Forum Non Conveniens and Jurisdiction Clauses in Ontario

The Court of Appeal for Ontario has released *Red Seal Tours Inc. v. Occidental Hotels Management B.V.* (available here). The decision is of note for three reasons.

- The court reverses the motions judge's decision not to grant a stay of proceedings. When these sort of conflicting decisions happen on the same facts, it can raise concerns about the way these motions prolong preliminary disputes in litigation.
- The court treats a contract that did not contain a jurisdiction clause as "part and parcel" of a series of related contracts that did contain such a clause (in favour of Aruba). The motions judge gave no effect to the clause, but the appeal court gives it central and crucial weight.
- The court's order is to "permanently stay" the proceedings. For more on this language see C. Dusten and S.G.A. Pitel, "The Right Answer to Ontario's Jurisdictional Questions: Dismiss, Stay or Set Service Aside" (2005) 30 Advocates' Quarterly 297 at 308. I have troubles with the concept of a permanent stay, since by its nature a stay has a temporary quality (unlike a dismissal). I wonder if a "permanent stay" here could be seen to signal a move towards the notion of dismissing cases on the basis of forum non conveniens recently seen in the United States Supreme Court in *Sinochem*.

Economics of Conflict of Laws

Edward Elgar Publishing has published an edited collection of works on "**Economics of Conflict of Laws**", edited by Erin A. O'Hara (Vanderbilt). Here's the blurb:

> *For this important collection, Professor O'Hara has selected some cutting-edge*

previously-published work on the application of economic analysis to the conflict of laws. This authoritative two-volume set offers theoretical and empirical insights into existing approaches to choice of law and the effects of conflicting choice-of-law approaches on judicial decision-making. It investigates several competing proposals for more efficient choice-of-law systems, including a special section on torts. Further topics include evaluations of contract clauses (including choice-of-law and choice-of-forum provisions), and the effects of party choice on jurisdictional competition by states to provide more desirable laws, with examples relating to securities regulation, bankruptcy rules, law firm rules of ethics, same-sex marriage laws and asset protection trust law. A game theoretic analysis of interstate judgment recognition is also included.

The work includes 25 articles, dating from 1963 to 2003. Contributors include: W. Baxter, A. Guzman, B. Hay, L. Kramer, R. Rasmussen, L.E. Ribstein, R. Romano, P. Stephan, S.E. Sterk and M. Whinco.

ISBN: 978 1 84720 076. Price: £275.00, but you can purchase it from the Edward Elgar website for the discounted price of £247.50.

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" – Annotation on "Color Drack"

Recently, the latest issue of the German legal journal *Praxis des Internationalen Privat- und Verfahrensrecht* ("IPRax") has been published.

I.) Annotation on *Color Drack*

The issue contains *inter alia* an annotation by *Peter Mankowski* (Hamburg) on the ECJ's judgment in *Color Drack GmbH./.Lexx International Vertriebs GmbH* of 3

May 2007 where the Court had to deal with the question of jurisdiction in cases where there are several places of delivery within a single Member State.

Mankowski outlines in his annotation six potential solutions, pointing out, however, that none of them is – due to the complexity of the issue – completely convincing. This is, according to *Mankowski*, also true with regard to the approach adopted by the ECJ, which has developed a two-stage solution for identifying the competent court in cases where there are several places of delivery within a single Member State: According to the ECJ, "the court having jurisdiction to hear all the claims based on the contract for the sale of goods is that for the principal place of delivery, which must be determined on the basis of economic criteria. In the absence of determining factors for establishing the principal place of delivery, the plaintiff may sue the defendant in the court for the place of delivery of its choice."

Mankowski examines this solution critically and points out that determining the main focus of the deliveries, as advocated by the Court, implied uncertainty which contravened the aims of the Regulation. Also the subsidiary solution of the Court which shall be applied in cases where no main focus can be ascertained, the claimant's choice, is regarded sceptically since the Court's premise, in these cases all places of (part) deliveries were equivalent, could not be agreed with.

Due to the uncertainties which are attended with determining the main focus, *Mankowski* asks for further concretizing criteria and suggests to proceed – following choice of law rules which try to designate the law with the closest link to the case – from the assumption that it is decisive where the deliverer's place of business which is in charge of the contract is situated. In cases where nothing is delivered at this place, Art. 5 (1) lit. c Brussels I Regulation referred to Art. 5 (1) lit. a Brussels I Regulation and consequently to national law.

See regarding this case also our previous posts on the Advocate General´s opinion, the judgment and further annotations.

II.) Contents

In addition to this annotation the new issue of the "IPRax" contains *inter alia* the following contributions:

- Article by *Axel Halfmeier* (Bremen) on the action raising an objection to

the judgment claim ("Die Vollstreckungsgegenklage im Recht der internationalen Zuständigkeit")

- *Wolf-Georg Ringe* (Oxford) examines the impact of the ECJ's jurisprudence regarding companies' freedom of establishment on international civil procedure law ("Überseering im Verfahrensrecht – Zu den Auswirkungen der EuGH-Rechtsprechung zur Niederlassungsfreiheit von Gesellschaften auf das Internationale Zivilprozessrecht")
- Annotation by *Herbert Roth* (Regensburg) on a decision of the Court of Appeal Düsseldorf concerning the question of whether the debtor's identity has to be clarified – in case of uncertainties – already during the proceedings for a declaration of enforceability ("Der Streit um die Schuldneridentität im Verfahren der Vollstreckbarerklärung nach Art. 41, 43 EuGVVO")
- Annotation by *Urs Peter Gruber* (Halle) on a decision of the Court of Appeal Bamberg dealing with the question of whether proccedings for a declaration of enforceablilty according to Artt. 51, 31 et seq. Brussels Convention are suspended in case insolvency proceedings are opened with regard to the respondent's assets *abroad* ("Inländisches Vollstreckbarerklärungsverfahren und Auslandskonkurs")
- Annotion by *Stefan Kröll* (Cologne) on two decisions of the Court of Appeal Karlsruhe regarding the question of whether procedural irregularities which have allegedly occured at the place of arbitration can be raised in the proceedings for a declaration of enforceability ("Die Präklusion von Versagungsgründen bei der Vollstreckbarerklärung ausländischer Schiedssprüche")
- Annotion by *Marcus Mack* (Heidelberg) on the U.S. Supreme Court decision in *Sinochem* ("Forum Non Conveniens – Abweisung ohne Zuständigkeitsprüfung")
- Article by *Stephan Balthasar* (Munich) on the recognition and enforcement of German judgments on the Channel Islands ("Anerkennung und Vollstreckung deutscher Urteile nach *common law* auf den Kanalinseln und Verbürgung der Gegenseitigkeit")

The full contents as well as news in private international law can be found at the journal's website.

ALI principles published

Members of the American Law Institute (ALI) approved on their annual meeting on May 15, 2007 principles on jurisdiction, recognition of judgments, and applicable law in transnational intellectual property civil disputes (a legal area believed to need reform). The project is the result of several years of intense cooperation, examination and analysis between a broad council, reporters, advisers, liaisons and consultants under the support of ALI. This highly competent group scholarship is made available here. **Highly recommendable!**

Recent Articles on Recognition and Enforcement in Canada

Readers of this site might be interesting in the following two articles:

Antonin I. Pribetic, "Thinking Globally, Acting Locally: Recent Trends in the Recognition and Enforcement of Foreign Judgments in Canada" in *Annual Review of Civil Litigation 2006*, T. Archibald and R. Echlin, eds (Toronto: Thomson-Carswell, 2007) at 141-199 (available on SSRN here).

Antonin I. Pribetic, "Enforcing Foreign Summary/Default Judgments: The Damoclean Sword Hanging Over Pro Se Canadian Corporate Defendants? *The United States of America v. Shield Development Co*." (2007) 7(1) Canadian International Lawyer 8-23, 2007 (available on SSRN here).

Articles for October

There are a few private international law pieces forthcoming in English journals over the next month or so (encompassing articles, case-notes and book reviews.) In no particular order, they are:

1. **Review: "Dicey, Morris and Collins on The Conflict of Laws"**, reviewed by Lorna Gillies, *Civil Justice Quarterly* 2007, 26(Oct), 524-526.

2. "**Sale of goods and the relentless march of the Brussels I regulation**", Jonathan Harris, *Law Quarterly Review* 2007, 123(Oct), 522-528.

> *Comments on the European Court of Justice ruling in Color Drack GmbH v Lexx International Vertriebs GmbH (C-386/05) on whether a court had jurisdiction to hear a dispute under Council Regulation 44/2001 Art.5(1)(b) where there were several places of delivery within one Member State under a contract for the sale of goods.*

3. "**German Supreme Court refers another question to the ECJ**", Bob Wessels, *Insolvency International* 2007, 20(8), 127

> *Notes the decision of the German Federal Supreme Court in Bundesgerichtshof (IX ZR 39/06) to refer to the European Court of Justice the question of whether the courts of the country in which the main insolvency proceedings against a debtor are underway, have international jurisdiction under Council Regulation 44/2001 (the Brussels Regulation) in an avoidance action against a third party with its statutory seat in another country.*

4. "**The enforceability in Spain of a choice of foreign law clause**", Carlos Valls, *International Company and Commercial Law Review* 2007, 18(9), 328-330.

> *Comments on the Spanish Supreme Court ruling in Deutsche Seereenderei GmbH v Martico S.L, which concerned a dispute arising from a Maritime Agency Contract which the parties had agreed would be governed by German*

law. Considers whether the Supreme Court could hear an appeal based on the correct application of German law and, if so, whether the Supreme Court's ruling would create a precedent for the interpretation of German law.

5. "**The Hague Convention, the civil law and the Italian experience**", Maurizio Lupoi, *Trust Law International* 2007, 21(2), 80-89.

Discusses how domestic trusts operate in Italy under civil law, and criticises the provisions on the legal nature of a trust in the Hague Convention on the Law Applicable to Trusts and on their Recognition 1985. Explains Italian practice for drafting trust deeds and the courts' approach to trusts. Examines how an amendment to the Italian Civil Code imposing limitations on dealings with assets will affect trust law.

6. "**The Fifth Element**" Marcel Lipelt, *Law Society's Gazette* L.S.G. (2007) Vol.104 No.34 Page 34.

Highlights changes to EC law, by reason of the transposition of European Parliament and Council Directive 2005/14 into the national law of all member states, which make it easier for residents of a member state who are involved in road traffic accidents in other member state to pursue a claim for damages against the foreign third party insurer, including allowing proceedings to be issued in the courts of the member state in which the claimant is domiciled. Considers which laws the English courts will apply when dealing with such claims, in particular when assessing damages.

(This isn't, by any means, meant to be a definitive list – if anyone knows of any other PIL-related articles about to be published, please do send me an email.)

Revocation of Wills in South African Private International Law

The July 2007 ICLQ contains an article by Prof Jan Neels on the revocation of wills in South African private international law with reference to other Commonwealth jurisdictions and the provisions of the Hague Convention on the Conflict of Laws Relating to the Form of Testamentary Dispositions (1961). Specific reference is made to section 3bis (1) (d) of the South African Wills Act 7 of 1953, which is partially based on article 2 of the Convention, and to revocation of wills by marriage and divorce.

Those with online access to the ICLQ can download the article.

Hague Conference on PIL signs agreement with UJ

A cooperation agreement between the Hague Conference on Private International Law and the Institute for Private International Law in Africa, Faculty of Law, University of Johannesburg, came into effect on 28 August 2007. In terms of the agreement the Johannesburg Institute will act as information centre for the Hague Conference and promote the work of the Conference on the African continent. The Conference will provide all their forthcoming publications, as well as all past publications since 1955, to UJ's law library in order to assist the Institute with the task.

ROME I & ROME II Conference

The conference website informs: This conference to be held in Lisbon, 12-13 November 2007, is organised by the Portuguese Presidency of the EU, in conjunction with the preceding German and the subsequent Slovenian Presidencies, and ERA. The conference will provide participants with an in-depth analysis of the future Rome I Regulation and the Rome II Regulation. The objective of the seminar is to promote a far-reaching and thorough debate concerning the most important or complex issues inherent to the regulations regarding law applicable to contractual and non-contractual obligations.

Concerning Rome I, the seminar will highlight in particular: (a) scope of application, (b) choice of law and applicable law in the absence of choice, (c) consumer contracts, (d) employment contracts, and (e) assignment. In case the legislation process in view of the Rome I Regulation will not be completed by 2007, the following Slovenian Presidency will be able to use the conclusions of this conference in the further adoption procedure.

Furthermore, the Rome II Regulation (OJ L 199/40 of 31 July 2007) will be presented. It shall apply from 11 January 2009. The discussion will concentrate on the following topics: (a) general rules, (b) product liability, (c) the violation of the environment, (d) unfair competition, and (e) infringement of intellectual property rights.

The seminar will provide a forum for debate between legal practitioners, namely judges and lawyers, experts in member states' ministries and EU legislators on the practical implementation of these two instruments of European private international law.

The conference programme can be downloaded from the conference website.

Conflict of Laws in a Globalized World

Cambridge University Press have published a new book on **Conflict of Laws in a Globalized World**, edited by Eckart Gottschalk (Harvard), Ralf Michaels (Duke), Giesela Ruhl (Max Planck, Hamburg) and Jan von Hein (Max Planck, Hamburg). The book is a tribute to the late Arthur von Mehren; the contributors (see below for a full list) are all former Joseph Story Fellows, who worked with von Mehren during their year at Harvard. Here is the publisher's blurb:

> *This book contains ten contributions that examine current topics in the evolving transatlantic dialogue on the conflict of laws. The first five contributions deal with the design of judgments conventions in general, the recently adopted Hague Convention on Choice of Court Agreements, problems involving negative declaratory actions in international disputes, and recent transatlantic developments relating to service of process and collective proceedings. The remaining five contributions focus on comparative and economic dimensions of party autonomy, choice of law relating to intellectual property rights, the applicable law in antitrust law litigation, international arbitration, and actions for punitive damages.*

The contents:

Editor's preface; Bibliographical note; Part I. ***Remembering Arthur T. von Mehren***: 1. *The last Euro-American legal scholar? Arthur Taylor von Mehren* (1922 – 2006) Jürgen Basedow; 2. *Arthur Taylor von Mehren and the Joseph Story Research Fellowship* Peter L. Murray; 3. *Building bridges between legal systems – the life and work of Arthur T. von Mehren* Michael von Hinden; Part II. ***Transatlantic Litigation and Judicial Cooperation in Civil and Commercial Matters***: 4. *Some fundamental jurisdictional conceptions as applied in judgement conventions* Ralf Michaels; 5. *The Hague Convention on Choice-of-Court Agreements – was it worth the effort?* Christian Thiele; 6. *Lis Pendens, negative declaratory-judgement actions and the first-in-time principle* Martin Gebauer; 7. *Recent German jurisprudence on cooperation with the US in civil and commercial*

matters: a defense of sovereignty or judicial protectionism? Jan von Hein; 8. *Collective litigation German style – the act on model proceedings in capital market disputes* Moritz Balz and Feliz Blobel; Part III. ***Choice of Law in Transatlantic Relationships***: 9. P*arty autonomy in the private international law of contracts: transatlantic convergence and economic efficiency* Gisela Ruhl; 10. *The law applicable to intellectual property rights: is the Lex Loci Protectionis a pertinent choice of law approach?* Eckart Gottschalk; 11. *The extraterritorial reach of antitrust law between legal imperialism and harmonious co-existence: the empagram judgement of the US Supreme Court from a European perpective* Dietmar Baetge; 12. *Mandatory elements of the Choice-of-Law Process in international arbitration – some reflections on Teubnerian and Kelsenian legal theory* Matthias Weller; 13. *Application of foreign law to determine punitive damages- a recent US Court contribution to Choice-of-Law evolution* Oliver Furtak.

The contributors:

- Jürgen Basedow
- Peter L. Murray
- Micahel von Hinden
- Ralf Michaels
- Christian Thiele
- Martin Gebauer
- Jan von Hein
- Moritz Bälz
- Feliz Blobel
- Gisela Rühl
- Eckart Gottschalk
- Dietmar Baetge
- Matthias Weller
- Oliver Furtak

The book can be purchased from CUP (on either their main site, or the US variant.) It is priced at £45.00 (or $85.00) and will be available from October 2007. ISBN: 9780521871303.

Many thanks to Ralf Michaels for the tip-off.