Warnings for a new Beginning: Singapore Choice of Law in Tort

To complete our round-up of newly available articles today, we have an article on "**Warnings for a New Beginning**" by William Tong (*University of Nottingham*), which explores the tort choice of law rules in Singapore, and how they compare with other common law jurisdictions such as the UK. Here's the abstract:

> *In striking contrast with some of the Commonwealth developments in the area of tort choice of law, where notably even the United Kingdom has abandoned the English common law position in relation to tort choice of law for a statutory regime embodied by Part III of the Private International (Miscellaneous Provisions) Act 1995, Singapore has largely maintained its adherence to the English common law position with the unequivocal acceptance by the Singapore Court of Appeal that the "applicable choice of law rule in Singapore with respect to torts committed overseas is that laid down in Phillips v. Eyre" and that the "exception to the rule as formulated in Boys v. Chaplin, Johnson v. Coventry Churchill and Red Sea Insurance" is part of Singapore law as well.*

Available to download from **here**.

The Application of the Statute Law of Singapore within its Private Internatinal Law

A note written By Adrian Briggs (Univeristy of Oxford) has been made available for download on the SSRN network: "**A Note on the Application of the Statute Law of Singapore within Its Private International Law**" *Singapore Journal of Legal Studies, pp. 189-203, 2005*. The abstract reads:

The purpose of this Note is to raise a question on which the rules of private international law of the common law, including Singapore, are less satisfactory than they should be. It is written in the light of one part of a seminar conducted at the Singapore Academy of Law in April 2005, but the proximate cause of the investigation was an enquiry as to the application of certain aspects of Singapore's statutory employment law in cases in which the factual and legal context contains points of contact to countries outside Singapore, or to laws other than the law of Singapore. It is presented in the form of a Note because its aim is to raise the issue as one for thought and further analysis, rather than pretending to give answers which are, in the writer's opinion, fixed and final. In the current state of the law's development it is not possible to claim any more for any individual analysis.

You can find the article, for free as usual, **here**.

Governing Cyberspace: a US Approach

A highly theoretical, and interesting, article on the rules governing e-commerce transactions (or "cyberspace", as the author puts it) has been posted on SSRN. David G. Post's article, "**Governing Cyberspace**", was originally in the *Wayne Law Review, Vol. 43, p. 155, 1996*. Here's the abstract:

What is the source of those law(s) that will govern our interactions in cyberspace? What body of rules will participants in cyberspace transactions consult to determine their substantive obligations and who is to make those rules? This paper sketches out two alternative models for the way in which order can emerge in this environment, models I refer to as Hamilton and Jefferson. Hamilton involves an increasing degree of centralization of control, achieved by means of increasing international coordination among existing sovereigns, through multi-lateral treaties and/or the creation of new international governing bodies along the lines of the World Trade Organization,

the World Intellectual Property Organization, and the like. Jefferson invokes a radical decentralization of law-making, the development of processes that do not impose order on the electronic world but through which order can emerge, in which individual network access providers, rather than territorially-based states, become the essential units of governance. The normative choice is a significant one, and I argue that mobility users' ability to move unhindered into and out of individual networks with their distinct rule-sets is a powerful guarantee that the resulting distribution of rules is a just one; indeed, that our very conception of what constitutes justice may change as we observe the kind of law that emerges from uncoerced individual choice.

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

Some English Articles in December

There have been a couple of articles in various journals concerning the conflict of laws this month. Without further ado, they are:

1) E.C. Ritaine, "**Harmonising European Private International Law: A Replay of Hannibal's Crossing of the Alps?**" International Journal of Legal Information, Vol. 34, No. 2, (2006) pp. 419-439.

2) Nikiforos Sifakis, "**Exclusive jurisdiction clauses – Article 27 and 28 of the Brussels I Regulation – the 'Italian torpedo' – anti-suit injunctions**" Journal of International Maritime Law, Issue 5, Vol. 12, (2006).

3) There's also a *forthcoming* article in the International Company and Commercial Law Review: P.J. Omar, "**The extra-territorial reach of the European Insolvency Regulation**" I.C.C.L.R. 2007, 18(2), 57-66. There's an abstract available for this article:

Assesses the extent to which the provisions of Council Regulation 1346/2000

may conflict with those of the UNCITRAL Model Law on Cross Border Insolvency 1997 in the event of an international insolvency which crosses EC borders and how priorities might be determined by EC courts in such circumstances. Reviews the limits of the Regulation's application and case law on its potential effect on non EC debtors bound by the Model Law, including the circumstances in which a company incorporated elsewhere may be deemed to have its centre of main interests within the EC. Considers the international relevance of the Regulation and the position of groups of companies with some non EC members.

Merry Christmas and Happy Holidays to you all.

Halsbury's Laws of Canada – Conflict of Laws

As part of LexisNexis Canada's new resource collection, **Halsbury's Laws of Canada**, Janet Walker of Osgoode Hall Law School has authored the volume on Conflict of Laws. Professor Walker is the author of Castel & Walker, Canadian Conflict of Laws, 6th edition, from the same publisher, which is Canada's leading text in the field. This new work features enhanced finding aids, a glossary of key terms, and listings of relevant secondary sources for further research. More information available here from the publisher.

Three Croatian Articles on Conflict

of Laws: Contracts and Companies

The 2006 special edition of the Collected Papers of Zagreb Law Faculty, which is dedicated to the 70th birthday of professor at the University of Zagreb Faculty of Law and member of the Croatian Academy of Arts and Sciences Jakša Barbi?, captures also the attention of the conflict lawyers, particularly due to three articles appearing there.

An article by professor emeritus Krešimir Sajko deals with the issues of contract conflict of laws de lege lata and de lege ferenda. The author compares the rules of the Rome Convention on the law applicable to international contractual obligation to the rules contained in the Proposal on the Rome I Regulation. Further comparison is made to the present Croatian rules in the field and the ones put forward by the group of Zagreb scholars. Professor Sajko concludes its paper by saying that, although there is no Croatian obligation to harmonize its conflict of law with the European rules, these rules should be adopted before Croatia becomes a Member State.

Another paper, written by professor Hrvoje Sikiri?, also covers contract conflict of laws but focuses specifically to the questions arising out of e-commerce. The central part of the article is dedicated to comparative analysis of the European and Croatian rules determining the law applicable to contracts negotiated, concluded and/or performed by electronic means. The conclusion defended here is that technical aspects of electronic commerce do not have sufficient bearing on the conflict principles to trigger the change in the subsidiary connecting factor that is applicable also in the non-electronic environment. In other words, the law of the country where the service provider (the party performing the characteristic obligation) is located should regulate the electronic aspects of the contract.

The third article relevant for this report is concerned with the freedom of movement of companies under the *acquis* rules. The author, docent Davor Babi?, attempts to answer the question whether the mobility of the companies in the EU enables the regulatory competition among Member States. With that goal in mind, the author first examines the rules of the Community primary legal sources on the freedom of establishment. Further discussed is the ECJ practice in regard to the freedom to choose the applicable company law when establishing a company and afterwards, when the company is already established, as well as its

limitations in the national laws.

European Parliament Legal Affairs Committee Adopts "Rome II"

Initial reports this morning suggested that the **European Parliament Legal Affairs Committee (JURI)** had **adopted the second reading report** (as amended) of the proposed **"Rome II" Regulation** on the law applicable to non-contractual obligations, and this has subsequently been confirmed on the MEP Rapporteur's website. Diana Wallis states:

> *On Wednesday 20 December 2006, the Legal Affairs Committee adopted the second reading report, reinserting the Articles relating to defamation and road traffic accidents which had been excluded in the Council Common Position. The report will be adopted in plenary session on 18 January 2006.*

The original draft second report of the European Parliament was produced on 8th November 2006 (see our news item on the substance of the report **here**), with the amendments to the draft report being published on 30th Novmber 2006.

Once the report has been adopted by the European Parliament, the likelihood is that the conciliation phase of the codecision procedure will go ahead (on the basis that the Council will not be best pleased with the reappearance of provisions that they rejected on first reading, and several new amendments put forth by JURI.) Twenty-five members of the Council and an equal number of EP representatives will have to sit down and, over a period of 6 to 8 weeks, devise a "joint text" on Rome II. If they fail, or the joint text is not approved by Parliament or Council, then Rome II will not make it any further. Details on the conciliation phase can be found here.

(*Many thanks to Andrew Dickinson for the tip-off.*)

U.S. Decisions: December 2006 Round-Up: Part I

December 2006 has seen a wealth of activity in the U.S. federal courts on topics of particular interest to private international practitioners. This month's U.S. round-up will divide the pertinent and most interesting cases into four primary subject-matter areas: (1) Choice of law; (2) Personal Jurisdiction; (3) International Discovery; and (4) Foreign Sovereign Immunity. Part I here will focus only on the first two issues, with Part II to follow within the next few days.

(1) Choice of Law

K.T. v. Dash, 2006 WL 3627688, (N.Y. Sup. Ct. App. Div. Dec. 14, 2006)

In this tort case, Plaintiff and Defendant, both New York residents, were on holiday in Brazil. Plaintiff alleged that she was raped by Defendant, and Defendant moved for dismissal on forum non conveniens ("FNC"), or in the alternative, the determination that Brazilian law applies to the suit. The appellate court first affirmed the trial court's denial of FNC dismissal, concluding that both parties reside in NY, many witnesses are also NY residents, and there is little burden on NY courts. Therefore, even though the events occurred in Brazil, NY is still a proper forum.

Turning to choice of law, the court first decided whether there is an actual conflict between Brazilian and NY law. To show actual conflict, defense counsel submitted an affidavit from a Brazilian lawyer claiming the elements of proving sexual assault in Brazil are much greater than those in New York. Because the affidavits were unclear and general, the court determined that defendants have not proven that an actual conflict exists.

The court nonetheless held that New York law is applicable even were a conflict to exist. Based on an interests analysis, the court held that New York is the forum with the greatest interests in both parties. Because both Defendant and Plaintiff only spent a few days while on vacation in Brazil, Brazil has little to no interest in

applying its law for the suit.

The court concluded with this well reasoned discussion of the choice of law question in tort cases:

> *[I]t is useful in our analysis to consider whether the application of the law of Brazil would thwart or threaten an important policy underlying New York's law, or, on the other hand, whether the application of New York law would frustrate any policies underlying Brazil's applicable rule of law. Defendant emphasizes that Brazil has a sovereign interest in regulating conduct within its borders, [but] the present litigation provides no proposed protection of anyone in Brazil, and, indeed, the outcome of the litigation will have no impact at all on Brazil or any of its citizens or residents. Brazil's interest in ensuring that citizens and non-citizens damaged by tortious conduct within its borders have the right to seek compensation from the tortfeasor, is in no way damaged by application of New York law in the present case. In addition, while enforcement of its rules regarding misconduct within its borders could generally be said to serve as a deterrent against future tortious conduct, the possibility of such a deterrent effect being felt in Brazil is minimal where the interaction was entirely between New Yorkers, and the matter is being addressed in a New York court. In contrast, . . . [the] application of Brazil's rule[s] could thwart New York's strong interest in providing recompense for its residents who have been injured by a sexual assault, especially if it was perpetrated by another New Yorker. So, even if the purpose of the Brazilian rule of law were said to be primarily conduct-regulating, in this context the general rule that "the law of the jurisdiction where the tort occurred will generally apply" (see Cooney, 81 N.Y.2d at 72) should not be applied. . . .We therefore conclude that New York law must govern this action, notwithstanding the occurrence of the alleged tort in Brazil and the conduct-regulating aspects of the competing rules.*

As the International Civil Litigation Blog astutely points out, this is a potentially important case giving international effect to cornerstone NY choice of law cases like *Babcock* and *Schultz*, and applying an interest analysis rather than a strict *lex loci delicti*.

The tort aspect of choice of law rules in *K.T.* must be read alongside a recent decision by the same court in a contract case. In *Certain Underwriters at Lloyd's,*

London v. Foster Wheeler Corp., 822 N.Y.S.2d 30 (N.Y. Sup. Ct. App. Div. 2006), the question presented was whether New York or New Jersey law governed a large number of excess liability insurance policies for asbestos-related claims. Supplanting a mere "grouping of contracts" approach for a "governmental interest analysis," the court held that "where it is necessary to determine the law governing a liability insurance policy covering risks in multiple states, the state of the insured domicile should be regarded as the proxy for the principal location of the insured risk. As such, the state of the domicile [at the time the policy was issued] is the source of applicable law."

(2) Personal Jurisdiction

Amirhour v. Marriott Intern. Inc., 2006 WL 3499241 (N.D. Cal. Dec. 4 2006)

This is a tort claim arising from a California resident's stay at a French Marriott. The chair attached to the wall of the shower collapsed, causing the plaintiff to fracture her pelvis. As is fairly typical in international litigation, plaintiffs brought suit at home in California rather than in France. The French defendant moved to dismiss for lack of personal jurisdiction, and all defendants sought dismissal on forum non conveniens.

The court first rejected plaintiffs' claim for general jurisdiction over the MVCI Holidays France by holding that Marriott Ownership Resorts, the U.S. based defendant, did not act as general agents for the foreign defendant. Turning to specific jurisdiction, the court held that MVCI Holidays France had not "directed activity at California which would have invoked the benefits and protections of the laws of California." Newsletters and payment reminders sent to plaintiff in California where insufficient. Those newsletters and notices were only sent after Plaintiff voluntarily contracted with Marriott Ownership Resorts and expressly agreed that they could send her such notices. Accordingly, the court dismissed MVCI Holidays France for a lack of personal jurisdiction.

Marriott International, Inc., a U.S. based corporation, sought dismissal of the entire suit through forum non conveniens. The defendant contended "that this action bears no relationship to California, arose out of activity occurring in France, and will involve the application of French civil law." Analyzing the Gulf Oil Corp. v. Gilbert factors, the court concluded that both the private and public interest factors weigh in favor of keeping the suit in California. Plaintiffs limited

resources and inability to successfully maintain a case in France was the decisive private factor. Further, the court held that California has an interest in the protection of its citizens. Accordingly, the court denied the motion to dismiss for FNC.

Again, the authors at the International Civil Litigation Blog point out an interesting twist. The court acknowledged that it deviated from the general Ninth Circuit rule requiring a trial court to make a choice of law determination prior to deciding FNC. Pereira v. Utah Transp., Inc., 764 F.2d 686, 688-89 (9th Cir. 1985). Although defendants alleged throughout their papers that French substantive law would apply, they did not submit any evidence in support of this contention, foreclosing the Court from making a choice of law determination. Nevertheless, even if French law applies were to apply this case, the court noted that it would still deny defendants motion to dismiss on forum non conveniens grounds.

R.J. Reynolds Tobacco Co. v. Tuazon, Nilo D., No. 05-1525 (U.S.)

In another interesting development — or non-development — coming from the Ninth Circuit, the Supreme Court this month denied certiorari over Reynolds' attempt to clarify and limit the application of general jurisdiction for torts ocurring abroad. Plaintiff Tuazon, a long-time resident and citizen of the Phillipines, asserted claims against the tobacco company in the State of Washington for injuries he sustained from smoking in his home country. Reynolds, a North Carolina corporation, moved to dismiss the suit on jurisdictional grounds. The Ninth Circuit held that, because Reynolds sold a substantial amount of cigarettes in Washington, alongside other activities aimed at marketing those sales, the court could exercise general (or "doing business") jurisdiction over the company there, even though its place of incorporation and principal place of business was in North Carolina and the cause of action arose abroad. *See* 433 F.3d 1163 (9th Cir. 2006). Lawyers for the company argued to the Court that, under the holding of the Ninth Circuit (as well as those of the Second, Sixth, Eighth and Federal circuits), which simply weighed the "confluence" of commercial contacts with the state to find minimum contacts, large companies like Reynolds who sell products in every jurisdiction can be de facto subject to suit on any cause of action in any state. They also pointed out that the federal courts of appeals have become widely split on the manner of assessing contacts for general jurisdiction — with the First, Fourth, Fifth and Eleventh Circuits taking a qualitative rather than quantitative approach to the

minimum contacts analysis for general jurisdiction — and asked the Court to accept the case and clarify the matter. The Supreme Court has upheld the assertion of general jurisdiction only once in the modern era (*see Perkins v. Benguet Mining Co.*, 342 U.S. 437 (1952)), and spoken to the issue last in 1984 (*See Helicopteros v. Hall, 466 U.S. 408 (1984)*). Though initially signalling interest in the case (by ordering a Brief in Opposition from the Respondent in September), the Court eventually denied certiorari on December 4. American law of general jurisdiction will have to wait even longer for a long-awaited clarification from the Court.

Several news sources picked-up on this cert denial, including CNN, and the SCOTUSBlog. The order of the Court can be found here.

(Disclaimer: Charles Kotuby is an attorney with Jones Day, who represented Petitioner in this matter)

Final Reminder: Call for Papers – Conference 2007

This is a **final reminder** that the **deadline for submission of an abstract of a proposed paper**, to present at the **Journal of Private International Law Conference 2007**, is **20th December 2006, at 6pm**.

Update: the deadline has now passed. Many thanks for all the submissions.

Vacancies for speaking at the conference *cannot* be guaranteed after the deadline, so we would urge all those who wish to present a paper to submit their abstract by 6pm on 20th December 2006. The abstract should be between 200-300 words.

You can find details on submitting the abstract of your proposed paper **here**.

German Article on Consumer Contracts in Rome I

An article by *Giesela Rühl* (Hamburg) on the provision concerning **consumer contracts** in the Rome I proposal has been published in the European Community Private Law Review (GPR) 2006, 196 et seq. The English summary reads as follows:

> *In December 2005 the European Commission has released the Proposal for a Regulation on the law applicable to contractual obligations. One of the most important changes relates to the scope of application of Article 5, which is characterized by the introduction of the targeted activity criterion embodied in Article 15 (1) lit. c) of the Brussels I Regulation and a safeguard clause for the protection of professionals. At first blush this combination – that is new to European private international law – seems to make sense. However, a closer examination reveals that the safeguard clause does not have an independent scope of application if it is combined with the targeted activity criterion. Since it merely complicates the provision of Article 5 (2) it should be deleted.*