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.

New and Renewed Members at the European Courts

The choice of who gets to stay, and who has to go, has been made at the European Court of Justice and the Court of First Instance; **on 6 October 2006, the mandate of thirteen judges and four Advocates General will expire**.

The Representatives of the Member States whose mandates have been *renewed* until 6 October 2012 are:

- Mr Peter Jann,
- Mr Christiaan Timmermans,
- Sir Konrad Schiemann,
- Mr Jiri Malenovsky,
- Mr Antonio Tizzano,
- Mr Jose? Narciso da Cunha Rodrigues,
- Mr Pranas Kuris,
- Mr George Arestis,
- Mr Anthony Borg Barthet and
- Mr Egils Levits
- Mr Paolo Mengozzi (as Advocate General)

Four *new* Representatives were appointed to the ECJ:

- Ms Pernilla Lindh, from the Court of First Instance (replacing Mr Stig von Bahr),

- Mr Jean-Claude Bonichot (replacing Mr Jean-Pierre Puissochet),
- Mr Thomas von Danwitz (replacing Ms Ninon Colneric),
- Mr Yves Bot, appointed Advocate General (replacing Mr Philippe Le?ger.)

In addition, and applying the system of rotation of Advocates General by alphabetical order of the Member States, Mr Ján Mazàk was appointed in place of Mr Leendert A. Geelhoed and Ms Verica Trstenjak was appointed in place of Ms Christine Stix-Hackl.

At the Court of First Instance, Mr Nils Wahl and Mr Miro Prek were appointed as Judges at the Court of First Instance of the European Communities, replacing Ms Pernilla Lindh and Ms Verica Trstenjak, respectively.

The successors will be sworn into office on **Friday 6 October 2006 at 17:00 in the main court room.** After the formal sitting, the Judges of the Court of Justice will elect *in camera*, from among their number, their President for a term of three years.

The full press release can be found here.

Update: Following the formal sitting on 6 October 2006, a press release has been issued by the ECJ with brief biographies of the new judges.

On 9 October 2006, following the partial replacement of the members of the Court of Justice, *Mr Vassilios Skouris*, who has been President of the institution since 7 October 2003, was re-elected to perform the duties of President of the Court of Justice of the European Communities for the period from 9 October 2006 to 6 October 2009. A short biography of the President can be found here.

British Columbia Court has Jurisdiction over Claim for

Tobacco Damages

The latest decision in the attempt by the government of British Columbia to sue several tobacco companies for damages and health care costs is *British Columbia v Imperial Tobacco Canada Ltd* [2006] BCJ No 2080 (CA) (available here). The decision provides a good review of the enacting of the *Tobacco Damages and Health Care Costs Recovery Act* by the government and the litigation thereunder. The British Columbia Court of Appeal rejects several jurisdictional challenges by the defendants and also rejects a motion for a stay based on *forum non conveniens*.

Court of Appeal for Ontario Refuses to Enforce American Letter of Request

In *Re Presbytarian Church of Sudan*, released September 26, 2006 (available here) the Court of Appeal for Ontario held that a letter of request from the United States District Court could not be enforced in Ontario. Residents and former residents of Sudan sued Talisman Energy Inc, a Canadian company, in the United States for acts of genocide, torture and other human rights violations, relying on the *Alien Tort Claims Act* for jurisdiction. Despite the government of Canada having formally expressed its concerns about the litigation proceeding in the United States, through a diplomatic note, the court held that the letter of request was not contrary to the public policy of Canada. However, the court refused the request on the basis that the evidence in support – an affidavit from New York counsel – was insufficient to establish that the evidence sought was relevant, necessary and not otherwise obtainable. The court described the affidavit as containing only "bald assertions" on these important elements of the test for giving effect to a foreign letter of request.

Council Adopts a Common Position on Rome II

After their general agreement on the text of the **draft Regulation on the law applicable to non-contractual obligations ("Rome II")** on 1-2 June 2006, the Council of the European Union has adopted a common position on 25 September 2006 under the co-decision procedure (by a qualified majority).

The Council's common position responds both to the Commission's original proposal in 2003, as modified by their proposal on 22 February 2006, and the amendments suggested by the European Parliament on 6 July 2005.

The draft statement of the Council's reasons can be found here. **The complete text of the draft Regulation proposed by the Council in their common position can be downloaded from here.**

All comments on the various acceptances and rejections contained therein are welcome.

Conceptualizing Yahoo v L.C.R.A.: Private Law, Constitutional Review and International Conflict of Laws

Ariel L. Bendor (*University of Haifa – Faculty of Law*) and Ayelet Ben-Ezer (*Interdisciplinary Center Herzliyah – Radzyner School of Law*) have posted an article on SSRN entitled, "**Conceptualizing Yahoo! v. L.C.R.A.: Private Law, Constitutional Review and International Conflict of Laws**". The abstract

reads as follows:

> *The Article deals with a topic that, despite its increasing importance, largely has been ignored in American case law and legal literature: the power of a court to review the constitutionality of foreign legal rules. The question arises in two contexts. The Court may be asked to review the constitutionality of enforcing the foreign law or judgment under the forum country's constitution, or it may be asked to do so under the foreign country's constitution. The United States District Court for the Northern District of California recently addressed these issues in Yahoo v. L.C.R.A. (169 F. Supp. 2d 1181 (2001)), which illustrates many of the difficulties courts encounter when faced with both constitutional issues and questions of international conflicts of law. The Article argues that despite numerous conceptual and pragmatic difficulties there is a strong policy justification for forum courts' constitutional review, and possible nullification, of foreign laws and judgments, at least in certain circumstances. This is since constitutional review, when carefully and appropriately limited, is an integral part of private international law that should allow for the disqualification of foreign laws and judgments only when the basic interests or other meta-principles of the forum dictate such a result. The Article, against the background of Yahoo v. L.C.R.A, attempts to conceptualize and provide a theoretical framework for the discussion and solution of problems relating to the conflux of constitutional review and international conflict of laws. The Article suggests that the central goals of private international law can still be accomplished within the framework of constitutional review. This can be achieved by fundamentally restricting the scope of constitutional review, especially when it involves "aggressive" measures such as the invalidation of foreign laws because of incompatibility with the foreign constitution. The thrust of this proposal is that forum courts should almost never apply foreign constitutional provisions that threaten to invalidate or otherwise nullify foreign laws, because they are not the appropriate place for such review, which is best left to the domestic courts of the relevant country. This principle is not absolute, however, and the Article suggests a few exceptions.*

The full article can be downloaded from here.

Some Fundamental Jurisdictional Conceptions as Applied in Judgment Conventions

It looks like Ralf Michaels (*Duke University*) has been busy recently! As well as his "EU Law as Private International Law" article, Ralf Michaels has also posted "**Some Fundamental Jurisdictional Conceptions as Applied in Judgment Conventions**" on SSRN. The abstract states:

> *The law of jurisdiction and of the recognition and enforcement of foreign judgments is confused. So is the debate about it. Basic concepts, even that of jurisdiction, have ambiguous meaning. Misunderstandings, most prominent in the failure to conclude a worldwide judgments convention at the Hague, are the consequence. This article tries to bring conceptual clarity to the field through an analysis of concepts and relations. The article first shows that jurisdiction as a requirement for the rendering of a decision (direct jurisdiction) and jurisdiction as a requirement for the decision's enforceability elsewhere (indirect jurisdiction), are logically independent from each other. It goes on to show that the three possible values of deontic logic – obligatory, optional, and impermissible conduct – are reflected in three possible statuses that jurisdictional bases can have: such bases may be required, excluded, or permitted. A combination of both distinctions leads to nine different possible combinations of direct and indirect jurisdiction. The article analyzes each of these nine in detail.*
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> *Such an analysis is crucial for the drafting of judgment conventions. Traditionally, a distinction existed between so-called single conventions that regulate only enforcement of foreign judgments, and double conventions that regulate also direct jurisdiction. Arthur von Mehren, for whose memorial volume this article is written, developed a third category, the so-called mixed convention. Although it represented a considerable improvement, the exact structure of mixed convention never became fully clear. This article proposes a new typology that is both richer and more exact.*

Although the article draws on rich comparative material from existing conventions, and although it emphasizes repeatedly the normative implications both of different values for jurisdictional bases and of different types of conventions, the article's prime aim is analytical, not normative. However, far from being a mere formalist exercise, such an analysis lays the indispensable prerequisites for a proper normative analysis. The definition of clear concepts does not guarantee proper policy debates, but without clear concepts policy debate is impossible. In this sense, the paper hopes to help provide new foundations for such debates.

The article can be downloaded in full from here.

EU Law as Private International Law? The Country-of-Origin Principle and Vested Rights Theory

Ralf Michaels (*Duke University*) has an interesting article forthcoming in the Journal of Private International Law, "**EU Law as Private International Law? Re-Conceptualising the Country-of-Origin Principle as Vested Rights Theory**". Here's the abstract:

One of the most pertinent issues in contemporary European conflict of laws is the tension between Community law and traditional choice of law rules. The biggest problem comes not from the transposition of member state rules on choice of law into methodologically comparable EC Regulations, but rather from the so-called country-of-origin principle. This principle holds, broadly, that EU member states may not impose obligations on a provider of goods and services that go beyond the obligations imposed by the provider's home state. Originally conceived mainly with public law obligations in mind, the principle

has an impact on choice of law insofar as it bars member states from applying their own law to the provider's conduct, even if they have the closest connections to this conduct.

The exact relationship between the so called country of origin principle, and private international law, has long puzzled scholars and courts. Yet attempts at explanation and reconciliation have so far been unsuccessful because they started from an inappropriately narrow understanding of private international law. Integrating comparative legal history, this paper proposes a broader understanding of private international law beyond the current post-Savignyan approach. Thus broader approach makes it possible to recognize how the country of origin principle is remarkably similar to an almost forgotten and universally rejected private international law approach – the vested rights theory. The article demonstrates the parallels between the country of origin principle and US, English, French and German historical versions theories of vested rights.

This insight presents an interesting challenge. The vested rights theory is now universally rejected because the criticism brought forward against it was and is felt to be irrefutable. One might think the same criticism would be able to bring the country of origin principle down, too. Indeed, the article shows how current criticism of the country of origin principle replicates to a large degree earlier criticism made against the vested rights theory. Remarkably, however, it shows also that the country of origin principle can refute the criticism.

The return of vested rights, and its regained ability to overcome seemingly irrefutable criticism, hold a broader lesson. The rise and fall (and rebirth) of private international law approaches depends less on abstract considerations and more on general ideas and ideologies of the times – in this case, economic liberalism.

Highly recommended.

German Articles on European and International Insolvency Law

The latest issue of the German legal journal "Rabels Zeitschrift" (Vol. 70 No.3, July 2006) attends to European and International Insolvency Law. These are the articles which focus on this topic:

- *Axel Flessner* (Berlin/Frankfurt (Main)), Europäisches und internationales Insolvenzrecht, Eine Einführung (European and international insolvency law – an introduction)
- *Christoph G. Paulus* (Berlin), Die ersten Jahre mit der Europäischen Insolvenzverordnung (The first years with the European Insolvency Regulation)
- *Horst Eidenmüller* (Munich), Gesellschaftsstatut und Insolvenzstatut (The law governing the company and the law governing the insolvency)
- *Daniel Girsberger* (Lucerne), Die Stellung der gesicherten Gläubiger in der internationalen Insolvenz (The position of secured creditors in the international insolvency)
- *Cecilia Carrara* (Rome), The Parmalat case
- *Alexander Trunk* (Kiel), Entwicklungslinien des Insolvenzrechts in den Transformationsländern (The development of insolvency law in transition countries)