U.S. Supreme Court Hears One Case, Grants Two More, On Private International Law Issues

On Tuesday, January 9, the Supreme Court heard argument in Sinochem v. Malaysia Int'l Shipping, regarding the doctrine of forum non conveniens in U.S. Courts. The case was previewed on this site here, and the argument transcript can be found here. It provides an interesting dialogue among members of the Court regarding the efficacy and operation of the doctrine in U.S. federal courts.

On Friday, January 19, the Court granted certiorari in 05-85, Powerex Corp. v. Reliant Energy Services. The question presented in that case is whether a foreign company owned by a Canadian province and doing commercial business in the U.S. is to be treated as an organ of a foreign government, and thus entitled to have legal claims against it heard in federal rather than state court. The Court added to this review the question of the Ninth Circuit Court's jurisdiction to review a remand order by the District Court. Courtesy of the SCOTUSblog, the briefs can be found here: Petition, Brief in Opposition, Reply. Amici briefs from the government of Canada and British Columbia are expected to be filed, and it wouldn't be surprising if other sovereigns line-up as well.

On that same day, the Court also granted review in 06-134, India Permanent Mission to the United Nations v. New York City over the question whether foreign embassy properties used as diplomats' residence are immune to property taxes assessed by the local New York City government. Especially interesting is question 2 presented in the petition: "Is it appropriate for U.S. Courts to interpret U.S. statutes by relying on international treaties that have not been signed by the U.S. government and do not accurately reflect international practice because they have been signed only by a limited number of nations." The Court granted review over both questions. Again courtesy of the SCOTUSblog, the briefs can be found here: Petition, Brief in Opposition, Reply . This is also a case where one would expect numerous amici from other nations.

European Parliament Legislative Resolution on Rome II

As we reported recently, the Committee on Legal Affairs' Recommendation (see our summary here) for the European Parliament's second reading of the proposed regulation on the law applicable to non-contractual obligations ("Rome II") was due for adoption in plenary session today.

And adopt it they did. Most of the (controversial) amendments recommended by JURI in their draft report have been approved by the European Parliament. Here is a short summary of the European Parliament's key amendments to the Council's Common Position:

- the rules on violations of privacy and rights relating to the personality (Recital 25a and Article 7a) have been retained, which identifies the country where the most significant element(s) occur as:

the country to which the publication or broadcasting service is principally directed or, if this is not apparent, the country in which editorial control is exercised, and that country's law should be applicable. The country to which a publication or broadcast is directed should be determined in particular by the language of the publication or broadcast or by sales or audience size in a given country as a proportion of total sales or audience size or by a combination of those factors. Similar considerations should apply in respect of publication via the Internet or other electronic networks.

- Recital 29(a) and Article 21a, on quantifying damages, are retained:

It is appropriate to make it clear that, in quantifying damages in personal injury cases, the court seised should apply the principle of restitutio in integrum having regard to the victim's actual circumstances in his country of habitual residence. This should include, in particular, the actual cost of after-care and medical attention.

- Article 6, on unfair competition and acts restricting free competition, is deleted
- the seemingly procedural rules on the pleading and proof of foreign law have been kept, albeit in slightly more flexible form:

> *Any litigant making a claim or counterclaim before a national court or tribunal which falls within the scope of this Regulation may give consideration to any issues of applicable law raised by his claim or counterclaim and accordingly where appropriate notify the court or tribunal and any other parties of the law or laws which that litigant maintains are applicable to all or any parts of his claim (Recital 29b).*
>
> *As in the Rome Convention, the principle of 'iura novit curia' applies. The court itself should of its own motion establish the foreign law. For the purposes of establishing the foreign law the parties should be permitted to assist the court and the court should also be able to ask the parties to provide assistance (Recital 30a).*

The accompanying articles from the original draft report, however, have been removed (Articles 15a and 15b), and it is therefore somewhat unclear what the inclusion of the recitals *only* is meant to signify. Numerous minor amendments suggested by JURI were, in the event, rejected by the European Parliament. Details of the votes in plenary session, amendment by amendment, can be found here. You can find all of the proposed amendments to the Common Position of the Council by the European Parliament in this document, on pages 45-53.

A new draft of Rome II, based upon the results of today's discussion and votes, will almost certainly make its way to a Conciliation Committee. That Committee, it would seem, have an awful lot of work to do if Rome II is going to be acceptable to the Council and, ultimately, the Member States.

Update: Diana Wallis MEP, Rapporteur for Rome II, has posted this on her website:

> *The European Parliament adopted the second reading report with an overwhelming majority on Thursday 18 January. **MEPs** have decided again to underline their support for the original first reading position, again putting back in the Articles relating to defamation and road traffic accidents which had*

been excluded in the Member States Common Position. There will almost certainly have to be a conciliation process to iron out the final difficulties between the European law-making institutions.

Many thanks to Giorgio Buono, University of Rome "La Sapienza", for his initial tip-off and for hunting down some of the documents referred to above.

Open Letter to French President on the European Intrusion into French Private International Law

Some sixty leading French jurists (including Prof. Pierre Mayer of the Pantheon Sorbonne) have, controversially, signed an open letter to President Jacques Chirac on the alleged illegitimacy of the European Union's acitvities in the field of private international law.

Jacco Bomhoff (*of Leiden University and the Comparative Law Blog*) has very kindly forwarded to us a translation of the extraordinary letter's key claims:

In a democracy organised on the basis of the principles of the rule of law, a legal provision is legitimate only if emanating from an institution that has the authority to prescribe it. (…) Nevertheless, and despite ever louder objections from a growing number of leading jurists in Europe, the Community Institutions are relentless in taking liberties with this fundamental precept. Now, with the proposal for a Regulation on the law applicable to contractual obligations (Rome I), they seem resolved to ignore this notion definitively from now on.

The principal allegation by the signatories, Bomhoff writes,

…seems to be their fear that the new Regulation – in contrast to the existing 1980 Convention – will offer too little scope for the application of protective

> *mandatory rules of the forum (cf. art. 7 of the Convention). This, the professors suggest, is an element of the Commission's grand plan to get rid of the great majority of mandatory rules in contract law generally (for, they argue, if cross-border contracts are so liberated, purely internal contracts cannot stay behind). This aproach "constitutes a grave attack on democracy as it robs national legislatures of all power".*

That, however, is not the end of the story. Some eighty other French academics have signed a counter-letter (including Paul Lagarde, Hélène Gaudemet-Tallon and Catherine Kessedjian), stating that they denounce the

> *dramatic, even apocalyptic, and therefore totally disproportionate tone…adopted by their colleagues.*

Comments, especially by our French readers, are most welcome. Many thanks to Jacco Bomhoff for the tip-off. A rough translation of the original post on the Coullises de Bruxelles website can be found here.

Ontario Court Analyses Role of Parallel Proceedings in Application for Stay

In *Molson Coors Brewing Co. v. Miller Brewing Co.* (available here) the Ontario Superior Court of Justice stayed proceedings between two North American beer titans in favour of parallel litigation underway in Wisconsin. The dispute concerned a licence agreement that did not contain an express jurisdiction clause but that was expressly governed by Ontario law. The proceedings in Wisconsin were commenced first, but only three months earlier than the Ontario litigation. The Wisconsin court had refused to grant a motion by Molson to stay its proceedings, leading Miller to then seek to stay the Ontario proceedings.

The most interesting part of the decision addresses the role parallel proceedings should be accorded in the *forum non conveniens* analysis. The court states that the existence of parallel proceedings should not trump all other factors. But it goes on to note that "absent concerns of injustice to the individual parties, a court may rightly elevate the factors of international comity, judicial efficiency, distribution of resources, and the avoidance of inconsistent results when performing the *forum non conveniens* analysis."

The court also offers some interesting observations about the relationship between Canada and the United States of America. One such observation is that "A court system that permits or encourages the commencement and continuation of parallel proceedings as a litigation strategy works against the achievement of a more seemless continental economy and sensible approach to dispute resolution."

Abolishing Exequatur in the EU: The European Enforcement Order

Marek Zilinsky has written an article on "**Abolishing Exequatur in the European Union: The European Enforcement Order**" in the new issue of the *Netherlands International Law Review* (*Volume 53, Issue 03, December 2006, pp 471-492*). The abstract states:

> *On 21 October 2005 the EC Regulation on European Enforcement Order for uncontested claims became applicable. According to this Regulation a judgment of a court of a Member State can be certified as a European Enforcement Order in the Member State of origin. A certified judgment is to be enforced in another Member State without any need of an intermediate procedure for recognition and enforcement. The exequatur procedure from the Brussels I Regulation is abolished in certain cases. In the Member State of enforcement there are only very limited possibilities of refusal of enforcement of a certified judgment. In this article the Regulation is discussed, as well as the further possibilities of simplification of cross border enforcement of civil judgments in the European Union. It is argued that for a further simplification of cross border enforcement a harmonization of the procedural laws of the Member States is necessary.*

Those with a subcription can download the article from here.

The Limits of the Judicial Function and the Conflict of Laws

There is an interesting article in the new issue of the *Netherlands International Law Review* on "**The Limits of the Judicial Function and the Conflict of Laws**" by Cathalijne van der Plas (Volume 53, Issue 03, December 2006, pp 439-470). Here is the abstract:

> *Is a Dutch court able to vary the terms of an English trust by applying English trust law if a Dutch court does not normally have such a wide discretionary power? Is a Dutch court able to apply a rule from Moroccan family law that designates the court itself as custodian if Dutch law does not confer such a task on a court? Is a Dutch court able, when it is asked to pronounce a divorce on the basis of Jewish law, to act in a religious capacity? These questions show possible limits of the judicial function in private international law matters. Private international law doctrine knows several theories that are intended to provide guidelines for answering these questions. After having explored those theories, the author concludes that at least three limits of the judicial function can be distinguished. If a Dutch court concludes that in applying the foreign law that has been designated by the Dutch conflict rules it would encounter one of these limits, then the court is not competent from a constitutional point of view to apply that foreign law, in conformity with the purpose intended by the foreign legislature. However, this does not mean that the court has no competence to give a decision at all. The author stresses that it is desirable, and sometimes even compulsory, that the court looks for an alternative decision to prevent parties from being sent home 'empty-handed'.*

Those with a subscription to the Journal can download it from the Cambridge journals website, or you can purchase it for £10.00.

From Politics to Efficiency in Choice of Law

A rather unusual article has appeared on SSRN by Erin O'Hara (Vanderbilt University School of Law) and Larry Ribstein (University of Illinois College of Law), entitled, "**From Politics to Efficiency in Choice of Law**". Here's the abstract:

> *This article proposes a comprehensive system for choice of law that is designed to enhance social wealth by focusing on individual rather than governmental interests. To the extent practicable, parties should be able to choose their governing law. In the absence of an explicit agreement, courts should apply rules that facilitate party choice or that select the law the parties likely would have contracted for — that is, the law of the state with the comparative regulatory advantage. The system relies on clear rules that enable the parties to determine, at low cost and ex ante, what law applies to given conduct, and therefore to choose the applicable law by altering their conduct. State regulatory concerns are accounted for through explicit state legislation on choice of law rather than ad hoc judicial determination of the states' interests. The article shows how this system might be implemented through jurisdictional competition.*

You can download the article from here.

International Effects of National

Laws: An Article Detailing the Flow of International Listings After Sarbanes-Oxley

A recent article by Profs. Joseph D. Piotroski and Suraj Srinivasan tackles whether the stringent requirements of the Sarbanes-Oxley Act on U.S. issuers has had an empiracle effect on the cross-listing behavior on U.S. and U.K. stock exchanges. It has long been speculated that the Sarbanes-Oxley Act has displaced business from New York to London, where the Financial Services Authority regulates the financial sector with a seemingly lighter touch, but the amount of business displaced from Wall Street to the City of London remained disputed. The Economist has recently pointed out that in 2001 the New York Stock Exchange dwarfed both London and Hong Kong for IPOs, but by 2006 it was being beaten by both.

The article tests two propositions.

> *First, has the rate of foreign cross-listings onto U.S. exchanges decreased in the period following the enactment of the Act? Second, are foreign exchanges – in particular, the London Stock Exchange – attracting foreign firms in the post-Act period that would have otherwise listed on a U.S exchange prior to the enactment of the Act? We find strong evidence that U.S. exchanges have experienced a decrease frequency of foreign listing following the Act. Our evidence suggests that a portion of the decline in foreign listings is attributable to firms bypassing a U.S. exchange listing and opting to list on the LSE's Alternative Investment Market following the enactment of the Act. These "lost" listings are composed of firms that are, on average, smaller and less profitable than the firms that actually listed on a US exchange in the post-Sarbanes-Oxley period. Interestingly, we also identify a small set of large, profitable firms from predominantly emerging markets that choose to list on US exchanges following the enactment of Sarbanes-Oxley despite being predicted to list on a UK exchange. Together, this evidence is consistent with a shift in both the expected costs and benefits of a foreign listing following the enactment of Sarbanes-Oxley. Our analysis provides the first evidence (of which we are aware) of how the Sarbanes-Oxley Act has altered the flow of foreign listings across international*

stock exchanges.

Aside from the obvious policy implications, this conclusion has legal ones as well. There currently exists a significant disagreement among the federal courts on the quantum of domestic conduct required to assert subject-matter jurisdiction over a foreign-listed issuer for violations of U.S. securities laws, with a conservative and territorial interpretation of those laws retaining a slim majority. *See generally Note: Defining The Reach of the Securities Exchange Act: Extraterritorial Application of the Antifraud Provisions*, 74 Fordham L. Rev. 213 (2005). Alongside a recent decision of the First Circuit that certain of the Sarbanes-Oxley Act provisions do not have an extraterritorial effect, one cannot help but wonder if the cross-border flow will continue in an effort to effectively circumvent U.S. federal laws.

The full article can be downloaded from the SSRN.

Informal Meeting of Ministers for Justice and Home Affairs on Judicial Cooperation in Family Law Matters

Yesterday, the Ministers of Justice of the European Union met to discuss the future of judicial cooperation in the fields of family law and the law of succession.

Due to an constant increase of international family relationships, the Ministers of Justice agree that further actions have to be taken in these fields of law. Thus, the planned new legal instruments concerning family law and the law of succession have a high priority during the German Presidency of the European Union.

The aim of the new rules is to grant European citizens not only greater legal certainty and predictability, but also greater freedom and flexibility concerning

> *the way they choose to organise their relationships in terms of family law. The objective is thus to strengthen the autonomy of the parties also in the fields of family and succession law. Whilst the Member States are united in their objective, opinions differ as to how best to achieve it. The majority of the Ministers of Justice hold the view that the aim is not only to improve the international procedural rules applicable to cross-border cases, but also to harmonise private international law in the areas of family and succession law.*

The full press release can be found on the website of the German Council Presidency.

Resolution of the Federal Council of Germany on Green Paper concerning Matrimonial Property Regimes

The Federal Council of Germany (*Bundesrat*) has passed a resolution on the Green Paper on Conflict of Laws in Matters concerning Matrimonial Property Regimes, including the Question of Jurisdiction and Mutual Recognition.

With this Green Paper the Commission has launched "a wide-ranging consultation exercise on the difficulties arising in a European context for married and unmarried couples when settling the property consequences of their union and the legal means of solving them. The Green Paper mainly deals with issues concerning the determination of the law applicable to the property consequences of such unions and ways and means of facilitating the recognition and enforcement in Europe of judgments and formal documents relating to matrimonial property rights, and in particular marriage contracts." (cf. our older post which can be found here)

The German *Bundesrat* welcomes in principle the Commission's plan to harmonise the choice of law rules in matters concerning matrimonial property regimes, in particular in view of the increasing mobility within the European Union and the resulting high number of international marriages. The *Bundesrat* stresses the significance of co-ordinating the future instrument and already existing and planned legal instruments such as Brussels II *bis* and Rome III.

However, despite the general positive attitude towards the planned instrument, the *Bundesrat* raises doubts as to whether a sufficient competence for the enactment of choice of law rules with a universal application – meaning that the choice of law rule can designate the law of a Member State as well as the law of a third State – exists. With regard to the introduction of a registration system, the *Bundesrat* adopts an even more critical point of view and negates a sufficient competence according to Art. 65 EC since the introduction of such a registration system would touch upon substantive law which is not covered by Art. 65 EC.

The considerations stated in the resolution on some questions posed in the Green Paper can be summarised as follows:

- The scope of the instrument should be restricted to the property consequences of the marriage bond and should not cover personal aspects. (question 1 a)
- The instrument should apply to the property consequences of that bond arising while the parties are still living together, when they separate as well as when the bond is dissolved. (question 1 b)
- As a connecting factor nationality is favoured. Further, the instrument should include the possibility to choose the applicable law. (question 2 a)
- The same criteria should be envisaged both for the lifetime of the bond and for the time of its dissolution. (question 2 b)
- The *Bundesrat* opposes an automatic change of the law applicable following a change of the spouses' habitual residence. Rather, the law applicable should only change if the parties make a choice of law. (question 4)
- The possibility for the spouses of choosing the law applicable to their matrimonial property regime is supported. (question 5 a)
- According to the *Bundesrat* all legal questions arising from the dissolution of a marriage should be decided by the same court. Thus, the court having jurisdiction under Brussels II *bis* should also be vested with jurisdiction to

rule on the liquidation of the matrimonial property. (question 7 a)

- With regard to the consideration to allow cases to be transferred from a court in one Member State to a court in another Member State, a rather critical attitude is adopted, *inter alia* since this might lead to delays. (question 11)
- With regard to the question whether non-judicial authorities should be incorporated, a rather restrictive point of view is taken: The instrument should include "courts" in terms of Brussels II *bis* but should not go beyond this. (question 12)
- The abolition of the exequatur for judgments is recommended. (question 15)
- The automatic recognition is in general regarded as desirable, however, it is pointed out that national provisions of property law must not be circumvented. If, for instance, additional declarations apart from the judgment are necessary according to national law in order to change the land register, these requirements have to be fulfilled. (question 16)
- Regarding registered partnerships it is stated that uniform conflict of law rules are generally desirable. However, choice of law rules designed for the matrimonial property regime should not be applied directly. Rather, specific conflict rules for the property consequences of registered partnerships should follow concerning the contents the ones designed for the matrimonial property regime. Further, it is pointed out that the registered partnership constitutes a rather new legal form of cohabitation. Thus, not in all Member States legal rules have been established yet. (question 19 a)
- With regard to *de facto unions* (non-formalised cohabitation), specific conflict rules are not regarded as necessary since partners living in such a relationship did choose deliberately not to submit themselves to the legal consequences of a marriage. Therefore rules drafted following the ones regarding the matrimonial property regime are not regarded as appropriate. (question 22 a)

The full resolution of 24 November 2006 can be found on the website of the Federal Council of Germany.