Party Autonomy and Private Law-Making in Private International Law: The Lex Mercatoria that Isn’t

Symeon C. Symeonides (Williamette University, College of Law, USA) has just posted an article on SSRN entitled, "**Party Autonomy and Private-Law Making in Private Intrernational Law: The Lex Mercatoria that Isn't**". Here's the abstract:

This essay discusses “non-state norms” from the perspective of American conflicts law. Commonly referred to as the “new lex mercatoria,” these norms are drafted by various international or intra-national non-governmental organizations and are proposed for incorporation by contracting parties or for application by arbitrators, with or without the parties' prior consent.

Understandably, these norms are popular among many arbitrators who tend to place them on the same footing as law. Current U.S. arbitration law uncritically permits this treatment to the extent it does not allow judicial review of an arbitrator's choice of law (or non-law). The fact that, unlike the law of most countries, American law generally enforces pre-dispute arbitration clauses in consumer contracts and most employment contracts can further exacerbate the situation. In contrast, in contracts that are not subject to arbitration, American courts apply non-state norms only to the extent they have been expressly incorporated into the contract and only if their application would not displace non-waivable rules of the law that would otherwise govern the contract.

This essay applauds the latter position of American conflicts law but suggests that U.S. arbitration law should be reformed so as to provide needed protection to consumers, employees, and other presumptively weak parties.

You can download the article from here. *Highly recommended*.

German Federal Supreme Court requests ECJ to give a Preliminary Ruling on Art. 11 (2), 9 (1) b) Brussels I

The German Federal Supreme Court has decided, on 26 September 2006 (VI ZR 200/05), to ask the ECJ to give a preliminary ruling according to Art. 234 EC-Treaty on the question of whether the Regulation 44/01/EC enables the party, who has been injured in an accident that has taken place within the European Union, to sue the other party´s foreign liability insurance directly at his/her own domicile for compensation on the basis of the reference made in Art. 11 (2) to Art. 9 (1) b) Reg. 44/01/EC (Brussels I).

This question has been answered negatively so far by most legal writers in Germany since a direct action brought against the liability insurance did not constitute a dispute based on a relationship relating to insurance law. However, such a dispute was required by Art. 9 Reg. 44/01/EC.

In contrast to the legal literature, the VI. Civil Division leans towards the legal opinion which has been expressed by the European Council and the European Parliament in Directive 2005/14/EC, namely to regard the injured party as a beneficiary in terms of Art. 9 (1) b) Reg. 44/01/EC by way of an analogous interpretation of this rule so that the injured party has a right of action at his/her domicile.

Since the Court has doubts as to whether a uniform interpretation can be reached without a decision of the ECJ, the Court referred the following question to the ECJ:

> ***Is the reference in Article 11 (2) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters to Article 9 (1) (b) of that regulation to be understood as meaning that the injured party may bring an action directly against the insurer in the courts for the place in a Member State where the injured party is domiciled,***

> ***provided that such a direct action is permitted and the insurer is domiciled in a Member State?***

The case is registered under nummer C-463/06 (*FBTO Schadeverzekeringen N.V. v Jack Odenbreit*).

European Parliament Votes for Common Rules on Succession and Wills

On 16th November, MEPs voted overwhelmingly (**450 to 51**) in favour of a report by Mr Gargani of the Committee on Legal Affairs, asking the European Commission to draw up a

> *Community legal instrument relating to private international law on successions and wills, as already called for in the 1998 Vienna action plan, the programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters, adopted by the Council and Commission in 2000, the Hague Programme of 4 November 2004 for strengthening freedom, security and justice in the European Union, and the Council and Commission Action Plan implementing the Hague Programme on strengthening freedom, security and justice in the European Union (p.3-4).*

The Report calls on the Commission to submit a legislative proposal to Parliament under Articles 65(b) and 67(5), second indent, of the EC Treaty during 2007, and to launch a call for proposals for an information campaign regarding cross-border wills and succession matters, targeted at legal practitioners in the field. The current problems in transnational testaments are described by the Rapporteur with an example:

> *Let us consider the hypothetical case of a German citizen who, on retirement, moves from Germany to the south of Spain (where he spends the last decade of his life) and dies there, leaving two sons residing in Germany and an estate comprising property in Germany. In a case of this kind, if the jurisdiction were determined solely on the basis of the deceased person's habitual place of residence at the time of death, the heirs – supposing they were in dispute over the will – would be obliged to bring the proceedings in question before the Spanish courts.*

The rules proposed in the Report are fairly wide-ranging; in terms of scope, "the legislative act to be adopted should aim to regulate succession exhaustively in private international law and at the same time: harmonise the rules concerning jurisdiction, the applicable law (the 'conflict rules') and the recognition and enforcement of judgments and public instruments issued abroad, except for the material substantive law and procedural law of the Member States (*p.5*). The proposed rule for determining a court's *jurisdiction* is the:

> ***habitual place of residence of the deceased at the time of his death*** *as the criterion for establishing both principal jurisdiction and the connecting factor.*

The Report also suggests that the parties be allowed to choose their court (in accordance with Articles 23-24 Brussels I Regulation), and that the testator be able to choose which law should govern the succession, the law of the country of which he is a national or the law of the country of his habitual residence at the time the choice is made; this choice should be indicated in a statement taking the form of a testamentary clause.

The default choice of law rule proposed is that of **the law of the country which was the habitual residence of the deceased at the time of his death**; this would ensure, the Rapporteur argues, that the court with jurisdiction and the applicable law would coincide, which would help to ensure that any disputes concerning the succession were rapidly and effectively resolved. The Rapporteur does, however, admit a problem with reconciling any kind of succession law with the *lex loci rei sitae*: the law of the place where the property is situated, which generally governs the question of *transfer of title*. The Rapporteur simply recommends that those laws should be "coordinated." The suggested method is to

ensure that:

> *the instrument to be adopted should make it clear that, for the purpose of acquiring and enjoying inherited property situated in a State other than that whose law applies to the succession, it is necessary to follow the rules of the law of the place where the property is situated only if that law requires further formalities or actions in addition to those required by the law applying to the succession.*

Amongst all this, the EP stress that:

> *if European citizens could have access to a standardised document which had binding force in all the Member States and identified the law applicable to the succession, the property concerned and the heirs and executors, those heirs and executors could exercise their rights in all Member States even more simply, safely and effectively.*

The EP therefore strongly recommend a "European Certificate of Inheritance", which should be issued by a public authority. The Report concludes by stating that,

> *This is obviously a complex and many-sided issue.*

That, at least, is apparent. The full Report by the Committee on Legal Affairs is available here. Also see the discussion in the 37th report of the UK government Committee on European Scrutiny. Does the Rapporteur's Report pick the right conflict of laws rules, and were the MEPs right to vote so strongly in favour of the Report? Comments welcome.

Telemedicine and Robotics in the

Conflict of Laws

There is a very unusual article in the latest issue of the *International Journal of Gynecology and Obstetrics* by Bernard Dickens and Rebecca Cook (Faculty of Law, University of Toronto) on "**Legal and Ethical Issues in Telemedicine and Robotics**". The abstract reads:

> *Modern medical concerns with telemedicine and robotics practiced across national or other jurisdictional boundaries engage the historical, complex area of law called conflict of laws. An initial concern is whether a practitioner licenced only in jurisdiction A who treats a patient in jurisdiction B violates B's laws. Further concerns are whether a practitioner in A who violates a contract or treats a patient in B negligently incurs liability in B, A, or both, and, if treatment lawful in A is unlawful in B, whether the practitioner commits a crime. Judicial procedures are set by courts in which proceedings are initiated, but courts may decline jurisdiction due to inconvenience to parties. If courts accept jurisdiction, they may apply their own substantive legal rules, but may find that the rules of a conflicting jurisdiction should apply. Cross-border care should not change usual medical ethics, for instance on confidentiality, but may mitigate or aggravate migration of specialists.*

You can download the article for free here.

Green Paper on Applicable Law in Divorce Matters Unpopular in Brussels

It seems that the European Commission's proposal to establish common rules on the applicable laws in cross-border divorce ("Rome III") has met with widespread criticism in Brussels amongst the EU member states. The proposal sets out which

national legislation should apply in the case of a couple of two nationalities or a couple living in their non-native country, such as an Irish and Finnish pair of EU civil servants living in Brussels. One may immediately ask why the EU needs to legislate for this at all. The Commission answer thus:

> *An "international" couple who want to divorce are subject to the jurisdiction rules of the new Brussels II Regulation, which allow the spouses to choose between several alternative grounds of jurisdiction (see point 3.6 of the attached working document). Once a divorce proceeding is brought before the courts of a Member State, the applicable law is determined pursuant to the national conflict-of-law rules of that State. There are significant differences between the national conflict-of-law rules (see point 3.4 of the attached working document). The combination of different conflict-of-law rules and the current jurisdiction rules may give rise to a number of problems in the context of "international" divorces. Apart from the lack of legal certainty and flexibility, the current situation may also lead to results that do not correspond to the legitimate expectations of citizens. Moreover, Community citizens who are resident in a third State may face difficulties in finding a competent divorce court and to have a divorce judgment issued by a court in a third State recognised in their respective Member States of origin. There is finally a risk of "rush to court" under the current situation (Green Paper, p.3).*

The Commission's proposal for the default choice of law rule?

> *The objective would be to ensure that a divorce is governed according to the legal order* ***with which it has the closest connection****. A number of connecting factors, which are commonly used in international instruments and national conflict laws, could be envisaged, such as the spouses' last common habitual residence, the common nationality of the spouses, the last common nationality if one spouse still retains it or "lex fori".*

The Swedish Justice Ministry study into Rome III highlights some of the causes for concern; in cases involving non-EU citizens or non-EU states, Rome III would also favour a legislature to which both spouses have a strong connection. For exmaple, a Swedish woman marries an Iranian man in Sweden and emigrates to Iran but after several years decides to leave both her spouse and his country and go home. "The proposal means that Iranian divorce law would be applied by the Swedish

court," the justice ministry study states.

Throwing all the different approaches to marriage and divorce into one big melting pot was bound to cause controversies – issues such as forced marriage, or the legality of divorce at all (it is illegal in Malta, for exmaple), or the minimum "separation"period, are all different in each member state, and member states will not want to water down their divoce laws. The Irish Ministry for Justice has, in its press release on the Irish opt-out from Rome III, stated that:

> *If Ireland were to adopt and implement this measure, this would allow EU nationals resident in Ireland to obtain a divorce in our courts on substantially different and less onerous grounds than that provided for in our constitution.*

The cost, and added time needed for finding foreign experts is also a worry, and one of the reasons behind the UK's opt-out. All in all, Rome III is not the most popular green paper in the playground right now. Is the criticism justified? Comments welcome.

Update: Mark Harper (*Withers*) has written a summary on the UK Government's opt-out of Rome III at legalweek.com. He concludes:

> *This failure by the Government to opt in will mean a two-speed Europe when it comes to family law. The rest of Europe will move forward towards harmonisation of these rules, as opposed to harmonising substantive law, and we will be left behind.*

German Article on the Principle of Mutual Recognition

A very interesting article on the principle of mutual recognition by *Heinz-Peter Mansel* (Cologne) has been published in the latest volume of the German legal journal Rabels Zeitschrift (70 RabelsZ (2006), 651 et seq.): "Mutual Recognition

as Basic Principle of the European Area of Justice" ("Anerkennung als Grundprinzip des Europäischen Rechtsraums").

Mansel gives first a short review on the European area of freedom, security and justice before differentiating the two forms of recognition as understood by the European Commission: The (procedural) recognition of judgments and the "recognition" of legal statuses and documents by means of choice of law rules. Subsequently he gives a definition of and an overview on the principle of mutual recogntion as well as its effects and its (possible) scope of application. Further, he attends to the developments in European primary legislation and in particular to the ECJ´s decisions in "Avello" and "Niebüll" (see concerning this case also our older posts which you can find here) and asks whether the findings of the ECJ concerning names might be applied also with regard to other questions relating to the personal status. This is followed by an analysis of possible developments at the level of European secondary legislation de lege ferenda. He concludes – inter alia – that the principle of mutual recognition could only be realised to a certain extent. He argues in particular that it could only complement, but not substitute the communitarisation of choice of law rules. He regards the proposal for a regulation introducing a "European certificate of inheritance" as a successful model for a possible rule on recognition de lege ferenda since it combines the communitarisation of choice of law rules with rules on recognition as well as uniform law.

Supreme Court of Canada Decision on Foreign Non-Monetary Orders

On November 17, 2006, the Supreme Court of Canada released its decision in *Pro Swing Inc. v. Elta Golf Inc.* (available here). It had been eleven months since the court reserved its decision. At issue was whether the Ontario court should recognize and enforce a consent decree and a contempt order made by the United States District Court for the Northern District of Ohio (Eastern Division). At first instance the Ontario Superior Court of Justice had enforced the decree and order,

but on appeal the Court of Appeal for Ontario had refused to do so.

The central issue in the case was whether the Canadian common law rule requiring a foreign decision to be for a fixed sum of money before it could be enforced would evolve to encompass non-monetary orders. On this issue all seven justices agreed that the time had come to change the rule so that non-monetary orders could be enforced.

However, the court divided 4-3 on whether this particular decree and order should be enforced, with a majority affirming the Court of Appeal for Ontario's negative answer. Justice Deschamps set out several reasons for the refusal, including that: (a) the contempt order was quasi-criminal in nature and so violated the rule on not enforcing foreign penal law; (b) the wording of the consent order was unclear; and (c) other judicial assistance mechanisms (particularly letters rogatory) were a more appropriate way of assisting the Ohio proceedings.

The dissent would have restored the first-instance decision and allowed enforcement. Chief Justice McLachlin held that civil contempt orders were not penal in nature and that the wording of the consent order was sufficiently clear.

The court refers to several issues which are left unresolved. What test will apply to whether a particular foreign non-monetary order is enforceable? Will new or expanded defences to enforcement be necessary to address the greater complexity involved in equitable orders? Does the requirement that the order be final require reconsideration outside the traditional scope of monetary orders? These issues will need to be worked out in subsequent cases.

The "Comments" Feature: A Forum for Discussion

Readers of this site will, I’m sure, be pleased to learn that there is now a **fully operational “comments” feature** in place on the site, that enables readers to

discuss the news items published on **CONFLICT OF LAWS .NET**. Under *each news item* you will find a **link** to the comments feature, which looks like this (the link is circled in red):

The number in brackets after “Comments” will tell you how many readers have already left comments about that news item. Clicking on the link will take you to the individual webpage for that particular news item, where you can discuss that item by leaving comments in the **window** provided. The comments window looks like this:

Once you have filled in your “Name” and “Email” once, the site will remember it for future occasions. Simply type your “Message” in the window provided, choose whether or not you want to be notified of any other comments left by other readers about that news item via email (by checking the box), and click “Submit.” Your comment will then be published on the site, underneath the news item.

We very much hope that this will serve as a useful and effective forum for discussion amongst our international readership. If you have any questions about the comments feature, then by all means contact us. Let the discussion commence!

Enforcing International Arbitration Agreements: the Remedial Powers of Federal Courts

Daniel S. Tan (*O'Melveny & Myers LLP*) has posted an article on "**Enforcing International Arbitration Agreements in Federal Courts: Rethinking the Court's Remedial Powers**" on the Social Science Research Network (SSRN) that will be published in the *Virginia Journal of International Law* in Spring 2007. The

abstract reads:

> *The area of remedies in private international law is largely unexplored, but provide the very means by which the courts can advance private international law aims such as controlling international litigation and enforcing forum selection. The contractual nature of arbitration agreements and the policy in favor of arbitration make this a good starting point from which a wider remedial framework can be developed.*
>
> *In practice, the U.S. federal courts invariably enforce arbitration agreements with the statutory remedies in the Federal Arbitration Act. Yet, there is no reason why this should be. Where the statutory remedy is deficient or inappropriate, the courts may appeal to their wider inherent remedial powers to fashion suitable relief. The domestic law of remedies suggests that the courts may use specific and (antisuit) injunctive relief to enforce the parties' right to the arbitral forum, or to award ordinary contractual damages to vindicate what is a straightforward breach of contract. Private international law remedies such as stays of proceedings and nonrecognition of judgments obtained in breach of arbitration agreements are other remedial alternatives that can be used to enforce such agreements. All the same, development of each of these remedies must be done within the context of an overarching remedial scheme – akin to that which exists in domestic law. The domestic law of remedies offers an interlocking set of remedial responses to vindicate wrongs. To effectively control international litigation and improper attempts at forum shopping, the courts must endeavor to develop a similar remedial framework in the private international law context, in order that they may be able to render the most appropriate remedial relief to enforce agreements to arbitrate and advance the policy in favor of arbitration.*

You can download the full article here.

Forum Non Conveniens and Choice of Law in Tort & Equity in the Singapore Court of Appeal

In *Rickshaw Investments Ltd and Another v Nicolai Baron von Uexkull* [2006] SGCA 39 (handed down on 3rd November 2006), there was an appeal against the first-instance decision that the appellant's (Rickshaw Investments Ltd) action against the respondent (Nicolai Baron von Uexkull) be stayed on the ground of *forum non conveniens*. The appellants had hired the respondent in 2001 to sell dynasty artefacts from the "Tang Cargo". The employment contract was subject to German law and the competence of the German courts. When the appellant terminated the contract in 2004, the respondent commenced proceedings in Germany against the first appellant on the basis of a claim in contract.

The appellants, meanwhile, commenced an action against the respondent in Singapore on 10 June 2005. The appellants stated four causes of action, as follows:

- conversion of 25 pieces of the Tang Cargo by the respondent;
- breach of the respondent's equitable duty of confidentiality towards the appellants;
- breach of the respondent's fiduciary duties as agent of the appellants; and
- deceit arising from the respondent's misrepresentations.

In deciding whether or not the appellant's claim in Singapore should be stayed on the ground of *forum non conveniens*, the Singapore Court of Appeal looked to the classic test given by the House of Lords in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460, stage one of which is that:

> *a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interest of all the parties and the ends of justice*

In order to determine whether Singapore was the appropriate forum for the present proceedings, the court stated the relevant factors for consideration were the **general connecting factors**; the **jurisdiction in which the tort occurred**; **choice of law**, ie, whether the choice of law clause in the contract was exclusive, and if not, which law should be applied to the claims in tort and equity; and the **effect of the concurrent proceedings in Germany**.

The court found that, under the *general connecting factors*, Singapore was the appropriate forum to hear the substantive dispute, as the location of the key witnesses was Singapore, and the respondent was a permanent resident of Singapore and resided in Singapore at the time the alleged tortious acts and equitable breaches took place.

In deciding *whether the natural and most appropriate forum is that in which the tort occurred*, the court placed considerable reliance on *Cordoba Shipping Co Ltd v National State Bank, Elizabeth, New Jersey (The Albaforth)* [1984] 2 Lloyd's Rep 91 and *Berezovsky v Michaels* [2000] 1 WLR 1004, which held that, inter alia, "…if the substance of an alleged tort is committed within a certain jurisdiction, it is not easy to imagine what other facts could displace the conclusion that the Courts of that jurisdiction are the natural forum" (per Goff LJ in the Alberforth at 96). In agreeing with that general principle, the court held that

> *we must emphasise that the result that is arrived at through the application of the Albaforth principle is only the prima facie position and/or a weighty factor pointing in favour of that jurisdiction. Applying this to the present case, the fact that the respondent's alleged torts were committed in Singapore does point towards Singapore as being the natural forum to hear the dispute, but this is only one of the factors to be taken into account in the overall analysis, albeit a significant one.*

In the *choice of law* analysis (looked at on the basis that where a dispute is governed by a foreign *lex causae*, the forum would be less adept in applying this law than the courts of the jurisdiction from which the lex causae originates), a key issue was whether the appellant's choice to sue in tort was tantamount to an avoidance of the governing law provision in the contract of employment. The court held that, absent bad faith on the part of the appellants,

> *…we see no reason why they should be denied the freedom of choice to frame*

> *their causes of action in the way they have. This has in fact been made clear in the case law. It is, for example, established law that the mere presence of a contractual relationship does not in itself preclude the existence of an independent duty of care in tort: Henderson v Merrett Syndicates Ltd [1995] 2 AC 145 as well as the decision of this court in The Jian He [2000] 1 SLR 8 at [26]….In other words, although the allegedly tortious acts were committed in the course of the respondent's employment in fact, the acts had a separate legal existence from his contractual obligations and breaches thereof.*

The claims in *conversion*, the other for *fraudulent misrepresentation or deceit* were claims in **tort**, and so the **double actionability rule** applied, subject to the double flexibility exception (see Briggs (1995) 111 LQR 18 at 21); i.e. the decision in *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190 meant that the tort might nevertheless be actionable even though it was not actionable under the *lex fori* or the *lex loci delicti*, and even heralded the possibility that the *lex causae* of a tort could be the law of a *third* jurisdiction (other than the *lex fori* or the *lex loci delicti*), which has the most significant relationship with the occurrence and with the parties. The court held that it might, in certain exceptional circumstances, be possible for a law other than Singapore law to apply, even in the case of a local tort (i.e. a tort committed in Singapore). That said, the claim in conversion was held to be governed by the *lex fori* – Singapore law, as that was also the lex loci delicti.The Red Sea exception did not apply, as most of the connecting factors (as discussed above) pointed to Singapore. The claim for fraudulent misrepresentation or deceit likewise fell wholly within Singaporean law under the double actionability rule.

The claims in *breach of confidence*, and *breach of fiduciary duties*, were claims in **equity**. In identifying the choice of law principles, the court relied heavily on T M Yeo, *Choice of Law for Equitable Doctrines* (Oxford University Press, 2004). The court decided that:

> *We would, however, accept the more limited proposition to the effect that where equitable duties (here, in relation to both breach of fiduciary duty and breach of confidence) arise from a factual matrix where the legal foundation is premised on an independent established category such as contract or tort, the appropriate principle in so far as the choice of law is concerned ought to be centred on the established category concerned.*

On that basis, as the allegations of breach of fiduciary duty as well as breach of confidence arose from the contract of employment itself, German law (as the governing law of the contract) should govern the claims in equity.

The court therefore concluded that, as a whole, the connecting factors clearly pointed to Singapore as being the appropriate forum for the hearing of the substantive issues concerned. On that basis, the appellants' action in the Singapore courts against the respondent ought **not** to be stayed.

> *It is also clear that Singapore is the most natural and appropriate forum to hear the claims in tort. The issue of choice of law appears, as we have noted, to be neutral and, although there is a risk of conflicting decisions by the Singapore and German courts, this factor does not weigh decisively in the respondent's favour, having regard to the other factors.*