Characterisation and liberative prescription/limitation in South Africa

South African academics welcome the outcome of the decision of the Supreme Court of Appeal in *Society of Lloyd's v Price; Society of Lloyd's v Lee* 2006 5 SA 393 (SCA) (which may be downloaded from www.supremecourtofappeal.gov.za). See Forsyth "'Mind the gap' part 2: The South African Supreme Court of Appeal and characterisation" 2006 *Journal of Private International Law* 425-431 and Neels "Tweevoudige leemte: Bevrydende verjaring en die internasionale privaatreg" 2007 *Tydskrif vir die Suid-Afrikaanse Reg [TSAR] / Journal of South African Law* 178-188.

The case dealt with the scenario that the limitation rules of the *lex causae* (English law) were of a procedural nature according to both the *lex causae* and the *lex fori*, the prescription rules of the *lex fori* being of a substantive nature (according to the *lex fori*). The court applied the rules of the *lex causae*. The court *a quo*, the Transvaal High Court, applied the rules of the *lex fori*: see *Society of Lloyd's v Price; Society of Lloyd's v Lee* 2005 3 SA 549 (T). In a similar case, the Cape High Court applied the *lex causae*: *Society of Lloyd's v Romahn* 2006 4 SA 23 (C).

Forsyth welcomes the court's adoption of Falconbridge's *via media* characterisation technique but Neels is in favour of a simple rule that liberative prescription is a substantive issue governed by the *lex causae*, irrespective of how the *lex causae* classifies its own liberative prescription or limitation rules (including such characterisation in terms of the domestic *lex causae* and such classification in terms of the private international law of the *lex causae*).

Second Issue 2007 of “Rivista di diritto internazionale privato e processuale”

The second issue for 2007 of the *Rivista di diritto internazionale privato e processuale* (*RDIPP*, published by CEDAM, Padova), one of Italy’s leading journals in private international law, has been recently published. All the articles in this issue are in Italian, and unfortunately just an English translation of the titles is available, but no abstract. Here’s the list:

ARTICLES

- *A. Malatesta* (University of Castellanza “Carlo Cattaneo” – LIUC), The State of Origin Principle and Conflict of Law Provisions after Directive 2006/123/EC on Services in the Internal Market: Is the Game Over? (Principio dello Stato di origine e norme di conflitto dopo la direttiva 2006/123/CE sui servizi nel mercato interno: una partita finita?);
- *A. Bonomi* (University of Lausanne), Some Issues on the Desirability of Erga Omnes Community Rules on Jurisdiction and Possible Solutions (Sull’opportunità e le possibili modalità di una regolamentazione comunitaria della competenza giurisdizionale applicabile erga omnes).

COMMENTS

- *V. Colandrea* (University of Naples “Federico II”), A Recent Arbitral Order of the International Chamber of Commerce on Cautio Iudicatum Solvi (La cautio iudicatum solvi alla luce di una recente ordinanza arbitrale della Camera di commercio internazionale);
- *S. Crespi* (University of Milan), Cross-Border Mergers before the EC Court of Justice: the Sevic Case (Le fusioni transfrontaliere davanti alla Corte di giustizia: il caso Sevic).

The *RDIPP* is not available online (for subscription information, refer to the publisher’s website, CEDAM).

An archive of the TOCs since 1998 is available on the ESSPER website (an online

project for indexing articles of Italian journals and working papers in law and other social sciences, headed by the library of LIUC University of Castellanza).

Determining the Enforceability of an English Court Order Varying a Jersey Trust: Limitation, Legal Basis and Comity

Jonathan Harris has written an article in the new issue of the *Jersey and Guernsey law Review* entitled "**Comity overcomes statutory resistance: In the Matter of the B Trust**" (*J.G.L.R.* 2007, 11(2), 184-201). The article:

> *Comments on the Jersey Royal Court judgment in Re B Trust on the application of the Trusts (Amendment No.4) (Jersey) Law 2006 Art.9 to determine the enforceability of an English court order varying a Jersey trust. Considers whether Art.9(4), limiting the enforcement of foreign judgments against Jersey trusts, had sufficient legal basis. Assesses whether the English order should be given effect on the basis of comity.*

Available only to those with a subscription to the *Journal*.

Anti-Suit Injunctions in the EU: A

Necessary Mechanism in Resolving Jurisdictional Conflicts?

Nikiforos Sifakis has written an article in the latest issue (Vol. 13, Issue 2, 2007) of the *Journal of International Maritime Law* (current issue's contents not yet on the website) entitled, "Anti-Suit Injunctions in the European Union: A Necessary Mechanism in Resolving Jurisdictional Conflicts?" (*J.I.M.L.* 2007, 13(2), 100-111). A small abstract is available:

> *Discusses the use of anti-suit injunctions in the EU. Considers the categories of cases in which anti-suit injunctions are granted in the UK, including exclusive court jurisdiction clauses, arbitration agreements and no choice of forum cases. Reviews the attitude of the European Court of Justice to anti-suit injunctions. Examines the reasons for antipathy towards anti-suit injunctions in Europe. Comments on the US system of anti-suit injunctions. Proposes a reform of Council Regulation 44/2001.*

There is also a short casenote on the US Supreme Court decision in *Sinochem Int'l Co., Ltd. v. Malaysia International Shipping Corp* by Dennis L. Bryant (*J.I.M.L.* 2007, 13(2), 89-90) in the same issue.

The full article and casenote are only available to those with a subscription to the *J.I.M.L.*

Choice of Law for Quantification of Damages: A Judgment of the House of Lords Makes a Bad Rule

Worse

Russell J. Weintraub has written a fairly critical note on the House of Lords judgment in *Harding v Wealands* in the current issue (Spring 2007) of the *Texas International Law Journal*, entitled, "**Choice of Law for Quantification of Damages: A Judgment of the House of Lords Makes a Bad Rule Worse**" (42 Tex. Int'l L.J. 311). The (fairly long) introduction reads thus:

> *In discussing choice of law for determining damages for torts, it is necessary to distinguish between "heads" of damages and "quantification" of damages under those heads. Heads of damages list the items for which a court or jury may award damages–medical expenses, lost wages, pain and suffering, punitive damages, and perhaps others. Quantification of damages measures the proper amount under each allowable head–how much for pain and suffering?*
>
> *It is also necessary to focus on the meaning of "substantive" and "procedural" as those terms are used for choice of law. For "substantive" issues a court applies the forum's choice-of-law rule to select the applicable law. "Procedural" in conflicts jargon is simply shorthand for saying that the forum's rule applies.*
>
> *"Procedural" is a term used in many contexts. It may refer to the rules that govern the workings of the forum's courts–pleading, preserving objections for appeal, discovery. In the United States it may refer to a federal court's freedom to apply a federal rule when the court has subject-matter jurisdiction because of the parties' diversity of citizenship and is applying state, not federal, law to "substantive" issues. Or, as indicated above, a "procedural" issue might be one for which the forum court will not engage in its usual choice-of-law analysis, but will simply apply its own rule.*
>
> *Justice Frankfurter said it as well as anyone: Matters of "substance" and matters of "procedure" are much talked about in the books as though they defined a great divide cutting across the whole domain of law. But, of course, "substance" and "procedure" are the same key-words to very different problems. Neither "substance" nor "procedure" represents the same invariants. Each implies different variables depending upon the particular problem for which it is used.*
>
> *Therefore, in deciding when to apply the "procedural" label in the context of*

choice of law, the question is: what justifies a forum in insisting on applying its local rule when under the forum's choice-of-law rule the law of another jurisdiction applies to all "substantive" issues? The proper standard is one that balances the difficulty of finding and applying the foreign rule against the likelihood that applying the forum's rule will affect the result in a manner that will induce forum shopping. Pleading, serving process, preserving objections for appeal, and similar issues relating to the day-to-day operation of courts are properly labeled "procedural" for choice-of-law purposes. Flouting those rules will affect the outcome, but an attorney is not likely to choose one forum over another to take advantage of such housekeeping provisions. Discovery rules require more balancing. A forum that permits massive pre-trial discovery is likely to attract plaintiffs. U.S.-style discovery is one of the reasons that American forums are magnets for the aggrieved and injured of the world. Nevertheless, it would be unthinkable to require U.S. judges and lawyers to learn and apply foreign discovery rules. Discovery is properly labeled "procedural" for choice-of-law purposes.

What about damages? Heads of damages, the items that a court or jury may include in computing the amount awarded to the plaintiff, are universally regarded as substantive. If the forum's choice-of-law rule for torts points to a Mexican state, that Mexican state's law determines the heads of damages. Quantification of damages under these heads, however, is regarded as "procedural" and forum standards apply.

The standard rule treating quantification of damages as procedural makes no sense. Quantification is the bottom line–what all the huffing and puffing at trial is about. The American devotion to jury trials in civil cases and the tendency of American juries to award "fabulous damages" are the primary reasons that foreign plaintiffs attempt to litigate their cases in U.S. courts. I have opposed this silliness, but the windmills show little sign of weakening. The United States Supreme Court has indicated the direction to take. Gasperini v. Center for Humanities, Inc. held that federal courts exercising diversity jurisdiction must apply "the law that gives rise to the claim for relief" to determine whether a jury verdict awards excessive damages. Other U.S. courts have not taken this hint that quantification of damages is too important for a "procedural" label.

One bit of sanity that survives in this choice-of-law madness is that courts regard statutory limits on recovery as "substantive." They apply these limits

when their choice-of-law rules select the tort law of the jurisdiction where the statute is in force. In Harding v. Wealands, however, the House of Lords, construing the Private International Law (Miscellaneous Provisions) Act 1995, has rejected even this limit on the "procedural" label when quantifying damages.

Available on Westlaw.

Articles on Hague Choice of Court and Evidence Conventions

The current issue (Spring 2007) of the *American Journal of Comparative Law* contains a couple of articles dealing with private international law issues. First, there is an article by Martin Davies on "**Bypassing the Hague Evidence Convention: Private International Law Implications of the Use of Video and Audio Conferencing Technology in Transnational Litigation**" (55 *Am. J. Comp. L.* 205). Here's the abstract:

New technologies for video and audio conferencing have made it possible to take testimony or depositions directly from witnesses in remote locations. This article considers the private international law issues that arise when a witness in one country gives evidence directly via conferencing technology to a court in another. The probative force of evidence given remotely from another country is affected if there is no effective sanction for perjury or contempt by the witness, or if the witness claims a privilege that would not be available in the jurisdiction where the court sits. The Hague Evidence Convention makes no provision for such situations, which must therefore be resolved by national law. This article undertakes a comparative analysis of the relevant law in several common law countries and stresses the need for a uniform international solution. Unless the Hague Evidence Convention provides that solution, it will become superseded in practice, at least so far as the evidence of witnesses is concerned.

Secondly, Guangjian Tu has written an article on "**The Hague Choice of Court Convention – A Chinese Perspective**" (55 *Am. J. Comp. L.* 347). The blurb reads:

> *In 1992, upon the initiative of the United States, the Hague Conference on Private International Law began to negotiate a convention on jurisdiction and the recognition of judgments. The project suffered a series of setbacks and was eventually abandoned in favor of a less ambitious undertaking, a Convention on Choice of Court Agreements. This Convention was eventually concluded on June 30, 2005 at the Twentieth Diplomatic Session of the Hague Conference. While it is a "double convention" addressing both issues of jurisdiction and of judgment recognition, its scope is rather limited because it deals only with forum selection clauses and their consequences. It is now open for signature and ratification (or accession). Informal consultations have already taken place in several interested States. They will be followed by formal consultations with a view to the signature and ratification once the Explanatory Report is finalized. As a member of the Hague Conference, the People's Republic of China has participated in the negotiations for this Convention. Will China sign and ratify it? This is an important question since China is now not only a member of the World Trade Organization (WTO), its economy is also growing rapidly, comprising a market of over a billion people, and playing an increasingly important role in the world. As a result, Chinese and foreign businesses interact in an increasing number of cases and contexts.*
>
> *This essay discusses the Hague Choice of Court Convention from the perspective of Chinese law to explore whether China can sign and ratify the Convention. It does not analyze its articles one by one but focuses only on the key issues. Part I explains the sources of Chinese law regarding international jurisdiction as well as recognition and enforcement of foreign judgments. Part II will examine the key issues of the Convention in light of the pertinent domestic law of China, analyze how these key issues are dealt with, and, in particular, whether there are conflicts between the Convention and Chinese law and how any such conflicts can be resolved. Part III will conclude that the Convention is acceptable to China and that China should ratify it.*

The *Journal's* website doesn't seem to be fully up-to-date, but both articles are available to Westlaw subscribers in the World Journals category.

Rome II and Small Claims Regulations published in the Official Journal

The Rome II Regulation (see the dedicated section of our site) and the Regulation establishing a European Small Claims Procedure have been published in the Official Journal of the European Union n. L 199 of 31 July 2007. The official references are the following:

Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (OJ n. L 199, p. 40 ff.): pursuant to its Articles 31 and 32, the Rome II Regulation will apply from 11 January 2009, to events giving rise to damage occurred after its entry into force (the twentieth day following its publication in the O.J., according to the general rules on the application in time of EC legislation).

Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure (OJ n. L 199, p. 1 ff.). The text of the Regulation is accompanied by four annexes, containing the standard forms to be used by the parties and the court in the procedure, as follows:

- Annex I: Form A – Claim form, to be filled in by the claimant (see Art. 4(1) of the Reg.)
- Annex II: Form B – Request by the Court or Tribunal to complete and/or rectify the claim form (see Art. 4(4) of the Reg.);
- Annex III: Form C – Answer form, containing information and guidelines for the defendant (see Art. 5(2) and (3) of the Reg.);
- Annex IV: Form D – Certificate concerning a judgment in the European Small Claims Procedure (to be filled by the Court/Tribunal: see Art. 20(2) of the Reg.).

According to its Art. 29, the ESCP Regulation will enter into force today (1 August 2007, the day following its publication in the O.J.), and will apply from 1 January 2009.

German Article: Costs of Free Choice of Law from an Economic Perspective

An interesting article written by *Giesela Rühl* has recently been published in the German legal journal *Rabels Zeitschrift* (71 RabelsZ 2007, 559 et seq.):

"Die Kosten der Rechtswahlfreiheit: Zur Anwendung ausländischen Rechts durch deutsche Gerichte"

Here's the English abstract:

> *Free choice of law has been the focus of the economic analysis of law for several years. However, most of the contributions have concentrated on one aspect of choice-of-law clauses only, namely their efficiency. In contrast, few authors have taken note of other economic problems that free choice of law might pose. One of these problems is the fact that choice-of-law clauses – at least if they call for application of foreign law – incur significant costs. After all, domestic courts will have to apply a law that they do not know and whose application, therefore, is more expensive than the application of domestic law. In economic terms, these additional costs can be classified as negative external effects. They may result in inefficiencies unless the parties – when making their choice consider and, thus, internalise the additional costs associated with the applicationof foreign law. Unfortunately, under current German law no such internalisation takes place: Courts have to determine the content of foreign law ex officio. And the parties neither have to support the courts in this endeavour nor to bear all the costs involved. This article, therefore, discusses several proposals for legal reform designed to provide the parties with an incentive to*

consider the additional costs when making their choice of law. More specifically, it discusses the economic advantages and disadvantages of adopting a lex fori approach, of requiring the parties to plead and proof foreign law and of increasing the court fees in cases where the parties have chosen a foreign law. It comes to the conclusion that the last option complies best with economic and legal requirements and, therefore, suggests to change German law accordingly.

Owusu and Turner: The Shark in the Water?

Chris Knight (St John's College Oxford [BCL]) has written a short article in the *Cambridge Law Journal* entitled, "**Owusu and Turner: The Shark in the Water?**" (2007, 66: 288-301). Here's the abstract:

An important current issue in the conflict of laws is how to deal with the decision of the European Court of Justice in Owusu v. Jackson. It has left numerous unanswered questions on the scope of the Brussels I Regulation and the future is deeply uncertain. Much could be written on whether Owusu is correct, and even more on where one should progress from the current position. But the concern of the present article is more limited: how does the decision in Owusu interact with the previous decision of the European Court of Justice in Turner v. Grovit? Before addressing that question, however, it is necessary to introduce both decisions, and, in particular, the different views of where the future after Owusu may lie.

Those with access to the CLJ can download it from **here**; otherwise, you can purchase the article for £10.00.

Austrian Article on Rome II

A critical article on the Rome II Regulation has been written by *Helmut Koziol* and *Thomas Thiede* (both Vienna) and is published in the latest issue of the *Zeitschrift für vergleichende Rechtswissenschaft* (ZVglRWiss 106 (2007), 235 et seq.):

"Kritische Bemerkungen zum derzeitigen Stand des Entwurfs einer Rom II-Verordnung"

Koziol and *Thiede* criticise the general rule provided in Art.5 of the Proposal (COM(2006) 83 final (now Art.4 of the Regulation)) for focusing solely on the interests of the injured party by designating the law of the country in which the damage arises or is likely to arise and not taking into account the interests of the liable party sufficiently.

The authors argue that this rule neglected the basic principles of liability law, the main purpose of which is the compensation of the damage suffered by the injured party. Since – according to the rule of *casum sentit dominus* – everybody has to bear the risk within one's own sphere, a special justification was necessary to transfer liability to others. This was only the case if the other party is "closer" to the damage. Thus, not only the interests of the injured party, but also the interests of the liable party should be taken into account and should be balanced. Further, special rules derogating from the general rules in a large number of cases, as provided in Art.5 (2) and (3) of the Proposal (now Art.4 (2) and (3) of the Regulation), are not regarded as desirable since those might result in the consequence that either the general rule was applied in cases not included in the special rules without good reason or that the special rules were applied analogously which might lead to the result that the general rule is not applied anymore.

Therefore, the authors conclude that a general rule which designates in principle the law of the country in which the event giving rise to the damage occured – except cases where the occurrence of the damage could have been foreseen by the liable party – would have been preferable. As an alternative, which is more

similar to the existing rule, the authors suggest a rule which designates the law of the country where the damage occurs, providing for an exception for cases where the damaging effects were not foreseeable for the tortfeasor.