Conference: Conflict of Laws and Economic Regulation

Mathias Audit, Horatia Muir-Watt and Etienne Pataut are hosting a conference in Paris on 22 – 23 June 2007 on "**Conflict of Laws and Economic Regulation**" (*Colloque Conflit de Lois & Régulation économique*).

Speakers include Paul Lagarde (Paris I) and Diana Wallis (European Commission) – a full list of speakers, and all of the details on time, place and registration can be found in the programme (*PDF, 3mb*).

Article in Commemorance of Arthur Taylor von Mehren

An article by *Symeon C. Symeonides* (Willamette University College of Law, Salem, Oregon) on the life and work of A*rthur Taylor von Mehren*, who has passed away on January 16, 2006, has recently been published in English in the German law journal "Praxis des Internationalen Privat- und Verfahrensrechts" (IPRax 2007, 261).

Here is a short excerpt:

> *As noted by his colleagues, Arthur was a "pure scholar", a "scholar's scholar", with "astonishing depth and range" and "a mind ever restless for new territory to explore." His published work spans the entire field of comparative law, both public and private, all branches of private international law (jurisdiction, choice of law, and recognition of judgments), as well as international commercial arbitration. He authored or co-authored 210 publications: ten books, four monographs, 119 articles, 48 book reviews (the most unselfish form of scholarship), and 29 reports and other writings. Most of them were published in English, but several were published in French and German, which Arthur spoke*

fluently, as well as in Spanish, Italian and Japanese.

Rome II: Agreement Reached in the Conciliation Committee

As stated on press releases published by the Council and the Commission (DG Freedom, Security and Justice), **an agreement has been reached on the text of the Rome II Regulation, during the first official meeting of the Conciliation Committee that was held yesterday evening** (the Conciliation Committee had been convened, pursuant to Art. 251(3) of the EC Treaty, after the formal rejection by the Council of the Parliament's Legislative resolution at second reading: for further details on the steps of the complex procedure that has lead to the agreement, see the Rome II section of our site).

According to a statement by Diana Wallis, Rapporteur on Rome II in the European Parliament, prior to the official meeting of yesterday **the institutions** involved in the codecision procedure (Council and Parliament, the Commission playing a mediating role) **had held six informal meetings** in order to facilitate the negotiations (so called "trialogues": for an overview of the conciliation stage, see the "codecision" section of the Commission's website).

The content of the agreement is summarized as follows in the Council's press release, with particular reference to the controversial issues (that were emphasized by the Commission in its opinion on the EP Second reading):

> *As a general rule, the draft Regulation sets out that the law applicable to a tort/delict is the law of the country where damage occurred. Only in certain limited, duly justified circumstances, the general rule will be derogated from and special rules applied. The draft Regulation contains special rules in matters of product liability, unfair competition, environmental damage, infringements of intellectual property and industrial action. In the context of a global*

compromise package, the Conciliation Committee settled all the questions arising from the amendments adopted by the European Parliament in second reading.

The agreement includes notably:

Violation of privacy or rights relating to the personality:

While it was agreed that legal actions connected with those rights will be excluded from the scope of this Regulation, the Commission was asked through a review clause to present, not later than 31 December 2008, a study on the situation in the field of the law applicable to non-contractual obligations arising out of violations of privacy and rights to relating to personality, taking into account rules relating to freedom of the press and freedom of expression in the media. Violations of privacy resulting from the handling of personal data will be also dealt with in the Commission's study.

Damages in personal injury cases:

This question arises primarily in connection with traffic accidents which have connection with more than one State. In particular, the issue of the quantification of damages in personal injury cases was discussed. The solution agreed provides, on the one hand, for a recital with criteria for the quantification of damages to be applied by judicial authorities in accordance with national compensation rules. On the other hand, the Commission undertook to examine the specific problems resulting for EU residents involved in road traffic accidents in a Member State other than the Member State of their habitual residence and to prepare a study on all options before the end of 2008. This study would pave the way for a Green Paper.

Unfair competition and acts restricting free competition:

A compromise solution was found. It will allow for the application of one single law, while at the same time limiting, as far as possible, "forum shopping" by claimants.

Foreign law:

The Commission will prepare a study on the effects on the way in which foreign law is treated in the different jurisdictions and on the extent to which courts in

the Member States apply foreign law in practice pursuant to this Regulation.

Other issues that were settled by the Conciliation Committee concern the relationship with other Community law instruments, the definition of environmental damage for the purposes of this Regulation, and a provision on punitive damages in the context of public policy.

The consolidated text resulting from the agreement (so called "joint text") is not yet available, subject to legal linguistic revision: however, **technical details on the joint text are provided by the statement released by Diana Wallis on her website**, with specific reference to the amendments adopted by the European Parliament at second reading on the basis of the Council's common position.

Once the linguistic revision completed, the Regulation shall be endorsed by the Parliament (absolute majority of votes cast) and the Council (qualified majority voting procedure) to be adopted, within six weeks from the date of approval of the joint text, pursuant to Art. 251(5) of the EC Treaty: the Parliament's vote is scheduled in the plenary session of 10 July 2007 (see the OEIL page on Rome II).

It is entirely possible that the Regulation will be published in the Official Journal in July 2007 (following the Parliament's vote in plenary and the expected signature of its President and the Council's). If no change has been made to the provisions on the application in time, it will start to apply in early 2009 (see art. 32 of the Council's Common Position), to events giving rise to damage which occur after its entry into force (art. 31; the date of entry into force is on the twentieth day following that of the publication on the O.J., except otherwise specified).

(Many thanks to Andrew Dickinson and Janeen Carruthers for the tip-off, and to Martin George and Edouard Dirrig for providing additional information and clarifications)

Fraude à la loi

In a judgment of 17 April 2007, the Court of first instance of Hasselt found that the exception of fraude à la loi did not apply to the following case: A man from India and a woman from The Netherlands married in Sweden. They had no connection to that country (no friends or family; never lived there). The city where they moved to in Belgium refused to recognise their marriage on the basis of fraude à la loi (arguing that the couple should have married in The Netherlands or in Belgium, and only went to Sweden because of the less stringent requirements regarding documents etc.). The court found that this exception did not apply. In its considerations, the court mentioned that this was not a simulated marriage.

Legalisation attachments in Belgium

In Belgium a practice has developed whereby the Belgian embassies in foreign countries may attach a ‘warning’ when legalising a document. The most frequent example is for repudiation. The warning note will then indicate to the future receiver of the document that according to the embassy, the document concerns the unilateral dissolution of a divorce.

This practice has been affirmed in an ‘Arrêté royal’ (published in the Moniteur belge of 11 January 2007). In the past the warning could be inserted on the legalisation sticker or on a separate sheet of paper attached to the document and legalisation, but according to the new rules only the last option remains.

It seems that such warning is most often respected in practice. However, strictly speaking the warning is not legally binding, as it is the competence of the authority in Belgium where the document is presented to consider its content and whether it can be recognised.

MPI Comments on the Green Paper on the Attachment of Bank Accounts

The Max Planck Working Group has – besides the comments on Rome I (see our older post) – also elaborated "Comments on the European Commission's Green Paper on Improving the Efficiency of the Enforcement of Judgments in the European Union: The Attachment of Bank Accounts".

The comments can be found on the MPI's website and will be published in the European Company and Financial Law Review (issue 2, 2007) in due course.

The Commission's Green Paper (COM(2006) 618 final) can be found here.

Yearbook of Private International Law, vol. VIII (2006)

The VIII volume (2006) of the *Yearbook of Private International Law* (published by Sellier and Staempfli in association with the Swiss Institute of Comparative Law) **is expected in June**. It contains a huge number of articles, national reports, commentaries on court decisions and other materials, up to nearly 500 pages.

The main section ("Doctrine") of the volume is devoted to the memory of Prof. Petar Šar?evi?, who co-founded the periodical in 1999 with *Prof. Paul Volken* (a biography and list of publications of Prof. Šar?evi? can be found in the *Liber Memorialis* dedicated to his memory, published by Sellier in 2006:

"Universalism, Tradition and the Individual", edited by *J. Erauw*, *V. Tomljenovi?* and *P. Volken*).

A presentation of the new volume is provided by the current editors of the Yearbook, *Prof. Paul Volken* and *Prof. Andrea Bonomi*, in the "Foreword":

> *The present volume of the Yearbook is a special one for at least two reasons. First, it includes a section devoted to the memory of the Yearbook's spiritual father, the late Petar Šar?evi?. […]*
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> *This special section features twelve most interesting contributions by colleagues from no less than eleven countries and three continents, thus confirming once again the worldwide reputation of Petar Šar?evi? and his Yearbook. The papers deal with a wide array of subjects ranging from classical themes such as the protection of children in inter-country adoptions and abduction cases, the principle of comity in United States case law and new national conflict codifications, to very fashionable topics like non-marital unions and same-sex marriages, up to the new challenging questions of the conflict régime of euthanasia and living wills. […]*
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> *With the intention of bringing the celebratory aim of the present volume in harmony with the general goals of the Yearbook, we have maintained in the current issue most of our traditional sections. We thus have the pleasure of presenting the reader with several most interesting national reports, as well as commentaries on court decisions and recent developments from various African, Asian and European countries. We will not mention all of them here, but we are pleased to stress that, in line with the purpose of extending with each passing year the Yearbook's information network, the present volume hosts for the first time contributions from Greece, India, Latvia, Qatar and Tunisia.*
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> *In order to make the Yearbook more attractive for practitioners, we have also enlarged the section on national court decisions and included contributions on international arbitration. And last but not least, this year's 'Forum' section summarizes the contents of two excellent doctoral theses on the pending European conflict system. One article analyzes the new system taking into account the scope of application of secondary Community legislation, while the other focuses on the conflict of laws aspects of the ever growing case law of the*

European Court of Justice.

Here's the list of articles published in the "Doctrine" section (we highly recommend to browse the whole table of contents of the volume, which is not reproduced here in its entirety):

- *Alfred E. von Overbeck*: Three Steps With Petar Šar?evi? (downloadable from the publisher's website)
- *Tito Ballarino*: Is a Conflict Rule for Living Wills and Euthanasia Needed?
- *Katharina Boele-Woelki, Ian Curry-Sumner, Miranda Jansen, Wendy Schrama*: The Evaluation of Same-Sex Marriages and Registered Partnerships in the Netherlands
- *Alegría Borrás*: Competence of the Community to Conclude the Revised Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters – Opinion C-1/03 of 7 February 2006: Comments and Immediate Consequences
- *Lawrence Collins*: The United States Supreme Court and the Principles of Comity: Evidence in Transnational Litigation
- *William Duncan*: Nationality and the Protection of Children across Frontiers, and the Example of Intercountry Adoption
- *Jasnica Garaši?*: What is Right and What is Wrong in the ECJ's Judgment on Eurofood IFSC Ltd
- *Huang Jin*: Interaction and Integration between the Legal Systems of Hong Kong, Macao and Mainland China 50 Years after Their Return to China
- *Ulrich Magnus*: Set-off and the Rome I Proposal
- *Yuko Nishitani*: International Child Abduction in Japan
- *Yasuhiro Okuda*: Reform of Japan's Private International Law: Act on the General Rules of the Application of Laws
- *Robert G. Spector*: Same-Sex Marriages, Domestic Partnerships and Private International Law: At the Dawn of a New Jurisprudence in the United States.

The table of contents of the previous volumes of the Yearbook (1999-2005) is available on the website of Sellier – European Law Publisher, in the "Private International Law" section (use the "serial" dropdown menu on the top of the page).

First Issue of 2007's Revue Critique de Droit International privé

The last issue of the French *Revue Critique de Droit International Privé* has just been released. It contains two articles, written in French.

The first deals with immigration law, which has traditionally been regarded as part of private international law in France. It is authored by professor Dominique Turpin and presents the last legislative reform in the field.

The title of the second article is "Le Reglement communautaire sur l'obtention des preuves: un instrument exclusif?" (The European Regulation on the Taking of Evidence: an Exclusif Instrument?). It is authored by Belgian professor Arnaud Nuyts. Unfortunately, the author does not provide any abstract.

Comments on Rome I

The latest volume of the German legal journal *Rabels Zeitschrift* (Vo. 71, No. 2, April 2007) contains "Comments on the European Commission's Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual oblitations (Rome I)" (in English) elaborated by the Working Group on Rome I of the Max Planck Institute for Comparative and International Private International Law.

The Mozambique Rule and IP Rights in New Zealand

In a recently reported judgment, McKenzie J of the High Court of New Zealand has held that the New Zealand courts can exercise jurisdiction over claims for the infringement of foreign copyright, at least where the defendant is served within the jurisdiction and where the existence and validity of the foreign copyright is undisputed.

The case, *KK Sony Computer Entertainment v Van Veen* (2006) 71 IPR 179, concerned the sale and distribution in New Zealand, Hong Kong and the UK of a computer program which enabled the user to circumvent the embedded copy protection in Sony PlayStation 2 computer games. The plaintiff alleged breaches of the New Zealand, Hong Kong and UK copyright statutes, and the defendant entered a statement of defence in which he admitted the facts that would make him liable under each of those statutes. Beyond entering that statement, the defendant did not otherwise appear.

McKenzie J entered judgment for the plaintiff. His Honour declined to follow previous New Zealand and Australian authority on the point, and instead applied the English Court of Appeal decision in *Pearce v Ove Arup Partnership Ltd* [1999] 1 All ER 769. His Honour drew a distinction between cases in which the plaintiff's title or rights were in dispute (in which the *Mozambique* rule would apply), and those cases in which the title or rights were undisputed (in which the court would be free to exercise jurisdiction).

His Honour then characterised the copyright infringement as a "wrong", and then asked whether the double actionability rule in *Phillips v Eyre* precluded the court from entering judgment for the plaintiffs. The problem was that the infringements of UK and Hong Kong copyright "do not constitute a wrong against New Zealand copyright, since New Zealand copyright is territorial in effect." The solution, again, was to be found in *Pearce v Ove Arup*: one simply "effect[s] a notional transfer to New Zealand, for consideration under New Zealand law, of both the infringing act, and the intellectual property right infringed."

The decision is a curious one in some respects. On the proffered reasoning, what

difference did it make that the defendant was resident in New Zealand? And if all jurisdictional complexities could be resolved by a "notional transfer", why should the court's jurisdiction be limited to those cases in which the existence of the IP right is undisputed? Cross-border infringement of IP rights is a real and topical problem: whether *Sony v Van Veen* (or, more importantly, *Pearce v Ove Arup*) offers a satisfactory response lies very much in the eye of the beholder.