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.*
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> *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.

Croatian Article on Choice-of-Law and Choice-of-Court Agreements

Davor Babi? has published an article on the choice-of-court and choice-of-law clauses in the cross-border contracts involving immoveables ("Izbor nadležnog suda i mjerodavnog prava u ugovorima o nekretninama s me?unarodnim obilježjem") in the July edition of the Croatian monthly journal *Pravo i porezi*, pp. 47-58.

The summary states that the author deals with the contents and limits of party autonomy when prorogating competence of a foreign court or arbitral tribunal, as well as when choosing the applicable law for the contracts concerned with immoveables. Both issues are analyzed, first under the Croatian private international law *de lege lata*, and then under the unified rules of *acquis* and *quasi-acquis* in the field of private international law. The latter is important particularly due to the fact that following the potential Croatian membership in the EU, the analyzed national legal sources would be to a great extent replaced by the European ones.

Proceeds from the Croatian Arbitration and Conciliation Days Published

Perhaps not as fresh news as possible but still worth noting is the second most recent edition of the Croatian journal *Law in Economics*, vol 46, no. 2, which brings together some of the proceeds from the 14th Croatian Arbitration and Conciliation Days held on 30 November and 1 December 2006 in the Croatian Chamber of Economy in Zagreb. The number of renewed foreign and Croatian legal experts and practitioners gathered at this annual meeting to present current developments in arbitrations of several legal systems and institutional rules, including Austrian, Croatian, Italian, Serbian and Swiss. The contributions published in the cited journal are as follows:

Krešimir Sajko: *On Conciliation as an Alternative Way of Settling Private International Law Disputes – The Existing Situation and the Solutions* De Lege Ferenda, pp. 7-18.
Nina Tepeš: *Activities and Practice of the Conciliation Centre of the Croatian Chamber of Economy*, pp. 19-26.
Mihajlo Dika: *Legal Position of Institutional and* Ad Hoc *Arbitration in Croatian Law* De Lege Lata *and* De Lege Ferenda, pp. 27-37.
Hrvoje Sikiri?, *Zagreb Rules and the Arbitration Act in Practice of the Permanent Arbitration Court at the Croatian Chamber of Economy – Selected Issues*, pp. 38-70.
Miljenko A. Giunio, Compétence de compétence – *A Preliminary Decision or an Award?*, pp. 71-89.
Eduard Kunštek, *Authority of the ICSID Arbitration Court for Stay of Enforcement of an Award*, pp. 60-101.
Aleksandra Magani?, *Arbitrability in Non-Contentious Matters*, pp. 102-133.
Boris Stani?, *Arbitral Settlement of Disputes Arising Out of the Agreements on Association of the Attorneys-at-Law*, pp. 133-150.
Gašo Kneževi?, *New Serbian Law on Arbitration*, pp. 151-161.

Arsen Janevski/Toni Deskoski, *Law on International Arbitration in the Republic of Macedonia*, pp. 162-177.

The papers by foreign authors will be published in the next edition of the Croatian Arbitration Yearbook.

Physical Presence of Defendant As a Ground For International Jurisdiction – Decision of the South African Supreme Court of Appeal

In a recent decision, *Richman v Ben-Tovim* 2007 2 SA 283 (SCA); [2007] 2 All SA 234 (SCA), the Supreme Court of Appeal of South Africa decided that the mere physical presence of the defendant in the foreign jurisdiction at the time process was served is a sufficient basis for international jurisdiction in the context of the recognition and enforcement of foreign judgements sounding in money. (The judgement under neutral citation [2006] SCA 148 (RSA) may be downloaded from www.supremecourtofappeal.gov.za. The decision of the court *a quo* was reported as *Richman v Ben-Tovim* 2006 2 SA 591 (C) (*per* Van Zyl J).)

There was some uncertainty in this regard as in *Purser v Sales; Purser v Sales* 2001 3 SA 445 (SCA) it was stated by the same court that South African private international law only accepted domicile or residence within the foreign jurisdiction and submission to the jurisdiction of the foreign court as grounds for international jurisdiction in this context. But in the *Richman* case, it was held: "There are compelling reasons why…, in this modern age, traditional grounds of international competence should be extended, within reason, to cater for itinerant international businessmen" (par 9; *per* Zulman JA). "[P]ublic policy would require the recognition by a South African court of a lawful judgment given by default by

an English court where personal service in England had taken place" (par 12; *per* Zulman JA). Reading the *Purser* and *Richman* decisions together, it may be stated that the following grounds for international jurisdiction in respect of judgements sounding in money are recognised in South African private international law today: (1) domicile, residence or physical presence of the defendant within the foreign jurisdiction at the commencement of the proceedings; and (2) submission to the jurisdiction of the foreign court.

The French Like It Delocalized: Lex Non Facit Arbitrum.

Arbitral awards remain delocalized under the French law of international arbitration. They can be recognised and enforced in France irrespective of the decision of the court of the seat of the arbitration to set them aside. F.A. Mann, and many in England are of the opinion that arbitration only exists if the seat of the arbitration allows it. Lex facit arbitrum. The French disagree and believe that arbitration is a private activity, which can be considered favorably or unfavorably, but certainly does not need to be empowered by any state ex ante. Thus, if the court of the seat nullifies the award, this does not mean that it cannot be recognised in another legal order. Would any court think of nullifying a road accident?

This delocalization doctrine builds on the *Hilmarton* precedent. On June 29, 2007, the French Supreme Court for Private Matters (*Cour de cassation*) confirmed in a case where the award had been set aside by the High Court in London. It held that the arbitral award did not belong to any state legal order, and that, as a consequence, it was an "international decision", the effect of which was a matter for the courts where recognition or enforcement was sought. In other words, it was not an "English award" for the sole reason that it had been made by a tribunal seating in England. As usual, the *Cour de cassation* relied on article VII of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards to justify the application of the French law of arbitration when it

is more favorable than the NY Convention.

The dispute had arisen between French company Est Epices and Indonesian company PT Putrabali Adyamulia. Putrabali had sold white peper to Est Epices, but the goods were lost during the carriage by sea. Est Epices refused to pay, and Putrabali initiated arbitral proceedings in London under the aegis of the International General Produce Association. In 2001, an arbitral panel found that Est Epices was entitled not to pay the price. Putrabali challenged the award before the English High Court, appealing on a point of law as the 1996 Arbitration Act allowed it to. The challenged was admitted and the award partially set aside. A second award was made in 2003, and found in favor of Putrabali, ordering Est Epices to pay Euro 163,086.

Est Epices sought recognition of the first 2001 award in France. The 2001 award was declared enforceable by the Paris court of appeal in March 2005. Putrabali appealed to the *Cour de cassation*. In a first judgment of June 29, 2007, the Court dismissed the appeal on the grounds given above.

At the same time, Putrabali had sought the recognition of the second 2003 award. In November 2005, the Paris Court of Appeal held that it could not be declared enforceable. In a second judgment of June 29, 2007, the *Cour de cassation* confirmed. It held that the recognition of the first award precluded the recognition of the second, as the first had res judicata. This was already held 13 years ago in *Hilmarton*.

The rationale behind the French solution is to limit the influence of local peculiarities. So, if a local mandatory rule obliges some witnesses to swear in a particular religious form, this should not be let jeopardize the whole arbitral process. In *Putrabali*, the award had been set aside as a consequence of a review of its merits. From France, this certainly looked like a shocking local peculiarity.