Homing Devices in Choice of Tort Law: Australian, British and Canadian Approaches

There is an article in the new issue of the *International & Comparative Law Quarterly* (October 2006; Vol. 55, No. 4) by **Reid Mortenson** (*TC Beirne School of Law, University of Queensland*) on "**Homing Devices in Choice of Tort Law: Australian, British and Canadian Approaches**". The abstract reads:

Since 1994, Canada, the United Kingdom and Australia have adopted new choice of law rules for cross-border torts that, in different ways, centre on the application of the law of the place where the tort occurred (the lex loci delicti). All three countries abandoned some species of the rule in Phillips v Eyre, which required some reference to the law of the forum (the lex fori) as well as the lex loci delicti. However, predictions were made that, where possible, courts in these countries would continue to show a strong inclination to apply the lex fori in cross-border tort cases—and would use a range of homing devices to do so. A comprehensive survey and analysis of the cases that have been decided under the Australian, British and Canadian lex loci delicti regimes suggests that courts in these countries do betray a homing instinct, but one that has actually been tightly restrained by appeal courts. Where application of the lex fori was formally allowed by use of a 'flexible exception' in Canada and the United Kingdom, this has been contained by courts of first appeal. Indeed, only the continuing characterization of the assessment of damages as a procedural question in Canada and the United Kingdom, seems to remain as a significant homing device for courts in these countries.

For those with online access to the ICLQ, the full article can be downloaded from here.

There is also a shorter article by **Richard Frimpong Oppong** (*PhD candidate, University of British Columbia*) in the latest issue of the ICLQ on "**Private International Law and the African Economic Community: A Plea for Greater Attention**". The full article, again for those with a subscription, can be found here.

Rome II: Draft Recommendation for EP Second Reading

Diana Wallis MEP and the Committee on Legal Affairs have published the Draft Recommendation for the European Parliament's Second Reading, following the Council's Common Position, on adopting a regulation on the law applicable to non-contractual obligations (Rome II).

Much that was removed by the Commission and Council has been reinserted by the Rapporteur; she has, for example, "decided to continue to press for inclusion" of rules relating to road traffic accidents and violations of privacy and rights relating to the personality. For the latter, new Recital 25a identifies the country where the most significant element(s) occur as:

> *the country to which the publication or broadcasting service is principally directed or, if this is not apparent, the country in which editorial control is exercised, and that country's law should be applicable. The country to which a publication or broadcast is directed should be determined in particular by the language of the publication or broadcast or by sales or audience size in a given country as a proportion of total sales or audience size or by a combination of those factors. Similar considerations should apply in respect of publication via the Internet or other electronic networks.*

The Rapporteur is not put off by its removal in both the amended Commission proposal and the Council's Common Position; indeed, it is suggested that "this issue should not be shirked".

Perhaps even more controversially, provisions have been introduced that would seem to be procedural rules on the pleading and proof of foreign law: new Articles 15a states that:

> *Any litigant making a claim or counterclaim before a national court or tribunal which falls within the scope of this Regulation **shall notify** the court or tribunal and any other parties by statement of claim or other equivalent originating document of the law or laws which that litigant maintains are applicable to all or any parts of his claim.*

New Article 15b requires the court seised to

> *establish the content of the foreign law **of its own motion**. To this end, the parties' collaboration may be required.*

The icing on the cake, however, comes with new Article 21a, innocently entitled "Damages". It states that:

> *In **quantifying damages in personal injury cases**, the court seised shall apply the principle of restitutio in integrum, having regard to the victim's actual circumstances in his country of habitual residence.*

The Rapporteur admits, in new Recitial 29a, that the amendments to the damages provisions that have been drafted seek the same result as those contained in Parliament's first-reading amendments, but simply by different means. The reintroduction is justified on the basis that:

> *...it is vital to take account of the circumstances in which the victim will find him or herself in his or her country of habitual residence: the actual cost of nursing and carers, medical aftercare and so on. This provision will assist in making free movement of persons within the internal market more attractive for citizens, while showing an awareness of citizens' concerns. It will also avoid placing an unfair burden on the social security and assistance schemes of the country of habitual residence of an accident victim.*

The full draft recommendation, with all of the amendments, can be found here.

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):

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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!