Commission’s Response to Council’s Common Position on Rome II

In the wake of the **Council's common position** on the proposed adoption of a Regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ("Rome II") (see our news item on the common position here), the **European Commission have published their Communication to the European Parliament**, pursuant to Art 251(2) of the EC Treaty.

The Communication discusses the common position's points of departure from both the Commission's modified proposal on 21 February 2006, and the amendments made by the European Parliament on 6 July 2005 (which were reflected in the Commission's modified proposal.) One point in particular may be of interest:

> *Article 16 departs from Article 13 of the Commission’s amended proposal which contained an additional paragraph dealing with the possibility for the court to give effect to overriding mandatory rules of another country than the country whose law is applicable under the rules of the instrument. This provision in the Commission’s proposal did not reflect any particular Community interest; it was aiming at consistency as it was inspired by a similar provision in the 1980 Rome Convention on the Law Applicable to Contractual Obligations.* ***The Commission has accepted this deletion****.*

Whilst the Commission states overall that it, "accepts the common position in the light of the fact that it includes the key elements included in its initial proposal and Parliament’s amendments as incorporated into its amended proposal", there are nevertheless some strong indicators of its displeasure over the common position in the text. For example:

> *The Commission continues to regret the approach in the common position which provides for a rather complex system of cascade application of connecting factors. It remains persuaded that its original solution offered an*

equally balanced solution for the interests at stake, while expressed in much simpler drafting.

The word "regret", in fact, appears no less than *four* times in the six-page document. It will be interesting to see what the European Parliament makes of it all; the second reading has been scheduled by the DG of the Presidency for 12 December 2006.

The Commission's Communication to the European Parliament can be downloaded from here (PDF). All comments welcome.

Recognition of a Surname and Validity 2

A German case which has been reported on before has now been continued (see for the facts and the history of the case the following older entry: Recognition of a Surname and Validity). After the ECJ has refused to hear the case in its judgment of 27th April 2006 (C-96/04), the parents filed an application at the Local Court (*Amtsgericht)* Flensburg to instruct the registrar to recognize the double-barrelled name of their son which had been determined according to Danish law and to register their son under this name in the family register. However, according to the Local Court (*Amtsgericht*) Flensburg, the court is not competent to instruct the registrar to register the applicants` son under this name since German law (§ 1617 I 1 German Civil Code (*BGB*)) does not provide for double-barrelled names if the parents do not use a common married name. Since the court regards it as a violation of Artt. 12, 18 EC-Treaty to ask a citizen of the European Union to use different names in different Member States, the court sees itself obliged to bring the matter before the Court of Justice according to Art. 234 III EC-Treaty.

Therefore the Local Court (*Amtsgericht*) Flensburg asked with decision of 16th August 2006 (69 III 11/06) the ECJ to give a preliminary ruling on the following

question: "In light of the prohibition on discrimination set out in Article 12 of the EC Treaty and having regard to the right to the freedom of movement for every citizen of the Union laid down by Article 18 of the EC Treaty, is the provision on the conflict of laws contained in Article 10 of the EGBGB valid, in so far as it provides that the right to bear a name is governed by nationality alone?" (see C-353/06)

We await the decision with interest.

Seminar: A Coherent Legal Regime for EU Media – Balancing Liberties

Diana Wallis MEP, on behalf of the ALDE group, is holding a seminar on 17 October 2006 in the European Parliament. The seminar is entitled: **'A coherent legal regime for EU media – Balancing liberties. The right to be let alone v. freedom of speech'**. As Ms Wallis' website states,

> *This event will gather experts, academics and Members of the European Parliament to discuss the current legal regime for EU media and explore possible options for the future, in particular with regard to the issue of applicable law. This seminar is set against the background of the Commission's rejection of Parliament's first reading formulation on defamation and the withdrawal of these provisions from the draft Regulation. The second reading of Rome II scheduled for the end of 2006 also coincides with the discussions on Television without Frontiers and the review of Brussels I and the E-commerce Directive.*

DRAFT PROGRAMME

12.45 – 13.00: Introductory Welcome

Session 1. Chair: Diana Wallis MEP, Rapporteur on Rome II

13.00 -13.30: European Private International Law and the media: relationship between existing instruments

- Speakers: Gregory Paulger, DG 'Information, Society and Media', European Commission
- Claudia Hahn, DG 'Justice and Home Affairs', European Commission

13.30 – 14.00: Jurisdiction, applicable law and the country of origin principle

- Speakers: Horatia Muir Watts, Université Paris I Panthéon Sorbonne
- Professor Paul Beaumont, University of Aberdeen

14.00 – 14.30: Q&A

14.30 – 14.50: Tea and coffee break

Session 2. Chair: Jean-Marie Cavada MEP, Chairman of LIBE

14.50 – 15.20: Applicable law to the violation of personality rights – a quest for reasonableness?

- Speakers: Marie-Christine de Perçin, vice chairperson of Presse-Liberté
- Speaker invited

15.20 – 15.50: Regulating the media: what role for the EU?

- Speakers: Tim Sutter, OFCOM
- Cecilia Renfors, Swedish audiovisual board

15.50 – 16.20: Q&A

16.20 – 16.30: Conclusions

The event will take place on Tuesday 17 October 2006 from 12.45 to 16.30 at European Parliament, Brussels, room ASP 3G3. More information on attending the event can be found here.

German Federal Supreme Court: Jurisdiction over Applications for an Injunction due to Nuisance

The German Federal Supreme Court assumed international jurisdiction of German courts according to Art. 5 Nr.3 Brussels I Regulation in a case of an application for an injunction due to nuisance according to § 1004 German Civil Code (judgment of 24.10.2005 – II ZR 329/03).

See for an annotation: Erik Jayme, IPRax 2006, 502.

German Publication: The Adoptive Child´s Right to Succeed in Private International Law

A new dissertation on private international law of family law has been published: *Inke Dietz*, Das Erbrecht des Adoptivkindes im Internationalen Privatrecht.

The publisher´s information reads as follows:

"Social developments have lead to an increasing significance of international adoptions in recent years. Starting from this finding, the thesis gives an overview of the developments of the German law on adoption including the adoption´s effects on the right to succeed (...) before examining German choice of law rules on adoption and the choice of law rules concerning the adoptive child´s right to succeed as well as the intertwining of the lex successionis on the one side and the applicable law on adoption on the other side. Further, the recognition of adoptions according to the Hague Convention on protection of children and co-operation in respect of intercountry adoption of 1993 is considered as well as the

option to transform weak adoptions according to the *Adoptionswirkungsgesetz (law on the effects of adoptions according to foreign law).*"

German/English Publication: Denationalization of Private Law?

Speeches which have been held to celebrate the 70th birthday of *Karl Kreuzer* have been published in the following volume: *Eva-Maria Kieninger* (ed.), Denationalisierung des Privatrechts? Symposium anlässlich des 70. Geburtstages von Karl Kreuzer.

Here is the content:

- *Klaus Laubenthal* (Würzburg), Begrüßung (Greeting)
- *Eva-Maria Kieninger* (Würzburg), Einführung in das Thema (Introduction)
- *Paul Lagarde* (Paris), Internationales Privatrecht und Europarecht (Private International Law and European Law)
- *Roy Goode* (Oxford), The harmonization of dispositive contract and commercial law – should the European Community be involved?
- *Hans van Loon* (The Hague), Unification of private international law in a multi-forum context
- *Herbert Kronke* (Rome/Heidelberg), Herausforderungen internationaler Privatrechtsmodernisierung (Challenges of the international harmonisation of private law)
- *Karl Kreuzer* (Würzburg), Schlussworte (Closing words)

Settled Expectations in a World of Unsettled Law: Choice of Law after the Class Action Fairness Act

Samuel Issacharoff (*New York University School of Law*) has made his forthcoming article in the *Columbia Law Review*, **"Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act"**, available for download on SSRN. The abstract reads as follows:

> *This Essay examines the pressure placed upon choice of law doctrine by the newly enacted Class Action Fairness Act ("CAFA"). The core argument is that current choice of law doctrine, which assumes fidelity to the forum state choice of law rules as its basic premise, corresponds poorly to the national scope of economic activity in cases brought into federal court under CAFA. The Essay argues that there needs to be some conformity between the national scale of contemporary economic activity and the state-by-state presumption of inherited conflict of laws doctrine in order to provide some sensible legal oversight of national market conduct. Because of the multiplicity of potential forums for litigation of national market activity, the inherited doctrines of Klaxon Co. v. Stentor Electric Manufacturing Co. and Erie Railroad Co. v. Tompkins do little to provide settled expectations about the substantive laws governing broad-scale economic conduct.*
>
> *The Essay offers an approach that should guide choice of law rules in the context of national market cases based on the need to facilitate common legal oversight of undifferentiated national market activity. The claim here is that conduct that arises from mass-produced goods entering the stream of commerce with no preset purchaser or destination should be treated as just that: goods in the national market. In the absence of national choice of law rules, this Essay suggests that courts should, as a default rule, apply the laws of the home state of the defendant to all standardized claims, regardless of the situs of the final injury. The upshot of this approach is to suggest a path for future development of national market cases that have been brought into the federal courts as a result of CAFA.*

The full article can be downloaded from here.

German Courts: Art. 34 Nr. 2 Brussels I Regulation

The Court of Appeal (OLG) Zweibrücken held in a recent decision (10.5.2005 – 3 W 165/04) that a foreign judgment cannot be recognized if the defendant was not served with the document which instituted the proceedings (here: "dagvaarding" of a Belgium court) according to Art. 34 Nr. 2 Brussels I.

The decision has been published in IPRax 2006, 487. See for an annotation: *Herbert Roth*, IPRax 2006, 466, who stresses the significance of Artt. 32 et seq. Brussels I and criticises therefore the plans to abolish the enforcement proceedings and the public policy clause de lege ferenda.

Seminar: The Future of Private International Law in England and Wales

The Future of Private International Law in England and Wales – Seminar at the British Institute of International & Comparative Law

Tuesday 24 October 2006 17:00 to 19:00
Location: Charles Clore House, 17 Russell Square, London WC1B 5JP

Participants

- **Lord Mance**
- **Professor Jonathan Harris, Birmingham University and Brick Court Chambers**
- **Adeline Chong, Nottingham University**
- **Adam Johnson, Herbert Smith**

This seminar is part of the British Institute's Evening Seminar Series on Private International Law which will run throughout the Autumn of 2006 and well into 2007 titled **'Private International Law in the UK: Current Topics and Changing Landscapes'**.

The series explores issues which are of topical importance for current legal practice and study in the field of Private International Law. Led by leading experts in the field, they will evaluate, in particular, the growing impact of the establishment of a European Civil Justice Area on the future of Private International Law in the UK.

Other Featured Events:

2006

1. 21 November: Substance and Procedure in the Law Applicable to Torts: Harding v Wealands
2. 18 December: Civil Remedies for Torture in the UK Courts: Jones v Saudi Arabia

2007

1. January: Non-justiciability: Reappraisal of Buttes Gas in the light of recent Decisions
2. 22 January: Intellectual Property Problems: Jurisdiction in IP Disputes
3. 22 January: The Future of International Patent Litigation in Europe
4. February: Resolving Family Conflicts in the EU: The Changing Landscape
5. March: The Road to Rome: An Update on the Law Applicable to Contractual Obligations

The British Institute's Series on Private International Law is kindly sponsored by Herbert Smith.

For more information, please log on to the BIICL website.

German Publication: On the way to a European Law Applicable to Divorce

A dissertation has been published which is of particular interest with regard to the recently published proposal of the European Commission for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters: *Sinja Rüberg*, Auf dem Weg zu einem europäischen Scheidungskollisionsrecht

Here is a short summary:

> *With the ever-increasing migration of European Union citizens, more and more people are entering into cross-boarder matrimony; a freedom guaranteed by Art. 6 GG. This brings with it a rise in the number of international family relations and, in parallel, divorce procedures. At the moment in the area of divorce law, the courts in Europe use various choice of law rules and substantive laws for one and the same circumstance. This legal position enables the divorce-seeking applicant to choose the best terms for his purpose. This "forum shopping" conflict can, under exemption of a presently available possibility for harmonisation of the substantive divorce law besides already existing unified rules on jurisdiction and a European accreditation system for family law, only be solved by a unified choice of law rules. The necessity and the possibility of reaching this goal become clear considering the historical development in the area of family law on a European level as well as the deficits in the Brussels II Regulation.*
> *In order to point out how diverse the consequences of a divorce case with international bearing can be, the reader is first provided with a legislative-comparative overview of the various larger Central and Western European EU member state's substantive and international divorce laws regulations. Furthermore, it is demonstrated that the problem has been recognised and taken seriously by the European legislator and that "Rome III" is not just a*

long-fallen star on the European agenda. Subsequent to this, the disputed question concerning the scope of competence of the European legislator in passing a European Law Applicable to Divorce is discussed.
Under consideration of the aforementioned European aspects, this work draws up a concept for a unified choice of law rules, an assignment already commenced by the European Commission under Regulation "Rome III". The goal must be to localise the legal and the spouse relationships as well as possible and to determine the state to which the closest ties are exhibited. This work should contribute to the necessary pan-European discussion on the causes and arguments for the various national civil law regulations. The new law applicable to divorce should meet the needs of the involved parties exactly. All conceivable tie-regulations are correlated in great detail and examined with regard to their suitability for "Rome III". An orientation on both the tie-system of the Brussels II Regulations as well as the autonomous international civil regulations regarding the divorce laws of the member states occurs at this juncture. The rationale on which the ties are based is researched in order to asses their transferability to a regulations system within a European law applicable to divorce. Within these bounds, the principal question of whether either the common nationality of the spouses or their habitual residence should have priority in European law applicable to divorce is addressed in detail. The author deals in depth with the adoption of an evasion as well as an absorption clause and discusses the pros and cons of a party autonomy authorisation in law applicable to divorce.
The results of these considerations consolidate into a European legal instrument on the law applicable to divorce – "Rome III", such that the author would recommend this work to the European legislator.