Finnish EU Presidency calls for Streamlining of Instruments in the Field of Civil Procedural Law

The Finnish EU Presidency has published a document from their Informal JHA Ministerial Meeting on 20-22 September 2006. Their concern is "**Facilitating access to justice and better regulation in civil justice.**" At present, the Presidency argues, there is a lack of coherence caused by differences in the substance of those instruments that regulate civil procedure. They give an example:

> *Let us assume that someone would like to recover a debt of 2,000 Euros in another Member State with the expectation that the claim will not be contested. The claimant may choose between the European Enforcement Order, the Payment Order, the Small Claims instrument, and the Brussels I Regulation. The procedure that has to be followed will differ depending on his or her choice. From the point of view of the claimant, it would surely be better if there was only one single application form for starting a recovery procedure in another Member State. De facto, approximately the same basic information is needed for the commencement of each procedure: the parties, the amount of the claim, the reasons for the claim, etc. It is only when we know the reaction of the defendant that we are in a position to decide which type of procedure should be used to continue. It may also be noted that the methods in the service of documents differ according to which instrument is selected. Why should we accept differences in this regard?*

The Presidency goes on to state their vision for an improved regime:

> *The Finnish Presidency is of the view that it is time to consider streamlining existing instruments in the field of civil procedural law. This work should be based on minimum standards and the aim should be to ensure the consistency and user-friendliness of the relevant provisions. Reducing the number of instruments and integrating different approaches would help practitioners and citizens in applying this legislation and thus enhance access to justice. Such benefits would clearly justify the effort that would have to be invested in*

negotiations aiming at streamlining the already existing substantive provisions.

The Presidency then poses two questions for discussion:

1. Do the Ministers ***agree with the conclusion that there is a lack of coherence and consistency in the instruments already adopted in the field of civil procedural law***? Could the ***extent of fragmentation of the Community legislation be lessened*** and the ***degree of user-friendliness be improved*** by taking a ***more systematic overview*** of the cooperation in civil law?
2. Do the Ministers ***agree on the advisability of streamlining the instruments on cross-border litigation in the EU into one single instrument based on consistent/common minimum standards***? Should this instrument consist of, in particular, rules covering the provisions on jurisdiction, the service of documents, the taking of evidence, the use of languages and translations, legal aid, special rules on payment and small claims procedures, and in addition, rules covering recognition and enforcement of different types of judgments?

The document can be found in full here. What do you think about the Presidency's conclusions? Comments very welcome.

The New Rule on the Assignment of Rights in Rome I – the Solution to all our Proprietary Problems?

There is an article in the new issue of the *European Review of Private Law* on "**The new rule on the assignment of rights in Rome I – the solution to all ourproprietary problems? Determination of the conflict of laws rule in respect of the proprietary aspects of assignment**" by Lilian Stephens (E.R.P.L. 2006, 14(4), 543-576). Here's the abstract:

Considers the extent of the neutral and formal nature of conflict of laws rules applying to the proprietary aspects of an assignment of a right, in light of the harmonisation of conflict of laws within the EU. Discusses attempts to harmonise substantive law on assignment and to harmonise conflict of laws rules in respect of assignment in the Rome Convention Art.12, in particular in respect of the proprietary aspects, and compares the interpretation of Art.12 in the Netherlands, Germany, England, France and Belgium. Assesses the relevant conflict of laws rule in the Proposal for a European Parliament and Council Regulation on the law applicable to contractual obligations (Rome I).

Those with a subscription can download the article from the Kluwer website when the journal issue becomes available.

The Further Consequences of a Choice of Law? Trafigura Beheer v Kookmin Bank

Adrian Briggs (Oxford University) has written a note on "**The further consequences of a choice of law?**" in the forthcoming issue of the *Law Quarterly Review* (L.Q.R. 2007, 123(Jan), 18-21). The note:

Comments on the three Commercial Court decisions in Trafigura Beheer BV v Kookmin Bank Co on a dispute arising when a Korean company which had issued a letter of credit to a Dutch company in respect of the sale of a cargo of oil brought proceedings in Korea alleging a breach of duty by the Dutch company regarding the failure to pass on the bills of lading. Discusses the Dutch company's application to restrain the Korean proceedings, and the questions whether the claim in tort arising out of the parties' contractual relationship was governed by English or Korean law, and whether the Korean company's behaviour was vexatious.

State Immunity and Sovereign Debt Developments

There is a short note by Katherine Reece Thomas in *Butterworths Journal of International Banking & Financial Law* (B.J.I.B. & F.L. 2006, 21(10), 432-434) on "**State immunity and sovereign debt developments**". Here's the abstract:

> *Reviews case law on state immunity for sovereign debts, including: (1) Grovit v De Nederlandsche Bank on whether a state bank was immune from the jurisdiction of the court in a libel action; (2) AIG Capital Partners Inc v Kazakhstan on whether assets held by a third party bank in an account belonging to a central bank were immune from attachment; and (3) Svenska Petroleum Exploration AB v Lithuania (No.2) on whether the State Immunity Act 1978 s.3 permitted the registration or enforcement of a foreign arbitration award. Comments on public policy concerns.*

Observations from the Intersection of Private International Law and Civil Procedure in the USA

Richard D. Freer (*Emory University*) has posted an article on SSRN entitled, "**Pondering the Imponderable and Other Observations from the Intersection of Conflicts and Civil Procedure**". The abstract reads:

> *In honor of the scholarship of Peter Hay, this essay explores some substantive areas of interest to scholars both of conflict of laws and civil procedure,*

including full faith and credit, federal common law, claim and issue preclusion, the Erie doctrine, and the efficient packaging of complex litigation. Though some have criticized conflict of laws scholarship as basing theory upon fact patterns that do not arise in the empirical world, this essay points out that Supreme Court treatment of full faith and credit has created real-world problems for which governing law simply cannot exist. In addition, while procedure often creates a structure permitting joinder of related claims in a single case, choice of law doctrine defeats the goal of efficiency by requiring the application of different substantive law. Moreover, the Supreme Court instruction to apply federal common law to determine the preclusive effect of a federal civil judgment creates an ersatz body of law by engaging in the assumption that state law provides the content of the federal prescription.

The full article is available here.

The Quest for the Optimum in Resolving Product-Liability Conflicts

Symeon C. Symeonides (*Williamette University, College of Law*) has just posted "**The Quest for the Optimum in Resolving Product-Liability Conflicts**" on SSRN. Here's the abstract:

This essay reports the findings of a comprehensive study of product-liability conflicts cases decided by American courts from 1990 to 2004. One of the findings is that choice-of-law methodology plays a less significant role in the courts' choice of the governing law than other factors, such as the number and pertinence of factual contacts with a given state.

For example, regardless of methodology, in 79% of the cases in which the product's acquisition and the victim's domicile and injury were in the same

state, the courts applied that state's law, regardless of whether it favored the plaintiff or the defendant, and regardless of whether that state was also the forum. Another finding is that, contrary to prevailing perceptions, American courts do not unduly favor plaintiffs as a class, nor the law or the domiciliaries of the forum state. Indeed, on the whole, the record of American courts in resolving these most intractable of conflicts is much better than one might assume from a selective reading of a few cases.

However, this record comes at a heavy cost in time and resources for courts and litigants. One way to remedy this problem is to provide courts with specific guidance in the form of choice-of-law rules. This essay proposes such a rule, and then examines how that rule would have resolved the cases of the study period. The answer: much in the same way (good or bad), but much more quickly, and at a lower cost.

You can download the full article here. The paper forms part of the forthcoming publication, *ESSAYS IN HONOR OF JOHN P. KOZYRIS, Ana Grammatikaki-Alexiou, ed., Sakoulas-Kluwer Publishers, 2006*. Recommended reading.

New Site Feature: Search by Jurisdiction, and New Editors

We have now implemented another way of finding the material you need on **CONFLICT OF LAWS .NET** quickly and efficiently. There are readers of this site located on every continent, and in every major jurisdiction; as a result, it makes sense for the news items to be **searchable by jurisdiction**, as well as by date and subject.

If you scroll down to the "ARCHIVES" section of the menu on the left-hand side, you will see two drop-down boxes, one of which will allow you to "Select by Date", and the other to "**Select by Category**". In the latter drop-down box, you will find

a list of categories that the news items on **CONFLICT OF LAWS .NET** are allocated to, and, as of today, a **list of jurisdictions** that the news items are placed into.

Clicking on “EU”, for example, will take you to all those news items that relate to the European Union (be it judgments of the ECJ, or new versions of proposed Regulations). We hope that this will make the site even more accessible to its users. Let us know what you think.

On a related note, we have appointed several more **editors**, who will be posting news and views in private international law from **Belgium**, **Croatia**, **Russia** and **Australia**, in addition to the jurisdictions we already have covered: the **UK**, the **USA**, **Germany**, **Canada** and **France**. All of the editors are very qualified scholars in their respective jurisdictions; for a full list of the editors, along with their profiles, see the Editors’ page. If your jurisdiction is not yet represented on **CONFLICT OF LAWS .NET**, and you feel that you are able and willing to take on an editorial role, please send an email with your details and CV to the General Editor, Martin George.

Some Case Comments And Practitioner Articles in November

There are a few case comments and articles on private international law in various practitioner updates this month in the UK. These include:

1. "**Court authority over internet sites based abroad**" *E-Commerce Law and Policy* (E.C.L. & P. 2006, 8(10), 6-7) by Hubert Best and Martin Soames. Abstract:

> *Examines courts' jurisdiction, and which laws should apply, where wrongdoing is committed by web based companies or individuals based in other countries. Provides examples from the US and other countries of the differing criteria used to determine courts' jurisdiction. Highlights the refusal of UK based software company, Spamhaus, who have a website but no physical presence in*

the US, to comply with a US District Court injunction and order for damages for listing a US bulk emailing company as a spammer. Suggests that international harmonisation of internet laws is unlikely to keep pace with internet development.

2. "**Marriage and non-marital registered partnerships: gold, silver and bronze in private international law**" *Private Client Business* (P.C.B. 2006, 6, 352-362) by Richard Frimston. Abstract:

Examines the extent to which private international law grants cross border recognition to civil and other non marital registered partnerships involving same sex couples. Reviews the definitions of "marriage", the countries in which same sex marriage is now lawful and the human rights implications of non recognition in EC Member States, highlighting the discrimination issues raised by the Family Division ruling in Wilkinson v Kitzinger. Considers the position regarding quasi marriages such as non marital registered relationships (NMRRs) or civil partnerships, including the registration requirements, the position where one party is a non national and the scope for mixed sex NMRRs.

3. "**Stays of Proceedings: Foreign Arbitrations**" *Arbitration Law Monthly* (Arb. L.M. 2006, Nov, 1-3). Abstract:

Examines the Commercial Court judgment in Abu Dhabi Investment Co v H Clarkson & Co Ltd on the jurisdiction of the court under the Arbitration Act 1996 s.9 to stay UK proceedings brought contrary to an arbitration clause which was subject to foreign law. Considers the terms of a joint venture to run an express liner service, focusing on whether the arbitration agreement in the memorandum of association and the shareholders' agreement applied to allegations that the contract was induced by misrepresentation. Examines the interpretation of arbitration clauses under United Arab Emirates law.

Conference: Croatia on its Way to the European Judicial Area – Settlement of Commercial and Consumer Disputes

The conference is organized by the Institute of European Law and Comparative Legislation and the University of Rijeka Faculty of Law. It will take place in the Hotel Ambasador in **Opatija, Croatia** on **7 and 8 December 2006**. The speakers at the conference are experts from Croatia as well as from several EC Member States including Germany, Italy, and the Netherlands. The simultaneous English-Croatian interpreting is provided.

Programme

7 December 2006

WELCOMING NOTE

Prof. dr. sc. Miomir Matulovi?, Dean of the Faculty of Law Rijeka, Croatia

INTRODUCTORY PRESENTATIONS

- **Is Croatia Prepared to Enter European Judicial Area?** Ljiljana Vodopija ?engi?, Vice-Minister, Ministry of Justice of Republic of the Croatia
- **Current State of Play of Consumer Protection Law in the Republic of Croatia** Ema Culi, Vice-Minister, Ministry of Economy, Labor and Entrepreneurship of the Republic of Croatia
- **Republic of Croatia on its Way to the European Union – Negotiations**Neven Pelicari?, Vice-Minister, Ministry of Foreign Affairs and European Integrations of the Republic of Croatia

FAIR ADMINISTRATION OF JUSTICE IN CROATIA AS A PRECONDITION OF ITS ENTERING INTO THE EUROPEAN JUDICIAL AREA

- **Key Elements of European Judicial Area** Prof. dr. sc. Werner Meng, Director of the Europa Institut, University of Saarbrücken, Germany

- **European Enforcement Order**Prof. dr. sc. Tito Ballarino, Law Faculty Milan, Italy
- **Creating the European Judicial Area in Civil and Commercial Matters – The ECJ's Powers and Limitations** Mr. sc. Ivana Kunda, Law Faculty Rijeka, Croatia
- **Reasonable Length of Civil Proceedings in Croatia** Prof. dr. sc. Aldo Radolovi?, President of the County Court Pula, Croatia
- **Fundamental rights as General Legal Principles in EU** Štefica Stažnik, President of the Croatian Judicial Academy, Ministry of Justice of the Republic of Croatia
- **Implementation and Application Requirements of EU law for NationalAuthorities** Prof. dr. sc. Linda Senden, Law Faculty Tilburg, the Netherlands

SETTLEMENT OF COMMERCIAL DISPUTES·

- **International Jurisdiction for Commercial Disputes – Differences between Croatian Law and Brussels I Regulation** Doc. dr. sc. Davor Babi?, Law Faculty Zagreb, Croatia
- **International Jurisdiction for Opening of Insolvency Proceeding** Doc. dr. sc. Jasnica Garaši?, Law Faculty Zagreb, Croatia
- **Extrajudicial Settlement of Commercial Disputes in Italy** Prof. dr. sc. Fabio Padovini, Law Faculty Trieste, Italy
- **Conciliation as a Tool for effective Settlement of Commercial Disputes – Newly Adopted Practice of the Croatian High Commercial Court** Mr. sc. Sr?an Šimac, President of the High Commercial Court Zagreb, Croatia

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SETTLEMENT OF CONSUMER DISPUTES

- **New Perspectives of Extrajudicial Settlement of Consumer Disputes in Croatia** Željka Luka?evi?-Suboti?**,** Head of the Consumer Protection Department, Ministry of Economy, Labor and Entrepreneurship of Republic of Croatia
- **Legal Remedies Available to the Croatian Consumer – Individual Action v. Collective Action** Dr. sc. Marko Bareti?, Law Faculty Zagreb,

Croatia

- **Group Litigation as an Efficient Mechanism for Consumer Protection** Prof. dr. sc. Vesna Tomljenovi?, Law Faculty Rijeka, Croatia
- **Extrajudicial Settlement of Consumer Disputes in Croatia** Dr. sc. Nina Tepeš, Law Faculty Zagreb, Croatia
- **Extrajudicial Settlement of Consumer Disputes in Italy**Prof. dr. sc. Gian Antonio Benacchio, Law Faculty Trento, Italy
- **Collective Legal Remedies beyond Injunctions against Unfair Trade Practices – German Perspective** Prof. dr. sc. Helmut Rüssmann, Law Faculty Saarbrücken, Germany
- **Injunction for Protection of Consumer Interests in EU Law** Prof. dr. sc. Silvija Petri?, Law Faculty Split, Croatia
- **Extrajudicial Settlement of Financial Services Disputes with Consumers – European Experiences and Croatian Law** Prof. dr. sc. Edita ?ulinovi?-Herc, Law Faculty Rijeka, Croatia & doc. dr. sc. Nataša Žuni? Kova?evi?, Law Faculty Rijeka, Croatia

Registering the participation is possible via fax (+385 51 359 595), or e-mail tempus@pravri.hr Participation fee is **800,00 kn**. There are also special rates for rooms at the Hotel Ambasadors available for the participants at the conference.

Contact information:

- Prof. dr. sc. Vesna Tomljenovi?; Prof. dr. sc. Edita ?ulinovi?-Herc; Dr sc. Vlatka Butroac
- Tel: +385 51 359 535
- Fax: +385 51 359 595
- E-mail: tempus@pravri.hr

The Making of European Private

Law: Regulation and Governance Design

Horatia Muir-Watt (*Université Paris I Panthéon-Sorbonne*) and Fabrizio Cafaggi (*European University Institute – Department of Law*) have posted an interesting article on SSRN, entitled "**The Making of European Private Law: Regulation and Governance Design**". Here's the abstract:

> *The current debate on the desirability and modes of formation of EPL ("EPL") is engaging a wide number of scholars and institutions. Current work concerns the search for a common core of EPL, the rationalisation of the acquis communautaire, the design of a European Civil Code. These ongoing projects raise at least two related questions concerning the challenges to Europeanisation of private law: First, what is the often implicit definition of private law standing behind the debate about the creation of EPL? Second, does the process of creation of EPL need some type of governance structure?*
>
> *In this paper, we thus intend to contribute to a better understanding of these two dimensions of the debate. First, we wish to highlight the internal transformation of private law and its increasing regulatory function to be considered in governance design. If we take into consideration the internal transformation of private law and its increasing regulatory function in addition to the role of private law in regulated sectors, we witness several phenomena that require consideration in the governance design, such as the change of private law sources, and the procedural nature of Europeanisation.*
>
> ***Within this framework it is important to identify the interplay between EPL and private international law. The role of private international law ("PIL") as a vehicle to ensure choice of rules for private parties might change quite considerably depending on the choices concerning private law rules, in particular whether there is harmonisation and which kind of private law rules are adopted. The role of PIL may also depend on the level at which rules are produced.***
>
> *Second, we address the issue of the appropriate governance structure. In other words, does EPL need a governance structure that will accompany its*

formation, consolidation and changes? More on the point, Is there a link between the governance design and the definition of EPL?

You can download the full article from here.