of Law

The Norwegian Court of Appeal (Borgarting lagmannsrett) recently handed down a decision on the question of Choice of law regarding the limitation period for money claims. The decision (Borgarting lagmannsrett (kjennelse)) is dated 2007-05-28, published in LH-2007-75346, and is retrievable from here.

Parties, facts and contentions

The plaintiff and distrainer, Østjydske Bank AS, domiciled in Denmark, served the defendant and distrainee, Joan Anni Myhre, domiciled in Norway, with a subpoena in a Norwegian Court of First Instance (Oslo byfogdembete), 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 Court issued a distress warrant. Before the seizure was carried out, the defendant claimed the loan of money had been repaid so there subsequently was nothing to seize, where upon the Norwegian Court of First Instance reversed its first ruling. In response, the plaintiff appealed to the Court of Appeal and contended, in response to the defendant´s secondary argument, that the Danish law, on the limitation period for money claims with a limitation period of 5 years, was applicable, and, that in accordance with that law, the plaintiff still had the right to demand performance of payment since the limitation period to demand such performance was not exceeded. By contrast, the defendant contended in her secondary argument that Norwegian law, on the limitation period for money claims with a limitation period of 3 years, was applicable, and, that in accordance with that law, the plaintiff no longer had the right to demand performance of payment since the limitation period to demand such performance had been exceeded. This case note will solely venture into the question of the limitation period for money claims since only that question involved an issue of private international law.

Ratio decidendi of the Norwegian Court of Appeal

The Norwegian Court of Appeal, succinct in its ruling, stated that in an international contractual legal relationship, the starting point for the parties to

resolve the question of choice of law, is the party autonomy. Since neither of the disputing parties contended the parties had made a choice of law in accordance with the rules of private international law and its rules for the party autonomy, the question of choice of law had to be answered in accordance with the Norwegian private international law and its individualising method after which the applicable law is designated in accordance with the State to which the contractual relationship has the most significant or strongest connection. Considering that the case at hand involved a loan from a Danish Bank to a person domiciled in Denmark at the time when the loan was granted, it followed from the individualising method that Danish law was applicable.

New Service Regulation Repealing Reg. 1348/2000 to Be Adopted by EP in Its Forthcoming Plenary Session

In its last meeting, on 4 October 2007, the EP's JURI Committee adopted a Recommendation for Second Reading, calling on the European Parliament to approve the Council's common position on a **new service Regulation that should replace Reg. No. 1348/2000**.

The codecision procedure leading to a new European instrument on service of documents started in July 2005, following the Report prepared in 2004 by the Commission and an external study on the application of Reg. 1348/2000. The procedure is summarized as follows by the EP Rapporteur *Jean-Paul Gauzès* in the Explanatory Statement accompanying the Recommendation for Second Reading (*links added*):

> *In July 2005, the Commission presented a draft European Parliament and Council regulation amending Council Regulation (EC) No 1348/2000.*

Following an agreement reached with the Council under the Austrian Presidency, Parliament adopted a certain number of amendments in July 2006, corresponding to the changes agreed with the Council, and officially invited the Commission to submit a codified version of Regulation No 1348/2000 in the form of an amended proposal.

In December 2006, the Commission submitted an amended proposal for a regulation embodying the amendments to Regulation No 1348/2000 adopted by the European Parliament and the Council, and repealing the aforesaid Regulation.

A likely modified version of this text was unanimously adopted at the Council meeting of 19 and 20 April 2007, which then drew up a joint position. The official adoption by the Council on 28 June 2007 was unanimous.

According to current forecasts, the EP's vote on the Recommendation for Second Reading should take place in the plenary session of 24 October 2007 (see the EP OEIL page), ending the codecision procedure with the adoption of the act, in the **text of the Council's Common Position**.

Further documentation on the service of documents in the EU is also available on the related page of the DG Freedom, Security and Justice.

Norwegian Court of Appeals on the Lugano Convention Article 5 nr. 1

The Norwegian Court of Appeal (Haalogaland lagmannsrett) recently handed down a decision on the Lugano Convention Article 5 nr. 1 on the interpretation of the notions "contract", "obligation" and "the place of performance" of the obligation. The decision (Haalogaland lagmannsrett (kjennelse)) is dated 2007-05-16, published in LH-2007-70583, and is retrievable from here.

Parties, facts and contentions

The plaintiffs, A and B, domiciled in Norway, served the defendant, C, domiciled in Spain, with a subpoena in a Norwegian Court of First Instance (Salten tingrett), with the object of action to ask the court to force the defendant C to repay A 265.000 NOK and B 238.550 NOK (and in addition interests for delayed payment) paid to the natural person C, via an account in Norway belonging to a Spanish registered legal person D, for a real estate project to be developed and realized in Spain for further sale with profit. Both parties agreed the legal relationship was contractual. However, the parties disagreed on the question which contract was the contract from which the claim for repayment derived.

The plaintiffs, A and B, contended adjudicatory authority could be attributed to Norwegian courts based on the Lugano Convention Article 5 nr.1, since the place of performance of the obligation in question was in Norway, based on to alternative arguments. The first alternative argument was that C, having admitted to A and B to have breached the conditions of the original agreement of the real estate project, had entered into a new agreement with A and B, which, first, disregarded the claim for compensation derived from the breach of contractual obligations in the original agreement, and, second, obliged C to repay the said sums to A and B in accordance with the new agreement. In accordance with the Norwegian monetary law on promissory notes (law of 1939-02-17, paragraph 3), the place of payment is the place of the domicile or place of business of the creditor, which in this case was Norway. Hence, within the meaning of the Lugano Convention Article 5 nr.1, the "obligation in question" was C´s obligation to pay A and B the said sums in accordance with the new agreement, and "the place of performance" for that obligation was in Norway. Provided the court did not accept the new agreement as the relevant contract within the meaning of the Lugano Convention Article 5 nr.1, the second alternative argument was that for the original agreement, the "obligation in question" was C´s obligation to pay A and B due to breach of the original agreement, and "the place of performance" for that obligation was not in Spain, but on C´s account in Norway.

The defendant C contended Norwegian courts lacked adjudicatory authority since the place of performance of the obligation in question for the original agreement was in Spain, and argued that C never had entered into a new agreement obliging C to pay the said sums to A and B.

Both the Norwegian Court of First Instance (Salten tingrett) as well as the Norwegian Appeal Court (Haalogaland lagmannsrett) rejected and dismissed the

case from becoming a member of the Norwegian adjudicatory law system based on lack of Norwegian adjudicatory authority in accordance with the Lugano Convention Article 5 nr.1.

Ratio decidendi of the Norwegian Court of Appeal

First, in determining its adjudicatory in/competence, the Norwegian Court of Appeal introduced the Lugano Convention, and, first, its main rule of jurisdiction contained in Article 2, where the plaintiff may sue the defendant at the place of the defendant's domicile, provided the defendant is domiciled in a Contracting State, and, second, its exceptions to the main rule contained in Article 5 in general and Article 5 nr.1 in particular, where upon the plaintiff, as an alternative to Article 2, may sue the defendant in matters relating to a contract, in the courts for the place of performance of the obligation in question. On establishing whether Article 5 nr.1 was applicable, the Norwegian Court of Appeal asked 1) which legal relationship at hand in the case was a "contract" within the meaning of Article 5 nr.1, 2) which "obligation" the dispute concerned, and 3) where the place of "performance" of the obligation was.

Second, the Norwegian Court of Appeal went on to determine which legal relationship at hand in the case was a "contract" within the meaning of Article 5 nr.1. The Court did not test the reality of the plaintiffs´ argument that they had entered into a new agreement with the defendant C (see above), but emphasized that significant for the question of adjudicatory authority was whether the plaintiffs´ pretensions about such a new agreement form the basis for the cause and object of the action and court litigation. The Court stated that since, first, the plaintiffs´ first argument – that the parties had entered into a new agreement obliging C to pay the said sums to A and B – had not been introduced in the subpoena to and arguments before the Court of First Instance, and, second, that the subpoena to and arguments before the Court of First Instance had contained references to the original contract for a real estate project to be developed and realized in Spain, that latter contract was the relevant "contract" within the meaning of the Lugano Convention Article 5 nr.1 from which the "obligation" derived and the "the place of performance" for that obligation is attributed adjudicatory authority.

Third, having identified the relevant contract, the Norwegian Court of Appeal interpreted the notion "obligation" within the meaning of the Lugano Convention

Article 5 nr.1, which must be understood as encompassing primary obligations born by each party and not obligations derived from non or wrong fulfilled obligations (the content of this rule is parallel to the rule in paragraph 25 of the Norwegian Civil Procedural Law of 13 August 1915 nr. 6 (Lov om rettergangsmaaten for tvistemaal, which outside the scope of application of the Lugano Convention determines the adjudicatory authority of Norwegian courts). The Court found, like the Court of First Instance, that, for C, the primary "obligation" of the contract was to carry out the development of the real estate project and accordingly administer the sums A and B had paid, and the cause of the plaintiffs´ action was C´s breach of that obligation, subsequently leading the plaintiffs to their object of action which was their claim for repayment, compensation, annulment of contract or some other claim. Hence, the Court dismissed the plaintiffs´ second alternative argument (see above) since "the obligation in question" did not encompass C´s obligation to pay A and B derived from C´s non-fulfilled primary obligation to develop the real estate project.

Fourth, having identified the disputed "obligation in question" born by C, the Norwegian Court of Appeal interpreted the notion "place of performance" of that obligation within the meaning of the Lugano Convention Article 5 nr.1. That notion needed no further interpretation as the Court found it clear that Spain was the place of performance of the obligation born by C since, in accordance with the original agreement, C was to buy, develop and sell real estate in Spain. Subsequently, the Court concluded that the Norwegian courts lacked adjudicatory authority where upon the Court dismissed the case.

Link Directory for Comparative Law and PIL – "Der virtuelle Rechtsvergleicher"

The Chair for Civil Law, Private International Law and Comparative Law at the *Europa-Universität Viadrina Frankfurt (Oder)* has created under the direction of

Prof. Dr. Dieter Martiny a very useful website (in German/English) which contains links on comparative law, private international law, uniform law as well as European Union institutions, case law and Community legislation. Further, it contains links to institutions, case law, legislation, universities, legal journals, lawyers, legal organisations and libraries of most Member States as well as the US, Australia, Israel, Norway, Switzerland and the Ukraine.

The link directory can be found here.

(Many thanks to Dr. Oliver L. Knöfel (Hamburg) for the tip-off.)