Transnational Tort Litigation as a Trade and Investment Issue

Alan O. Sykes (Stanford Law School) has posted "**Transnational Tort Litigation as a Trade and Investment Issue**" on SSRN. Here's the abstract:

Tort plaintiffs regularly bring cases in U.S. courts seeking damages for harms that have occurred abroad, attracted by higher expected returns than are available in the jurisdiction where the harm arose. Such claims are especially likely to be filed by plaintiffs from developing countries, who commonly argue that the remedies available to them in their home jurisdictions are deficient or non-existent. This paper focuses on a potential inefficiency of forum shopping that is of special importance in transnational tort litigation against business defendants – the potential distortion of trade and investment patterns that can result from implicit "discrimination" in the applicability of legal rules to producers or investors of different nationalities. These distortions are akin to those associated with discriminatory tariff or tax policies. They can reduce global economic welfare, and afford a potentially important argument for limiting foreign tort plaintiffs to the law and forum of the jurisdiction in which their harm arose. The problem arises even if the substantive or procedural law of the foreign jurisdiction in question is demonstrably inferior to U.S. law from an economic standpoint. The analysis has implications for a number of areas of legal doctrine, including the construction of the Alien Tort Statute, the rules governing choice of law in transnational tort cases, and the doctrine of forum non conveniens.

You can download the article, for free, from here.

Harding v Wealands – the Final Word on Assessment of Damages under English Law?

Yet another casenote on Harding v Wealands (2006) has been published, this time in the new issue of the *Civil Justice Quarterly*, written by Hakeem Seriki (C.J.Q. 2007, 26(Jan), 28-36). Here's the abstract:

> *Examines English and Australian case law on the classification of issues as either substantive or procedural in the context of a conflict of laws. Comments on the first instance, Court of Appeal, and House of Lords decisions in Harding v Wealands on whether the assessment of damages in respect of a car accident in Australia was a "question of procedure" within the meaning of the Private International Law (Miscellaneous Provisions) Act 1995 s.14(3)(b) so that the law of the forum, rather than the law of New South Wales, applied.*

The *Civil Justice Quarterly*, to my knowledge, isn't accessible online, so you'll have to get your hands on a copy of the Journal itself to read the article.

Mutual Recognition of Personal and Family Status in the EC

An interesting article written in English by *Roberto Baratta* (University of Macerata, Italy) has been published in the latest volume of the German legal journal IPRax (IPRax 2007, 4 et seq.): "**Problematic elements of an implicit rule providing for mutual recognition of personal and familiy status in the EC**".

In this article *Baratta* examines whether certain primary rules of the EC Treaty may serve as a "theoretical gateway" for establishing a private international law

principle of mutual recognition which facilitates the recognition of European Union citizens' personal status and family relationships within the European Union.

As a "theoretical gateway" *Baratta* considers three basic provisions of the EC Treaty.

As a first basis Art. 17 EC which is completed by Art. 18 EC guaranteeing EU citizens "the right to move and reside freely within the territory of the Member States" is contemplated. *Baratta* regards the latter right as including "the right to move with the personal status and family situations legally acquired" in the respective Member State of origin and supports this teleological interpretation of these two provisions of the EC Treaty with the ECJ's ruling in *Dafeki,* where the Court had affirmed, "at least as a matter of principle, the obligation to recognise that a worker (exercising a fundamental freedom) had the same personal status he or she possessed in her national State".

The second argument in favour of a principle of mutual recognition brought forward by *Baratta* is Art. 12 EC. Here, *Baratta* concludes from ECJ case law such as *Konstantinidis* and *Garcia Avello* that "legal values granted to a person by its national State cannot be denied by another Member State, in particular whenever this refusal has a negative effect on the integration of European citizens and, more generally, on their freedom to circulate and enjoy fundamental rights".

The third provision which is referred to is Art. 10 EC according to which Member States are obliged "to take all appropriate measures […] to ensure fulfilment of the obligations arising out of this Treaty […]". *Baratta* regards it as a jeopardy for the exercise of the freedom of movement as well as the attainment of the objectives of the Treaty – which is forbidden by Art. 10 EC – if a Member State refuses *a priori* to recognise a legal status duly acquired by an EU citizen according to its national legal system.

Baratta regards the aforementioned provisions as a theoretical foundation of a private international law principle of mutual recognition and derives from this principle the following three consequences:

First he argues that domestic conflict-of-law rules as well as substantive rules should not be applied if they lead to a non-recognition result.

Second, "the aim of the principle would be to maintain throughout the territory of the EC the personal and family status legally acquired in the Member State of origin" and therefore the Member States would be obliged to recognise legal relationships acquired either ex lege or by an act of public authorities.

And third, the recognising Member State should in principle grant the respective status an effect as similar as possible to the effect of the same situation in the State of origin.

Baratta however supports – due to the different legal traditions in the Member States – a certain limitation of this principle by allowing a – narrowly construed – public policy exception.

Finally *Baratta* concludes that a private international law principle of mutual recognition could simplify the solution of private international law problems with regard to some status matters but was, however, "not capable of replacing the traditional conflict of law rules as a whole". One reason is that the scope of the principle is limited to intra-Community situations. Therefore *Baratta* supports the creation of European private international law rules on the basis of Art. 65 EC which "would be better placed to achieve predictability, continuity of family relationships and consistency with a future, comprehensive and coherent Community system of PIL […]".

Provisional EU Council Agendas on Private International Law Matters

The German Presidency has produced, in accordance with its obligations under Article 2, para. 5, of the Council’s rules of procedure, the indicative provisional agendas for Council meetings prepared by the Permanent Representatives Committee for the period up to 30 June 2007. Scrolling through the agendas, the various proposed Rome Regulations (I, II & III) are all timetabled (along with what they hope to achieve), as well as a few other related matters:

Justice and Home Affairs Council, Brussels, 15/16 February 2007 (p. 24)

- (Possible) Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (**Rome II**) ? *Adoption of the amended common position*
- (Possible) Proposal for a Regulation of the European Parliament and of the Council establishing a **European Small Claims Procedure** ? *Adoption*
- (Possible) Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of **judicial and extrajudicial documents** in civil or commercial matters ? *Adoption of the Common position*

Justice and Home Affairs Council, Luxembourg, 19/20 April 2007 (p.26)

- (Possible) Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (**Rome II**) ? *Adoption of the amended common position*
- Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (**Rome I**) ? *Debate on certain issues*
- Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decision and cooperation in matters relating to maintenance obligations (**Maintenance regulation**) ? *Conclusions on certain issues*
- (Possible) Proposal for a Council Regulation amending Regulation (EC) N° 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters (**Rome III**) ? *Debate on certain issues*

Justice and Home Affairs Council, Luxembourg, 12/13 June 2007 (p. 28)

- Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (**Rome I**) ? *Debate on certain issues or general agreement*
- (possible) Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decision and cooperation in matters

relating to **maintenance obligations**. VO Unterhalt ? *Conclusions on certain issues*

- Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters (**Rome III**) ? *Debate on certain issues*

You can find the full list of provisional agendas here.

There's No Case Like Rome (III)

Rachael Kelsey and Caroline Murphy have written a fairly scathing piece on Rome III (i.e. the "green paper on conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition") in the latest issue of the *Journal of the Law Society of Scotland*. Here's a taster:

> *Picture the scene. March 2008, and you're in Lochmaddy Sheriff Court for a divorce proof. You've cited your witnesses, booked your shorthand writer, copied your authorities, even lodged all your productions on time… you've read Cunningham, Wallis, even Coyle. How bad can it be?*
>
> *Thankfully not as bad as it looked like it might be a couple of months ago. At that stage the UK had indicated that we wanted to take part in the adoption of what has become known as Rome III – to give it its proper title, "The green paper on conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition", SEC(2006)952, which is due to come into force on 1 March 2008.*
>
> *At the end of October however the government decided that we would exercise our right not to opt in at this stage (we may still in the future). We need to hope and pray that our government doesn't change its mind.*

You can access the full note online for free.

German Courts: Scope of Art. 6 (3) Brussels I Regulation

The scope of Art. 6 (3) Brussels I (counter-claim) has not been clarified by the ECJ so far. Also the German Federal Supreme Court has left this question explicitly open in a judgment of 7 November 2001 (VIII ZR 263/00).

Now, the Local Court Trier adopted with judgment of 11 March 2005 (32 C 641/04) a **restrictive** approach. The Court held that a counter-claim can only be based on Art. 6 (3) Brussels I if the counter-claim arises from the same contract or facts on which the original claim was based; i.e. it has not been regarded as sufficient if the claim and the counter-claim are based on different sales contracts which have been concluded within the context of continuous business relations between the parties. Rather the existence of a framework contract or an apportioned contract is regarded to be necessary.

The Court refers for supporting this restrictive interpretation mainly to the wording of Art. 6 (3) Brussels I which differs from the wording of Art. 28 (3) Brussels I by not regarding a close connection between the actions as sufficient, but rather requiring that the claim and the counter-claim arise from the same contract or facts.

This point of view is in line with the predominant opinion among German legal writers, but has nevertheless been criticised by *Michael Stürner* (IPRax 2007, 21 et seq.) who argues that it should be possible to bring a counter-claim in the court in which the original claim is pending in cases where separate proceedings may lead to irreconcilable judgments in terms of Art. 28 (3) Brussels I. In contrast to the Local Court Trier he regards the matter in dispute of both proceedings – claim and counter-claim – to be decisive, rather than the existence of an apportioned contract.

The full judgment can be found in IPRax 2007 41 et seq.

German Publication: The Transfer of Seat of the European Company

A new German doctoral dissertation on European company law has been published. The thesis of *Wolf-Georg Ringe* (Hamburg), Die Sitzverlegung der Europäischen Aktiengesellschaft deals with the transfer of seat of the European Company which is also known as "Societas Europaea" (SE). Transfer of seat has a significant impact on companies – in particular for economic reasons – and has been subject of the ECJ's jurisprudence on several occasions in recent years (Daily Mail, Centros, Überseering, Inspire Art). However, since the mobility of companies has been subject to the different national legislations so far and a company's right to leave the Member State of origin is not protected by Art. 48 EG-Treaty (right of establishment), the issue of transfer of seat has – according to the author's point of view – not been solved satisfactorily by now.

By introduction of the European Company as a supranational form of a company by means of Council Regulation (EC) No. 2157/2201 of 8 October 2001 on the Statute for a European company (SE) the question of transfer of seat has gained a new dimension. This Regulation provides for the first time an opportunity for large enterprises to choose a community-wide uniform corporate governance.The European legislator aimed in particular at creating a new instrument to overcome the difficulties relating to the cross-border transfer of seat. Thus, the present thesis examines as to whether the new Regulation is capable of solving this problem in a satisfactory way.

For this purpose, the author first classes the problem of the European Company's transfer of seat with international company law and shows that the Regulation did neither adopt the the real seat regime nor the registered office regime, but rather established a new concept by referring, on the level of choice of law rules, to the registered office and by interlinking, on the level of substantial rules, the registered office and the head office (Art. 7).

In the second part it is examined as to whether Art. 7 s. 1 of the Regulation – according to which the registered office of a SE shall be located within the Community, in the same Member State as its head office – is in line with the right of establishment. This might be questionable in view of the ECJ's jurisprudence (Überseering) where a broad interpretation of the right of establishment has been adopted. Concerning this question the author adopts a critical attitude and suggests a review of the Regulation.

In the third part the author attends to applicatory problems of the transfer of seat, in particular to the balancing of the different interests of involved parties.

The fourth and last part of the thesis deals with the transfer of seat in cases which are outside the scope of Artt. 7 and 8 and are therefore not covered by the Regulation.

Ringe finally comes to the conclusion that the European Company's model of transfer of seat constitutes the first possibilty to transfer a company’s seat within the European Union on the basis of a comprehensive legal framework. Thus, the rules on the European Company’s transfer of seat are regarded as a welcome opportunity to facilitate companies’ cross-border mobility.

Lawrence Collins Appointed a Lord Justice of Appeal

The Honourable Mr Justice Lawrence Collins, co-author of probably the world's most famous work on private international law, *Dicey, Morris & Collins on the Conflict of Laws*, has been appointed a Lord Justice of Appeal (a permanent judge of the Court of Appeal of England and Wales). From the press release:

> *The Honourable Mr Justice Lawrence Collins, LL.D., FBA (65) has been a Judge of the High Court of Justice, Chancery Division, since 2000. He qualified as a solicitor in 1968 and was a partner in Herbert Smith, solicitors, from 1971 to*

2000. In 1997 he became a QC and was a Deputy High Court Judge from 1997 to 2000, when he became the first solicitor to be directly appointed to the High Court bench. He was made a Bencher of the Inner Temple in 2001.

He has been a Fellow of Wolfson College, Cambridge, since 1975, and was elected a Fellow of the British Academy in 1994. He is an elected member of the Institut de droit international, and is the author of works on international law, including the general editorship since 1987 of Dicey and Morris (now Dicey, Morris and Collins) on the Conflict of Laws.

Mr Justice Lawrence Collins was knighted in 2000.

Many congratulations, Sir Lawrence.

A European Order for Payment Procedure

Following on from our news about the **European Payment Procedure Order** and its movements through the various European organs, Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure has been published in the *Official Journal of the European Union*.

There are numerous annexes in the Regulation, filled to the brim with boxes and forms for one to tick, sign and complete. Brussels do, however, foresee the potential for disillusionment, and have put at the very top of the annexes:

Please ensure that you read the guidelines on the last page – they will help you to understand this form! (…their exclamation mark, not mine.)

Regulation (EC) No. 1896/2006, in essence, simplifies the procedure for recovery

of uncontested claims (i.e. claims where there is no dispute over whether the money is owed or not, but where the debtor is unwilling or unable to pay) between Member States. A creditor will fill in the relevant application form, giving a number of details on the claim (e.g. details of the parties involved, amount of the claim, cause of action, brief description of evidence supporting the claim). The court will then issue a "payment notification" which informs the defendant about the claim and gives the defendant debtor an opportunity to lodge a statement of defence. If the defendant debtor lodges a statement of defence, the Order for Payment Procedure is automatically brought to an end and the matter is transferred to ordinary civil court proceedings. If he does not act, the court delivers the Order of Payment to the defendant debtor, requesting payment.

The Regulation comes into force in the UK (having opted in) on 12 December 2008. More coverage on the EU Law Blog.

Casenote on Harding v Wealands and the Quantification of Damages

Pippa Rogerson (Cambridge University) has written a short casenote in the latest issue of the *Cambridge Law Journal* on the judgment of the House of Lords in *Harding v Wealands* [2006] UKHL 32. Here's the first paragraph:

> *THERE is a contradiction at the heart of this casenote. On the one hand, the House of Lords was completely right in its decision in Harding v. Wealands [2006] UKHL 32, [2006] 3 W.L.R. 83 overturning the Court of Appeal's judgment (noted [2005] C.L.J. 305) and reinstating that of Elias J. On the other, it was utterly wrong.*

Those with online access to the Cambridge Law Journal can download the article from here.