Request for a Preliminary Ruling on the Service Regulation

The German *Bundesgerichtshof* (Federal Supreme Court) has referred the following questions to the ECJ for a preliminary ruling:

> *Must Article 8(1) of Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters ('the Regulation') be interpreted as meaning that an addressee does not have the right to refuse to accept a document pursuant to Article 8(1) of the Regulation if only the annexes to a document to be served are not in the language of the Member State addressed or in a language of the Member State of transmission which the addressee understands?*
>
> *If the answer to the first question is in the negative:*
>
> *Must Article 8(1)(b) of the Regulation be interpreted as meaning that the addressee 'understands' the language of a Member State of transmission within the meaning of that regulation because, in the exercise of his business activity, he agreed in a contract with the applicant that correspondence was to be conducted in the language of the Member State of transmission?*
>
> *If the answer to the second question is in the negative:*
>
> *Must Article 8(1) of the Regulation be interpreted as meaning that the addressee may not in any event rely on that provision in order to refuse acceptance of such annexes to a document, which are not in the language of the Member State addressed or in a language of the Member State of transmission which the addressee understands, if the addressee concludes a contract in the exercise of his business activity in which he agrees that correspondence is to be conducted in the language of the Member State of transmission and the annexes transmitted concern that correspondence and are written in the agreed language?*

The case is registered under C-14/07 (*Weiss und Partner*). The referring decision of the *Bundesgerichtshof* can be found on its website.

Rome II: Commission’s opinion on Parliament Second Reading

On March 14th, **the Commission released its opinion** (COM(2007)126 fin.) **on the European Parliament's amendments** to the Council Common Position on Rome II, that were adopted at second reading on 18 January 2007 (see our post here).

The guidelines of the Commission's position had been already expressed by EU Commissioner Franco Frattini during the debate that preceded the vote in the Parliament plenary session (see our resumé here): apart from a formal acknowledgment of some of the Parliament's amendments (aimed to clarify the wording of some recitals and provisions), the Commission rejects most part of the amendments on the controversial issues of the Regulation, on which an agreement could not be reached in the first two stages of the codecision procedure.

In particular, **the following provisions of the Parliament legislative resolution** (hereinafter: EP resolution) **were rejected**:

- **the introduction of a specific rule on violations of privacy and rights relating to the personality** (amendments 9, 15 and 19: new Recital 25a and new Art. 7a of the EP resolution):

> *The Commission already rejected this rule at first reading. Given the political impasse in the Council, the Commission would now prefer to exclude this tricky question from the scope of the Regulation, as in its amended proposal, especially since there is very little international litigation in this area.*

On the conflict rule on violations of privacy and rights relating to the personality, see also the letter of 28 February 2007 (Council doc. n. 6899/07) from Peter Hustinx (**European Data Protection Supervisor**) to the President of the Council, expressing some doubts and concerns on the proposed Art. 7a EP

Resolution, and **risks of inconsistencies with the Directive 95/46/EC** (on the protection of individuals with regard to the processing of personal data and on the free movement of such data).

- **the possibility for the Court to "reasonably" infer a choice of law by the parties, having regard to other factors than an express clause** (amendment 10: Recital 28 of the EP Resolution):

The proposed form of words is not compatible with the legal certainty objective, which requires certainty as to the existence of a choice by the parties.

- **the introduction of the *restitutio in integrum* principle in quantifying damages for personal injuries** (amendments 11 and 22: new Recital 29a and new Art. 21a of the EP Resolution):

While [the Commission] agrees that this is a very interesting idea for improving the situation of road traffic victims, it considers that this constitutes harmonisation of the Member States' substantive civil law which is out of place in an instrument harmonising the rules of private international law.

- **the abolition of the specific rule relating to anti-competitive practices**:

The Parliament's vote on the conflict rule for unfair competition was quite contradictory: following the proposal put forward by the Rapporteur Diana Wallis in the Draft Recommendation for Second Reading, the rule itself (Art. 6 of the Council Common Position) has been deleted (see amendment 17). In a last minute attempt to agree on a compromise text, the Rapporteur had nevertheless proposed, a few days before the Parliament's plenary session, a number of modifications (doc. n. PE 382.964v01-00) to the provision of Art. 6 (see Amendment 31) and to the recitals dealing with it (see Amendments 28-30/Recitals 19-21).

In the Parliament's vote, some of the recitals have been adopted, which clarify the wording and the scope of the provision, but the modified text of Art. 6 has been rejected: the final outcome is that Recitals 19, 20 and 21 of the EP Resolution refer to an article which does not exist any more. The Commission emphasizes this paradoxical situation, while partially agreeing on the modifications approved

by the Parliament, with a view to retain the special provision:

> *[P]reserving this specific rule boosts certainty and foreseeability in the law since it anchors the place where the loss was sustained. Moreover, the Commission fails to grasp the intentions of Parliament, which, despite this deletion [of Art. 6], would preserve and even improve the recital […] relating to the specific rule. If Parliament actually wished to preserve the specific rule, the Commission would accept the rule as proposed in amendment 31, rejected by Parliament.*

- **the introduction of a very detailed provision on the relationship between Rome II and other Community instruments containing rules having an impact on the applicable law, in particular the internal market instruments** (see Amendment 24/Art. 27):

> *In view of the recent developments in the European Parliament and the Council in the context of negotiations of other proposals, such a specifically tailored provision in this instrument no longer seems necessary.*

As regards some **general issues of private international law theory, the Commission rejects the following amendments of the EP resolution**, that had been originally proposed by the Rapporteur Diana Wallis as autonomous provisions (see Amendment 21/Art. 15a and Amendment 22/Art. 15b of the Draft Recommendation for Second Reading) but then adopted by the Parliament in the form of recitals:

- **the introduction of a new recital allowing a litigant to raise the issue of the applicable law** (amendment 12: new Recital 29b of the EP Resolution):

> *The Commission already explained in its amended proposal that, while it supported the idea of easing the task of a court faced with international litigation, this was not something that could be expected of all the parties, in particular those who are not legally represented. Since it cannot accept a rule such as this, the Commission cannot accept either a mere recital, especially as this is a horizontal issue that should be addressed in a broader context. But the Commission is willing to look into the question of the application of foreign law*

in the courts of the Member States in the report on the application of the Regulation, as proposed in the amended proposal.

- **the express introduction of the *iura novit curia* principle, according to which the Court should determine the content of the applicable foreign law of its own motion** (amendment 13: new Recital 30a of the EP Resolution):

[The Commission] believes that in the current situation most Member States would be unable to apply such a rule as the requisite structures are not in place. But it agrees that this is an avenue well worth exploring and that special attention should be paid to it in the implementation report.

A **partial agreement** was expressed by the Commission **on the definition clause** contained in new Recital 21a (see amendment 32, presented by the Rapporteur a few days before the Parliament's plenary session: doc. n. PE 382.964v01-00), **which clarifies the scope of the specific rule on environmental damage set out in Art. 7** of the Council Common Position, with a view to keep it in line with Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage (see. Art. 2(1) of the directive):

While the Commission is basically in favour of clarifying the scope of the specific rule on environmental damage, it regrets that the definition adopted in amendment 32 is so restrictive, confining the scope so that the rule would not apply, for instance, to air pollution. The Commission can accept a definition only if it covers all non-contractual obligations in respect of environmental damage, irrespective of the nature of the damage.

The opinion is the last official statement of the Commission's position on Rome II, prior to the Conciliation Committee that will be convened, in accordance with Art. 251(3) of the EC Treaty, after the formal rejection by the Council of the Parliament legislative resolution (the Council JHA is scheduled on April 19th 2007).

Germany: New Central Authority For International Child Abduction and Adoption Cases

Since 1 Januar 2007, Germany has a new authority dealing with questions of international legal relations and international legal assistance which had fallen before in the competence of the Federal Public Prosecutor (*Generalbundesanwalt*) – the *Bundesamt für Justiz*.

Thus, the *Bundesamt für Justiz* is now *inter alia* the competent authority according to:

- the 1980 Hague Convention on the Civil Aspects of International Child Abduction
- the 1993 Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption
- the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children
- the Brussels II *bis* Regulation

In addition, the *Bundesamt für Justiz*

- is the German contact point in the European Judicial Network (EJN)
- is competent to refer questions on the interpretation of the Brussels Convention and the Rome Convention on the Law Applicable to Contractual Obligations to the ECJ
- will be the central authority according to the Hague Convention on the International Protection of Adults as soon as it will enter into force (the German Parliament adopted the implementing law on 14 December 2006 – however, for the entry into force of this Convention it is necessary that, besides Germany, a third State ratifies the Convention. So far, only the UK has ratified the Convention (only for Scotland))

Cf. with regard to the competences of this new authority the article by *Rolf Wagner*, Das Bundesamt für Justiz, IPRax 2007, 87

German Courts: Non-Applicability of Art.5 (2) Lugano Convention in Favour of a Public Authority

According to the *Oberlandesgericht* (Higher Regional Court) *Dresden*, Art.5 (2) Lugano Convention is not applicable in favour of a claimant governed by public law subrogated to the rights of the maintenance creditor.

In the present case, a public authority had paid an education grant to the daughter of the defendant who was legally obliged to provide her maintenance. Afterwards, the public authority brought an action against the defendant aiming at the disclosure of his income as well as the variation of the maintenance order based on a statutory subrogation. The claimant referred to Art.5 (2) Lugano Convention.

The appeal court held that Art.5 (2) Lugano Convention was not intended to facilitate maintenance actions of public authorities subrogated to the rights of the maintenance creditor brought against the maintenance debtor. This point of view is founded on the nature of Art.5 (2) as an exception to the general rule of Art.2, according to which the defendant is to be sued in the courts of his domicile. The exception to this general principle in Art.5 (2) was justified by the goal to protect the maintenance creditor who is regarded as the weaker party and to provide him with the opportunity to sue the maintenance debtor at his, i.e. the creditor's, domicile/habitual residence. This rationale, however, could not be asserted in favour of a public authority since a public authority was – in contrast to a private maintenance creditor – not in an inferior position. Even though the wording of the provision itself did not require the maintance creditor to be the claimant, the Court advocated, in view of the aforementioned arguments, this restrictive

interpretation of Art.5 (2) Lugano Convention.

The Court referred in particular to the ECJ's ruling in C-433/01 (*Freistaat Bayern v. Jan Blijdenstein*) where the ECJ had decided in this sense as well, even though with regard to the Brussels Convention. However, the *Oberlandesgericht Dresden* held that this ruling was applicable to the case at issue since both Conventions had to be interpreted uniformly.

Abstracts of the reasoning can be found in NJW 2007, 446 (OLG Dresden, judgment of 28 September 2006 – 21 UF 381/06).

Conference: «The New European Contract Law: From the Rome Convention to the "Rome I" Regulation»

An international symposium on **Rome I Proposal** is organised **on March 23th and 24th in Bari** by the ***Fondazione Italiana per il Notariato*** (Italian Notary Public Foundation) and the **University of Bari** (Department of International Law and EU Law):

> *More than fifteen years after the Rome Convention on the law applicable to contractual obligations took effect, there are several reasons to open a new public debate on the private international law provisions for one of the most crucial areas in the notarial practice.*
>
> *First of all, the development of specific contract–related rules, both at Community and international level, frequently clashes with the discipline set by the Convention. Moreover, delicate problems arise both from the possibility to choose, as the applicable law, not only national statutes, but also non binding codes (for example the UNIDROIT principles) and from the progressive*

development of a core of mandatory Community rules applicable to intra-Community cases.

The application of the Convention meets further challenges in the rise of new issues (such as e-contracting and its influence on the rules concerning contract completion; consumers' contracts); and in the development of new legal issues, such as the agreements that govern non-matrimonial relationships.

This led the European Commission to submit a draft regulation (so-called Rome I), which not only introduces our subject into the communitarisation process of Private International Law, but which also modifies its content on important aspects. This conference represents, therefore, a special opportunity for a de iure condito discussion of the results achieved, and of problems still to be solved, and for an evaluation of possible solutions to be adopted de iure condendo.

Here's the programme:

FRIDAY 23 MARCH – MORNING SESSION

Chair: *Bruno Volpe* (Consiglio Nazionale del Notariato)

- Welcome speech – *Giovanni Cellamare* (University of Bari)
- Introductory address – *Giuseppe Gargani* (Chairman of the European Parliament Legal Affairs Committee)
- The Communitarization of Private International Law: Role and Prospects of Private Autonomy – *Sergio Maria Carbone* (University of Genoa)
- Delimiting the Scope of Application of Community Conflict Rules on Contractual Obligations: in particular, Gifts and Conventions Governing Non-matrimonial Relationships – *Giovanni Liotta* (Consiglio Nazionale del Notariato)
- Delimiting the Scope of Application of Community Conflict Rules on Contractual Obligations: in particular, Shareholders' Agreements – *Stefania Bariatti* (University of Milan)
- The Law Applicable in the Absence of Choice: Difference between the Old and New Discipline – *Ugo Villani* ("Luiss-Guido Carli" University of Rome)
- Freedom of Choice of the Applicable Law – *Gabriella Carella* (scientific coordinator of the conference, University of Bari)

FRIDAY 23 MARCH – AFTERNOON SESSION

Chair: *Fausto Pocar* (University of Milan – President of the ICTY)

- Choosing as Applicable Law «the Principles and Rules of the Substantive Law of Contract Recognised Internationally or in the Community »: Examples and Impact on Contracts' Practice – *Olivier Tell* (European Commission, DG for Freedom, Security and Justice)
- Drafting the Choice-of-law Clauses – *Alfredo Maria Becchetti* (Consiglio Nazionale del Notariato)
- Internally, Communitary and Internationally Mandatory Rules – *Nerina Boschiero* (University of Milan)
- Consumer Contracts Concluded by Remote Communication Techniques – *Cyril Nourissat* ("Jean Moulin" University – Lyon 3)
- The Law Applicable to Agency – *David Ockl* (Consiglio Nazionale del Notariato)
- Matters Governed by Lex Contractus and the Law Applicable to the Effects of Contract as Against Third Parties – *Domenico Damascelli* (scientific coordinator of the conference, Consiglio Nazionale del Notariato)

SATURDAY 24 MARCH – MORNING SESSION

Chair: *Federico Tassinari* (Consiglio Nazionale del Notariato)

- The Law Applicable to the Form of Contracts; in particular, Contracts Relating to a Right *in Rem* or Right of User in Immovable Property – *Tito Ballarino* (University of Padua) and *Paolo Pasqualis* (Consiglio Nazionale del Notariato)
- The Law Applicable to Voluntary Assignment: Delimiting the Competence among Laws to Take into Account – *Andrea Bonomi* (University of Lausanne)
- The Impact of the "Rome I" Regulation on Italian Private International Law – *Francesco Salerno* (University of Ferrara)
- Draft Regulations Relationship with other Provisions of Community Law and with International Conventions – *Andrea Cannone* (University of Bari)
- Coordinating the "Rome I" and "Rome II" Draft Regulations – *Luciano Garofalo* (University of Taranto)

Simultaneous interpreting in English and French will be provided.

For further information and registration, see the website of the *Fondazione Italiana per il Notariato* and the downloadable leaflet (in English and French version).

Swedish Supreme Court on Jurisdiction and Patent Infringements

Introduction

The Swedish Supreme Court (*Högsta Domstolen*) recently rendered a decision on adjudicatory jurisdiction over a negative declaration pursuant to non-infringement of a patent, and hence non-contractual non-liability. The decision is dated 2006-06-02 and was published in NJA 2006 p. 354 (NJA 2006:39), – case no. Ö 2773-05. Following is a brief note on the decision.

Parties, facts and contentions

The plaintiff, Alligator Bioscience AB, a company domiciled in Sweden, served the defendant, Maxygen Inc., a company domiciled in the USA holding a European patent (EP 0 752 008) valid in Sweden, with a subpoena in a Swedish court (Stockholms tingrätt). Alligator´s object of action was to ask the court to declare that Alligator was in its right to manufacture fragment induced diversity by a method of in vitro mutated polynucleodes (abbreviated FINDTM) without infringing Maxygen´s patent. Maxygen asserted the court must reject to hear the case and subsequently dismiss the case from becoming a member of the Swedish adjudicatory law system, based, first, on lack of Swedish adjudicatory authority, and, second, Alligator´s lack of interest to have that question determined by the court. This case note will solely venture into the question of adjudicatory authority.

Court instances and conclusions

The decisions of the court of first and second instance as well as the Supreme Court were as follows. The court of first instance (*Stockholms tingrätt*) attributed adjudicatory authority to Swedish courts based on analogous application of the Brussels and Lugano Conventions article 5.3 and the Brussels I Regulation article 5.3, admitting that neither were directly applicable. Maxygen appealed that decision to the court of second instance (*Svea Hovrätt*), which concurred with the court of first instance. Maxygen appealed that decision to the Swedish Supreme Court, which attributed adjudicatory authority to Swedish courts on the basis of Swedish national law Chapter 10, §3 in "*rättegaangsbalken*" (1942:740).

Ratio decidendi of the Swedish Supreme Court

In the following, the rationale of the Swedish Supreme Court will be described.

First, the Swedish Supreme Court identified the legal basis for conferring, delimiting and thus both attribute and exclude adjudicatory authority to Swedish courts. Since the defendant neither was domiciled in an EU State nor an EFTA State, the legal basis for determining the attribution of jurisdiction to Swedish courts was, in accordance with the Brussels I Regulation article 4.1 and the Brussels and Lugano Conventions article 4, to be determined by Swedish law. Further, the Swedish Supreme Court reasoned that the attribution of jurisdiction to court could in principle be based on analogous application of the Brussels and Lugano Convention article 5.3 and the Brussels I Regulation article 5.3 since, finding support in Swedish legal literature (Bogdan´s book titled "Svensk internationell privat- ocj processrätt", 6th edition 2004 p. 113 with references to NJA 1994 p. 81 and 2001 p. 800) those rules express international principles in conflicts of adjudicatory jurisdiction between courts in different States under the condition that their application do not lead to limitation of Swedish adjudicatory authority. However, since the Swedish Supreme Court in case in NJA 2000 p. 273, had established that article 5.3 of the Lugano Convention was inapplicable to negative court declarations of non-contractual non-liability, and it was uncertain and a controversial issue in legal literature whether the Brussels I Regulation article 5.3 and the Brussels Convention article 5.3 encompassed a negative declaration for non-infringement of a patent, and hence a declaration for non-contractual non-liability. Since that question so far was an open question, the Swedish Supreme Court decided it was not evident in this case to base Swedish

adjudicatory authority on an analogous application of the Brussels and Lugano Conventions article 5.3 and the Brussels I Regulation article 5.3.

Second, the Swedish Supreme Court outlined its policy considerations for the possibility to seek a negative declaration of non-infringements of patents on the basis of the possibility to seek negative court declarations on non-infringements of trademarks. Since in the EU it is possible to seek a negative declaration on a non-infringement of a trademark on the condition that such a declaration is permitted to seek in accordance with a Member State´s national law (see regulation no 40/94 of 20 December 1993 article 92 b), and such a negative declaration is permitted in the Swedish trademark law § 44, by consequence, the Swedish Supreme Court reasoned, Alligator´s lawsuit were to be attributed to Swedish courts if that claim had been a claim on infringements of trademarks. (Swedish trademark law states that the legal dispute is to be attributed to the court where the defendant is domiciled or has its place of business, or, if the defendant is neither domiciled nor has a place of business in a Member State, the legal dispute shall be attributed to the court where the plaintiff is domiciled or has its place of business, see article 93.1, 93.2 and 93.5.) Further, the Swedish Supreme Court reasoned, since the European Patent Convention does not regulate the equivalent question for patents, and there are no objective grounds to determine the attribution of jurisdiction to court different from negative declarations on non-infringement of trademarks, the solution should be the same for patents as it is for trademarks. Finally, the Swedish Supreme Court noted the Commission proposal on 1 August 2000 to the regulation on European Patents, COM 2000(412), which was a proposal not yet promulgated, which presupposes in articles 30 and 34 that a plaintiff is permitted to seek a negative declaration on non-infringement of a patent against a patent-holder in an EU court for immaterial rights.

Third, upon having determined that the Brussels and Lugano Conventions article 5.3 and the Brussels I Regulation article 5.3 were inapplicable by analogy, and upon establishing that well founded reasons argue in favour to permit a plaintiff to seek a negative declaration on non-infringement of a patent, the Swedish Supreme Court sought the legal basis for determining Swedish adjudicatory authority in Swedish national law Chapter 10, §3 in “rättegaangsbalken” (1942:740). In accordance with this law, the legal or natural person who does not have a known domicile in Sweden, can in disputes relating to movable property be

sued at the place where the movable property is. In a previous Swedish Supreme Court decision, in case NJA 2004 p. 891, it was not necessary for the Swedish Supreme Court to determine whether and to what extent immaterial rights could be located within the sphere of a State territory in the sense the said law required, but expressed it was a controversial issue. Further, since Maxygen´s patent was a European patent, was valid in Sweden and had the same legal position as if the patent were registered in Sweden, and since that patent could be exploited as security rights in accordance with Swedish law, the Supreme Court reasoned those rights were possible to locate, where upon Maxygen´s patent rights could be located in Sweden as conceived in the spirit of the Swedish national law Chapter 10, §3 in "*rättegaangsbalken*" (1942:740).

Fourth, the Swedish Supreme Court ended by commenting on whether and under what conditions a future decision on establishing liability for and enforce permanent discontinuation of patent infringement would lead to a nullification of a preceding negative declaration on non-liability for non-infringement of a patent. The Swedish Supreme Court noted that a preceding negative declaration on non-liability for non-infringement of a patent could not in any event be nullified so long as the decision to establish liability for and enforce permanent discontinuation of patent infringement did not interfere with the uncertainty the plaintiff wished to achieve certainty for through her seeking of the negative declaration on non-liability for non-infringement of a patent.

Consent-Based Jurisdiction: Ontario

See *Mueller v. Resort Investors International, ULC*, [2006] O.J. No. 4952 (S.C.J.) (available here) for a straightforward rejection of the defendant's challenge to the jurisdiction of the Ontario court on the basis that the defendant served and filed both a notice of intent to defend and a statement of defence. The motions judge

held there was no need to consider whether there was a "real and substantial connection" to Ontario; the defendant had attorned.

This should seem quite orthodox, for it is. But there have been several recent Ontario decisions threatening to upset that orthodoxy as part of the impact of *Morguard*. In my view, expressed in "Lost in Transition: Answering the Questions Raised by the Supreme Court of Canada's New Approach to Jurisdiction" (2006) 85 Can. Bar Rev. 61 (with C. Dusten of the Faskens firm in Toronto), *Morguard* and subsequent decisions of the Supreme Court of Canada have not displaced this traditional basis for jurisdiction. Cases like *Shekhdar v. K & M Engineering and Consulting Corp.* (2004), 71 O.R. (3d) 475 (S.C.J.), *Deakin v. Canadian Hockey Enterprises* (2005), 7 C.P.C. (6th) 295 (Ont. S.C.J.) and *R.M. Maromi Investments Ltd. v. Hasco Inc.* (2004), 73 O.R. (3d) 298 (S.C.J.) cannot be correct on this point.

Two Paradigms of Jurisdiction

Ralf Michaels (*Duke*) has published "**Two Paradigms of Jurisdiction**" in the Michigan Journal of International Law (27 Mich. J. Int'l. 1003). Prof Michaels has very kindly provided us with an abstract:

> *This article addresses a puzzle: The law of jurisdiction remains strikingly different between the US and Europe, despite cultural and economic similarities. The reason suggested is one of paradigms. My hypothesis is that Americans and Europeans do not simply think differently about how to apply jurisdiction; they even think differently about what jurisdiction is.Similarities of goals notwithstanding, each side remains in its own paradigm of jurisdiction, and these paradigms are significantly different. Paradigms explain not only why these differences exist, but also why they remain stable despite all the transatlantic efforts at agreement and the relative similarity of goals and values. This explanation is seemingly paradoxical: convergence and unification are difficult not because of differences but because of similarities. Precisely because American and European law provide functionally equivalent methods*

for resolving the same problems, they cannot agree on, much less unify, these methods.

Propounding the notion of paradigmatic difference between U.S. and European thinking about jurisdiction makes important contributions both to the law of jurisdiction and to the theories and methods of comparative law. The contribution to the law of jurisdiction is both explanatory and evaluative. On a macro-level, exploring paradigmatic difference contributes to a mutual understanding of the structure within which Americans and Europeans think about issues of jurisdiction. Broadly, Americans adopt an "in or out" paradigm that is vertical, unilateral, domestic, and political, while Europeans adopt an "us or them" paradigm that is horizontal, multilateral, international, and apolitical. On a micro-level, understanding paradigmatic difference can provide a single explanation for a wide variety of differences between U.S. and European jurisdictional theory and practice. Taken together, paradigmatic difference suggests mutual criticism tends to be biased. As long as each side argues from within its own paradigm, the approach taken by the other side must necessarily seem deficient.

The second field to which the idea of a paradigmatic difference makes a contribution is the theory of convergence, legal unification, and comparative law. The common understanding is that unification is easy where legal systems are functionally equivalent because each side agrees on the goals and disagrees only on the means. Unification is difficult, according to this account, only where goal preferences differ strongly. By contrast, this Article shows how functional equivalence between different legal orders makes unification more difficult to achieve. Precisely where different legal orders reach similar results by different means, within different legal paradigms, it is very costly for them to unify those means, while the benefits from unification are rather slim. Although the theory of legal paradigms builds on functionalist comparative law, it represents a significant elaboration that can account for difference and for culture.

This Article proceeds as follows. Part II.A. presents two explanations frequently given to explain the differences between U.S. and European jurisdictional law, and shows that both are ultimately insufficient. Part II.B. introduces functional comparison and show how it can actually help stabilize, rather than overcome, difference. Part II.C. introduces the concept of paradigms and paradigmatic difference as a more promising explanation for these differences. Part III

develops this hypothesis by laying out two different paradigms underlying different legal systems-a vertical, domestic, unilateral, political paradigm for U.S. law (Part III.A.), and a horizontal, international, multilateral, apolitical paradigm for European laws (Part III.B.). An important finding in these two sections is that each of the paradigms has ways of accounting for those considerations that are fundamental to the other paradigm, but in different ways: through subsumption under its own terms, and through externalization to other institutions than the law of jurisdiction. Part IV applies the findings of paradigmatic difference to five specific issues on which Americans and Europeans disagree: the role of due process; the discrimination against foreign plaintiffs in U.S. courts and against foreign defendants in European courts; the relevance of state boundaries and extraterritoriality; attitudes towards forum non conveniens, antisuit injunctions, and lis alibi pendens; and negotiation styles in the efforts to conclude a worldwide judgments convention in the Hague. Part V concludes.

You can download the article from **here** (PDF). **Highly recommended**.

Insurance in Rome I: A Consultation by the Treasury and DCA

From the HM Treasury website:

In December 2005, the European Commission proposed to transpose the 1980 Rome Convention into an EU regulation (Rome I). Following consultation with stakeholders which raised a number of serious issues with the initial text, the United Kingdom elected not to opt in to Rome I in May 2006. In doing so, the UK undertook to work for an acceptable text that might allow the UK to opt into at the end of the process, provided the outcome was judged acceptable. The Finnish and German EU Presidencies jointly presented a revised Rome I text on

12 December 2006, which would bring insurance generally within Rome I for the first time. As insurance is a new area for Rome I, HM Treasury and DCA are conducting this consultation.

Click here for the full "Insurance in Rome I" consultation paper (PDF, 953kb). Comments are expected by 30 March 2007.

Stay of Divorce Proceedings in England

Carel Johannes Steven Bentinck v Lisa Bentinck [2007] EWCA Civ 175

Divorce proceedings brought in England were stayed in circumstances where the issue of which jurisdiction was first seised between the English and Swiss jurisdictions had been argued out in Switzerland and all that was awaited to determine the issue was the judgment of the Swiss court.

The appellant husband (H) appealed against a case management order directing preparations for contested hearings in relation to divorce proceedings brought between H and his wife (W) in both the Swiss and English jurisdictions. Following the break-up of their marriage H had taken up permanent residency in Switzerland and W had remained in the United Kingdom. A premarital agreement had provided that the contract and marital relationship between the parties would be governed by Swiss law and be subject to Swiss jurisdiction. H initiated conciliation and divorce proceedings in the Swiss court. W then petitioned for divorce in England and later contested the jurisdiction of the Swiss court. Following various hearings and applications the issue was pending in both courts as to which was first seised. The Swiss court issued a notice fixing the hearing on jurisdiction in divorce and ancillary matters. That hearing proceeded and at the time of the instant hearing judgment was reserved. H argued that as the Swiss court had yet to decide whether it was first seised, the English court should stay its proceedings until such time as that decision was made and that once

Switzerland had decided whether or not it was seised of the matter, the English court could make the necessary directions consequent upon the Swiss decision.

The Court of Appeal held that H's appeal succeeded despite the fact that no single criticism could be made of the judgment of the court below. The judge had rightly identified that the essential dispute between the parties was as to money. With equal clarity he recorded that he had taken the case in circumstances that were plainly unsatisfactory with no opportunity for pre-reading and little time for argument. Despite the absence of error in the judgment below it was not only open to the instant court but incumbent upon it to act to avoid any further wastage of costs and court resources. There was a strong argument for deferring in London for the simple reason that the issue of which jurisdiction was first seised was to be determined in Switzerland according to Swiss law. The notion of having conflicting expert evidence from Swiss lawyers upon which a London judge had then to determine seisin according to Swiss law made no sense at all when a Swiss judge was there to determine the very issue. That consideration became even more powerful when the issue had been argued out in Switzerland and all that was awaited was the judgment of the court. The instant court would abandon common sense and responsibility if it permitted the parties to continue to incur costs in the English jurisdiction in preparation for a London fixture on the premise that it might precede in time the delivery of the Swiss judgment. H's application for a stay of proceedings was granted.

(Postscript: the Klosters judgment did, in the event, decide that Switzerland had jurisdiction and was first seised in respect of all relevant matters). You can download the Court of Appeal judgment from BAILII.

Source: Lawtel