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.

India to Join Hague Conference to Protect a Married Woman's Rights?

Reports today suggest that India may well sign up to the Hague Conference on Private International Law shortly. Overseas Indian Affairs Minister Vayalar Ravi, in a press conference on the eve of the *Pravasi Bharatiya Divas* (the global

conference for overseas Indians) to announce a bill to grant voting rights to non-resident Indians (NRIs), also stated that,

> *Steps are also being taken by the ministry to ensure that Indian women getting married to NRIs are not exploited or abused.*

Mr Ravi said India was **likely** to join the Hague Conference on private international law, to:

> *protect the interests of Indian women.*

There were already rumblings at the Indian Society of International Law Conference a few weeks ago that India were considering it. The Indian Government's consultation on "failed and fraudulent marriages" between Indian women and overseas Indian men has proved controversial in recent past; the National Commission for Women [NCW] New Delhi proposed a draft Convention for such marriages, which recommended, *inter alia*, that:

- Registration of marriage be made compulsory
- Bilateral agreements for protection of such marriages be concluded between India and such other countries where the Indian Diaspora is in large numbers.
- If the NRI husband has not become a citizen of the country, in which he resides, concerned Indian laws to apply irrespective of the place of the filling of the petition for dissolution of the marriage.
- Government monitored conciliation process of settlement of matrimonial disputes be initiated.
- Suppression of information regarding marital status by NRI grooms to be dealt with under criminal law and steps taken through extradition treaties wherever operational.

The matter was also discussed during *Pravasi Bharatiya Divas* 2005, with the general consensus being that:

- There should be comprehensive legislation so that there is legal remedy available to such girls. Special courts without legislation would be futile.
- Registration of marriages should be made compulsory in case of Overseas Indians. This will ensure compliance of conditions of a valid marriage.

There will be complete proof of marriage and it would be a very strong deterrent for bigamous marriages.
- If a person abandons his wife, he should forfeit his property.
- Such instances may be made criminal offences.
- Overseas citizenship of such a person should be forfeited.

Joining the Hague Conference may well help matters, but it isn't exactly clear *which* Conventions will be adopted to alleviate the difficulties facing NRIs. The ISIL report suggests that the Child Abduction Convention is the focus, as it would help the "high incidence of child removal" to and from the UK, US and Canada, by "returning children to the country of their habitual residence by a mutually reciprocal international arrangement between countries." The report suggests that there could be more: "if India signs *some* of The Hague Conventions…Recognition of Indian marriages and divorces and reciprocally similar foreign instances would come to an International agreement." One wonders how much of that is sheer optimism, however.

Private International Law matters were discussed yesterday at the *Pravasi Bharatiya Divas* 2007, with representatives from the Indian Parliament, the Indian Society of International Law and the Minister for Law and Justice in attendance. It will be interesting to see what they make of it all.

Seminar: The Future of International Patent Litigation in Europe

This seminar is part of the British Institute's seminar series on private international law which will run throughout the Autumn of 2006 and well into 2007 entitled *Private International Law in the UK: Current Topics and Changing Landscapes*.

Date: Monday 22nd January 2007, 17.30 – 19.30

Location: British Institute of International and Comparative Law, Charles Clore House, 17 Russell Square, London WC1B 5JP

Speakers:

- (Chair) The Rt Hon. Mr. Justice Kitchin
- Harry Temmink, European Commission
- Nick Gardner, Herbert Smith
- Third speaker to be confirmed

Subject matter:

> *At present patents can be awarded either on a national basis or through the European Patent Office (EPO) in Munich, which grants so-called 'European Patents' with a single application and granting procedure. However, once granted the European patent becomes a national patent for the designated Member State which causes difficulties by the need to work in different national legal systems in case of dispute. In view of the difficulties in reaching an agreement on the Community Patent, other legal agreements have been proposed outside the European Union legal framework to reduce the cost of litigation, namely the London Agreement and the European Patent Litigation Agreement (EPLA).*

The Seminar will address current issues relative to international patent litigation with a particular focus on the practice in England and Wales. It will further explore recent and future developments at European Community level which will determine the substance of international patent litigation.

Sponsored by *Herbert Smith*. More information, including pricing, can be found on the **BIICL website.**

Seminar: Jurisdiction in IP Disputes

This seminar is part of the British Institute's seminar series on private international law which will run throughout the Autumn of 2006 and well into 2007 entitled *Private International Law in the UK: Current Topics and Changing Landscapes*.

Date: Monday 22nd January 2007, 15.00 – 17.00

Location: British Institute of International and Comparative Law, Charles Clore House, 17 Russell Square, London WC1B 5JP

Speakers:

- (Chair) The Rt Hon. Lord Justice Jacob
- Professor Gerrit Betlem, University of Southampton
- Professor Jan Brinkhof, Brinkhof Advocaten
- Michael Silverleaf QC, 11 South Square

Subject matter:

> *Two ECJ judgments of 13 July 2006 –* GAT v. LuK *and* Roche Nederland BV *– have stirred much concern in the patent community. It was ruled that contrary to practice presently established in some Member States the courts in the country of registration are exclusively competent to adjudicate validity, even when the issue of validity only arises as an incidental matter. Further it has been held that it is also not possible to join claims against affiliated companies for coordinated infringement of European bundle patents before the courts in the country where the principal office steering the activities has its seat.*

The seminar will feature an in-depth discussion of the implications for the English practice of the recent ECJ cases referred to. It will further explore current issues in England and Wales and other European jurisdictions relative to the subject of jurisdiction in cross-border IP cases.

Sponsored by *Herbert Smith*. More information, including pricing, can be found

on the **BIICL website.**

Is Cross-Border Relief in European Patent Litigation at an End?

Marc Doring and Francis van Velsen have written an article in the Journal of Intellectual Property Law & Practice entitled, "**Is cross-border relief in European patent litigation at an end?**" (J.I.P.L.P. 2006, 1(13), 858-860). Here's the first paragraph of the article:

> *The ECJ decisions in GAT v LuK and Roche v Primus appear to have prohibited cross-border relief, bringing the Dutch and the German patents courts (which were willing to grant such relief in certain circumstances) in line with the English Patents Court (which has always refused to grant such relief). However, the decisions still enable the Dutch and German patents courts to continue to grant cross-border relief in certain circumstances. Whether they will do so remains to be seen.*

Those with a subscription to the Journal can download the article from the J.I.P.L.P. website. You can browse some of our other posts on these two ECJ decisions here.