Rome I Regulation – A Dangerous Proposal?

Stuart Dutson (Linklaters) has written an article in the Journal of Business Law (J.B.L.): ***A dangerous proposal – the European Commission's attempt to amend the law applicable to contractual obligations***. Here is the abstract:

> *This article analyses the Proposal for a European Parliament and Council Regulation on the law applicable to contractual obligations (Rome I). Explores the proposed changes to the Convention on the Law Applicable to Contractual Obligations 1980, the Rome Convention. The article welcomes some of the proposals, including the ability for parties to choose non-State bodies of law, but argues that two are dangerous, focusing on the provisions on applicable law in the absence of choice and the application of foreign mandatory rules.*

Journal of Business Law J.B.L. (2006) September Pages 608-618.

ECJ Interpretation of Art 6(1) of the Brussels I Regulation

Case C-103/05 Reisch Montage AG v Kiesel Baumaschinen Handels GmbH (13th July 2006) concerns the interpretation of Article 6(1) 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.

The question referred to the ECJ by the Oberster Gerichtshof (Supreme Court of Austria) was:

> *Can a claimant rely on Article 6(1) of Regulation … No 44/2001 when bringing a claim against a person domiciled in the forum state and against a person resident in another Member State, but where the claim against the person*

domiciled in the forum state is already inadmissible by the time the claim is brought because bankruptcy proceedings have been commenced against him, which under national law results in a procedural bar?

The ECJ held, *inter alia*, that:

- Article 6(1) should be interpreted strictly in order to preserve the dominant rule in Article 2(1) (see Case C-51/97 *Réunion européenne and Others* [1998] ECR I-6511, paragraph 16, and Case C-265/02 *Frahuil* [2004] ECR I-1543, paragraph 23).
- National courts must have regard for the principle of legal certainty (see Case C-281/02 *Owusu* [2005] ECR I-1383, paragraph 38). That principle requires, in particular, that the special rules on jurisdiction be interpreted in such a way as to enable a normally well-informed defendant reasonably to foresee before which courts, other than those of the State in which he is domiciled, he may be sued.
- The provisions of the regulation must be interpreted independently, by reference to its scheme and purpose. Since Article 6(1) is not one of the provisions, such as Article 59 of Regulation No 44/2001, for example, which provide expressly for the application of domestic rules and thus serve as a legal basis therefor, Article 6(1) of the Regulation cannot be interpreted in such a way as to make its application dependent on the effects of domestic rules.

Therefore, the Court ruled that Article 6(1) must be interpreted as meaning that, in a situation such as that in the main proceedings, that provision may be relied on in the context of an action brought in a Member State against a defendant domiciled in that State and a co-defendant domiciled in another Member State even when that action is regarded under a national provision as inadmissible from the time it is brought in relation to the first defendant.

Case C-103/05 Reisch Montage AG v Kiesel Baumaschinen Handels GmbH [click for full judgment].

Art 16(4) of the Brussels Convention: exclusive jurisdiction in relation to patents

Case C-4/03 Gesellschaft für Antriebstechnik mbH & Co. KG v Lamellen und Kupplungsbau Beteiligungs KG (13th July 2006) concerned a reference from the Oberlandesgericht Düsseldorf (Germany) to the ECJ for a preliminary ruling on the interpretation of Article 16(4) of the Brussels Convention.

The Oberlandesgericht (Higher Regional Court) Düsseldorf sought, in essence, to ascertain the scope of the exclusive jurisdiction provided for in Article 16(4) of the Convention in relation to patents. It asked whether that rule concerns all proceedings concerned with the registration or validity of a patent, irrespective of whether the question is raised by way of an action or a plea in objection, or whether its application is limited solely to those cases in which the question of a patent's registration or validity is raised by way of an action.

The ECJ adjudged that:

- To allow a court seised of an action for infringement or for a declaration that there has been no infringement to establish, indirectly, the invalidity of the patent at issue would undermine the binding nature of the rule of jurisdiction laid down in Article 16(4) of the Convention.
- While the parties cannot rely on Article 16(4) of the Convention, the claimant would be able, simply by the way it formulates its claims, to circumvent the mandatory nature of the rule of jurisdiction laid down in that article.
- The possibility which this offers of circumventing Article 16(4) of the Convention would have the effect of multiplying the heads of jurisdiction and would be liable to undermine the predictability of the rules of jurisdiction laid down by the Convention, and consequently to undermine the principle of legal certainty, which is the basis of the Convention (see Case C-256/00 *Besix* [2002] ECR I-1699, paragraphs 24 to 26, Case C-281/02 *Owusu* [2005] ECR I-1383, paragraph 41, and Case C-539/03 *Roche Nederland and Others* [2006] ECR I?0000, paragraph 37).

- To allow, within the scheme of the Convention, decisions in which courts other than those of a State in which a particular patent is issued rule indirectly on the validity of that patent would also multiply the risk of conflicting decisions which the Convention seeks specifically to avoid (see, to that effect, Case C?406/92 *Tatry* [1994] ECR I-5439, paragraph 52, and *Besix* , cited above, paragraph 27).

On those grounds, the ECJ ruled that **Article 16(4) of the Brussels Convention is to be interpreted as meaning that the rule of exclusive jurisdiction laid down therein concerns all proceedings relating to the registration or validity of a patent, irrespective of whether the issue is raised by way of an action or a plea in objection.**

See here for the full judgment.

German Article on Rome II Regulation

Dr. Michael Sonnentag (*Freiburg*) has published an article in the German legal journal "Zeitschrift für vergleichende Rechtswissenschaft" on the Europeanisation of the non-contractual law of obligations ("Zur Europäisierung des Internationalen außervertraglichen Schuldrechts durch die geplante Rom II – Verordnung", Vol. 105 No.3 (2006), p. 256).

In his article *Sonnentag* attends to the background of the existing proposals, the legal basis, the scope of application of a future Rome II Regulation, its individual conflict of law rules and general questions such as public policy.

Publication: EU Private International Law

Peter Stone (University of Essex, UK) has published ***EU Private International Law: Harmonization of Laws***, part of the Elgar European Law Series.

This book focuses on harmonization of conflict laws at the European Community level, which has been driven by the introduction of a series of conventions and regulations. It offers critical assessment of these advances across four main areas of concern: civil jurisdiction and judgments; the law applicable to civil obligations; family law; and insolvency.

Specifically, the measures examined and evaluated include:

• the Brussels I Regulation on civil jurisdiction and judgments
• the Regulation on uncontested claims
• the Rome Convention 1980 on contracts
• the Rome II Proposal on torts and restitution
• the Brussels IIA Regulation on matrimonial proceedings and parental responsibility
• the Regulation on insolvency proceedings.

Contents: Preface Part I: Introduction 1. Introduction Part II: Civil Jurisdiction and Judgements 2. History, Outline and Scope 3. Domicile 4. Alternative Jurisdiction 5. Protected Contracts 6. Exclusive Jurisdiction 7. Submission 8. Concurrent Proceedings 9. Provisional Measures 10. Recognition and Enforcement of Judgements 11. Enforcement Procedure Part III: Choice of Law in Respect of Obligations 12. Contracts 13. Protected Contracts 14. Torts 15. Restitution Part IV: Family Matters 16. Matrimonial Proceedings 17. Parental Responsibility 18. Familial Maintenance and Matrimonial Property Part V: Insolvency 19. Insolvency Index

The book is priced at £99.00. More information can be found on the publisher's website.

Form over Substance

There is a short note by Wendy Hopkins and Stephen Turner (Beachcroft LLP) in the new issue of the Solicitors Journal on the recent House of Lords ruling in *Harding v Wealands* (2006) UKHL 32; (2006) 3 WLR 83 (HL) [see this post for the judgment].

The article focuses on whether the relevant provisions of the New South Wales Motor Accidents Compensation Act 1999 were procedural and should be excluded when determining the quantification of damages for personal injury.

Ref: *Solicitors Journal S.J. (2006) Vol.150 No.32 Page 1071*.

German Publication: The Consumer Contract in Private International Law and International Civil Procedure Law

A new thesis concerning consumer contracts has been published in Germany in June 2006: *Kathrin Sachse, Der Verbrauchervertrag im Internationalen Privat- und Prozessrecht.* In this thesis, structure and limits of the international consumer contract are analysed against the background of European law and comparative law. On the basis of the different approaches to define the term "consumer", a proposal for a uniform concept of "international consumer contract" is developed.

More information can be found on the publisher´s website.

German Articles on International Adoption Law

The German legal journal "Das Jugendamt" (The Youth Welfare Office) attends in its new volume 8 (2006) in particular to international adoption law. It contains articles concerning this topic as well as judicial decisions, which focus on problems concerning the recognition of foreign adoptions, such as the question whether German public policy is violated if the interests of the child have not taken into account sufficiently.

Contents (concerning international adoption law):

1. *Jörg **Reinhardt**, Die Praxis der Anerkennung ausländischer Adoptionsentscheidungen aus Sicht der Adoptionsvermittlung* (The recognition of foreign adoptions from the perspective of adoption agencies), p. 325
    - *Jörg Reinhardt* describes in this article the recognition of foreign adoptions from the point-of-view of adoption agencies.
2. *Mathias **Beyer**, Zur Frage der ordre public-Widrigkeit ausländischer Adoptionsentscheidungen wegen unzureichender Elterneignungs- und Kindeswohlprüfung* (On the violation of German public policy by foreign adoptions due to an insufficient examination of the adoptive parents´ qualifications and the child´s interests), p. 329
    - *Mathias Beyer* annotates in his article two decisions of German local courts which concerned the question whether German public policy is violated if no sufficient examination of the future adoptive parents´ suitability and the interests of the child has taken place.
3. *Wolfgang **Weitzel**, Anerkennung einer Auslandsadoption nach deutschem Recht trotz schwerwiegender Mängel der ausländischen Entscheidung?* (Recognition of a foreign adoption according to German law despite serious legal flaws of the foreign decision?), p. 333

- *Wolfgang Weitzel* discusses in his article a decision of the *Amtsgericht* (Local Court) *Hamm* (see below) which concerns the question whether a foreign adoption can be recognized in Germany even if the adoption was flawed.

4. ***KG Berlin,*** *4 April 2006 – 1 W 369/05, p. 356*

   - In this decision the court ruled that an adoption which has been carried out without taking the interests of the child into account violates German public policy and can therefore not be recognized.

5. ***LG Dresden****, 26 January 2006 – 2 T 1208/04, p. 360*

   - In this decision the court ruled that the relevant point in time for assessing whether the recognition of the foreign adoption violates German public policy is when deciding about the recognition.

6. ***AG Hamm****, 3 February 2006 – XVI 41/05, p. 361*

   - The court ruled that a foreign adoption which has been carried out without an examination of the prospecitve adoptive parents´ qualification violates German public policy.

7. ***AG Hamm****, 17 April 2006 – XVI 44/05, p. 363*

   - The court ruled that a foreign adoption can be recognized even if it is legally flawed as long as it serves the interests of the child and is consistent with the essential principles of German law.

Publication: An Economic Analysis of Private International Law

An new book edited by *Jürgen Basedow* and *Toshiyuki Kono* with the cooperation of *Giesela Rühl* is being published in August 2006: An Economic Analysis of Private International Law. The book contains eleven contributions covering

different aspects of private international law which have been discussed at a German-Japanese Conference in 2005.

More information can be found on the publisher´s website.

Domestic Courts and Global Governance

Christopher Whytock (Duke University) has posted a very interesting article on SSRN, entitled Domestic Courts and Global Governance. Here's the abstract:

> *This paper proposes a concept of "transnational judicial governance" that draws attention to the important but widely neglected role of domestic courts in the governance of transnational relations, makes explicit the connections between private international law and global governance, and emphasizes the domestic legal and institutional foundations of transnational activity. Because legal scholars have done little positive theoretical or systematic empirical work on judicial decisionmaking in transnational disputes, and because international relations scholars – even those interested in global governance – generally have paid little attention to domestic courts, we have little knowledge about how domestic courts actually behave as global governors.*
>
> *This paper, and the broader project on domestic courts and global governance of which it is a part, seeks to help fill that gap. I first present the concept of transnational judicial governance, and clarify its relationship to the concepts of transgovernmental networks and the legalization of world politics. Second, taking an interdisciplinary approach, I situate the concept in relation to private international law scholarship, and international relations scholarship on global governance, international political economy, sovereignty, and the judicialization of politics. Third, I draw on the judicial decisionmaking literature to develop a positive theory of transnational judicial governance. I highlight a key dimension of variation in transnational judicial governance decisionmaking: assertion of domestic governance authority versus deference to foreign governance*

authority. Then, treating judges as boundedly rational actors, I argue that this variation can be largely explained by the heuristics used by judges to make their decisions. Fourth, I explain the overall research design for the project. I conclude by discussing the broader implications of transnational judicial governance and identifying some of the important empirical and normative questions raised by the role of domestic courts in global governance that can guide future research. Public international law scholars and international relations scholars are increasingly collaborating. This paper is the first in a series of papers aimed at bringing together private international law and international relations, two disciplines which have for the most part remained separate, but which have the potential for substantial mutual gains.

Comment: The article does not deal with private international *law* in substantive detail (i.e. it simply provides definitions of phrases such as "choice of forum", "recognition and enforcement", and so on), but that is arguably not within its scope. Regardless, it is certainly a fascinating insight into the potential connections between the conflict of laws and the political sciences.