The Impact of Art 6(1) of the ECHR on Private International Law

There is a substantial article by Professor James Fawcett (University of Nottingham, and co-author of Cheshire & North) in the new issue of the International & Comparative Law Quarterly on "**The Impact of Article 6(1) of the ECHR on Private International Law**" (Int Comp Law Q 2007 56: 1-48). The abstract reads:

> *An increasing trend in private international law cases decided by courts in the United Kingdom has been to refer to the European Convention on Human Rights and, in particular, to Article 6. This article will examine the impact of this provision on private international law. The article will go on to examine why the impact has been so limited and will put forward a new approach that takes human rights more seriously, using human rights law to identify problems and the flexibility inherent in private international law concepts to solve them.*

And a small extract from the conclusion to whet your appetite:

> *A new approach is needed which takes human rights more seriously. A hybrid human rights/private international law approach should be adopted. The first stage of this requires the court to ascertain whether, in the circumstances of a particular case, there has been, or there is a real risk that there will be, a breach of Article 6 standards in England or abroad. Human rights jurisprudence should be used to ascertain whether there is such a breach. The second stage involves solving the human rights problem that has been identified. The English courts should act in a way that ensures that they are not in breach of Article 6 standards. In the areas of greatest risk of encountering a breach of Article 6 standards, this can be achieved by using existing private international law concepts of public policy and the demands of justice.*

Those with a subscription to the Journal can download the full article from the ICLQ website.

The Mobility of Companies in Europe

There is an article in the new issue of the European Company and Financial Law Review on "**The mobility of companies in Europe and the organizational freedom of company founders**" (E.C.F.R. 2006, 3(2), 122-146) by Wolfgang Schon (Director, Max-Planck-Institute for Intellectual Property, Competition and Tax Law, Munich). Here's the abstract:

> *The article discusses how the mobility of companies in Europe can be understood in terms of the interplay of EC law, national company law and private international law. Considers the principles upon which these laws apply to different forms of company mobility, including transfers of the real seat, transfers of the registered office and cross-border mergers.*

And here's the prologue from the publisher's website:

> *Klaus Hopt's disciples have asked me to give a presentation in his honour on the topic of "mobility of companies in Europe". To be honest, I would have preferred another subject which focuses much more on the person at the centre of this event. The topic would read: "The mobility of a company law professor in Europe". There exist more than enough articles on the future of the "real seat theory" and the "incorporation theory" regarding the legal framework for enterprises after the famous ECJ decisions in Centros, Überseering and Inspire Art. Nobody seems to care about individuals. Yet in the case of Klaus Hopt we should have second thoughts: Is he a legal person? Of course he is – there is hardly another writer who has acquired so much practical and scientific experience in law and affiliated research areas. Does he have a registered office? I think so – it should be at the Max Planck Institute for Foreign and International Private Law in Hamburg. Can we attribute a siège réel to him? This is hard to say. Starting his academic career in Tübingen, he has moved his chair to Florence, to Berne, to Munich and to Hamburg. If he were a company, he would have been liquidated on this itinerary at least three times. Currently*

he teaches in Paris, in New York and in many other places. He travels around the world, giving university lectures, attending committee meetings and organising conferences. Is it possible to say – as the European Court of Justice put it in Daily Mail – that he owes his existence to the domestic legal order of only one specific Member State of the European Union? Or should we qualify him as a supranational entity, the human role model for the "European Company", who is able to move from country to country without losing his identity, being able to communicate in many different languages, feeling at home in many different legal orders?

Those with access to the Journal, either through a subscription, or Athens, or some other means, can download the PDF version of the article from here.

The Battle over Jurisdiction in EC Insolvency Law

Thomas Bachner has written an article in the European Company and Financial Law Review on "**The battle over jurisdiction in European insolvency law – ECJ 2.5.2006, C-341/04 (Eurofood)**" (E.C.F.R. 2006, 3(3), 310-329.) Here's the abstract:

The article discusses the European Court of Justice ruling in Re Eurofood IFSC Ltd (C-341/04) on the conditions which can rebut the presumption that a subsidiary company's centre of main interests within the meaning of Council Regulation 1346/2000 Art.3(1) was the jurisdiction where its registered office was located. Considers whether the Irish court's appointment of a provisional liquidator to act for the Irish subsidiary of an Italian parent company constituted a judgment opening insolvency proceedings for the purpose of Art.16(1) of the Regulation. Assesses whether Italian proceedings were invalid under Art.26 on the ground that the provisional liquidator was denied the right to be heard.

Again, available to those with access to the Journal.

Communication Breakdown

Quite a few private international law case comments were published just before the New Year. We'll start with Edwin Cheney's "**Communication Breakdown**" in the *Commercial Litigation Journal* (Co. L.J. 2006, 10(Nov/Dec), 9-11). The note:

> *...examines the Commercial Court judgment in Newsat Holdings Ltd v Zani in which the court considered whether an alleged deceit in the form of a statement made by a defendant located abroad to claimants through their London based lawyers was an act committed within the jurisdiction for the purposes of the CPR Part 6 r.6.20(8)(b). Summarises the characteristics of the tort of deceit and considers earlier authorities on the conflict between the place where a statement is made and where it is received.*

Available to those with a subscription to the Journal.

Internet Defamation and Choice of Law in Dow Jones v Gutnick

Yet another article originally published in the 2003 issue of the *Singapore Journal of Legal Studies* (pp. 438-518) has been posted on SSRN: "**Internet Defamation and Choice of Law in Dow Jones & Company Inc. v. Gutnick**" by Gary Ky Chan (Singapore Management University – Department of Law) & Michael Hor (National University of Singapore – Faculty of Law). The abstract reads:

> *This article focuses on choice of law in the context of Internet defamation with*

reference to a recent Australian High Court decision, Dow Jones v. Gutnick. The case raised a myriad of issues ranging from comparative defamation laws (and value systems) of the United States versus Australia, the meaning of "publication" and the need for Internet-specific legal reforms. These issues interact with and have an impact upon the choice of law problem. This article discusses the various alternatives for resolving the choice of law problem. It concludes by tentatively recommending some choice of law rules in the context of Internet defamation.

Download the article from here for $5.

Applicable Law Aspects of Copyright Infringement on the Internet

An article by Andrea Antonelli on "**Applicable Law Aspects of Copyright Infringement on the Internet: What Principles Should Apply?**", which originally appeared in the *Singapore Journal of Legal Studies, pp. 147-177, 2003*, has been made available for download on SSRN for a small fee. Here's the abstract:

Digital technology, and particularly the Internet, is reducing the cost of publishing works, but has also made the unauthorised copying and distributing of works virtually costless. Despite the level of harmonisation of copyright laws worldwide, achieved through the Berne Convention, the TRIPs Agreement and WIPO Copyright Treaty, such copyright infringements on the Internet still give rise to a number of relevant conflict of laws issues. This article focuses on the analysis of the applicable law rules provided under the Berne Convention in relation to economic and moral rights in the light of the various technical scenarios of copyright infringement in cyberspace. From this perspective, it also attempts to assess if and to what extent it is possible to attribute a new

meaning to too often datable applicable law principles.

You can access the full article here for $5.

Seminar: Non – Justiciability: Reappraisal of Buttes Gas in the Light of Recent Decisions

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 15 January 2007, 17:30 to 19:30

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

Speakers:

- (Chair) The Rt Hon. Lord Bingham
- Lady Fox CMG QC, Vice President British Institute of International and Comparative Law
- Professor Richard Garnett, University of Melbourne
- Dapo Akande, St Peter's College, Oxford
- Henry Forbes Smith, One Essex Court

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

Private International Law Applied to Business

Yasmine Lahlou & Marina Matousekova have written an article in the latest issue of the *International Business Law Journal* on "Private International Law Applied to Business" (No.4, 2006, p.547-573). The abstract states:

> *In the field of conflicts of laws, French courts were referred disputes relating to employment and factoring agreements. The issues of procedural agreements and court's duty in applying foreign laws were dealt with, as well as the impact of public policy rules on insurance contracts. French courts also ruled on the issue of court's jurisdiction as regards agency agreements and insolvency proceedings as well as on States' jurisdictional immunities.*
>
> *In community law, the ECJ and French courts ruled on the notion of the « centre of a debtor's main interests » in the sense of Article 3.1 of the EC Regulation 1346/2000 on insolvency proceedings as well as on problems of transmission of acts between Member States (EC Regulation 1348/2000). The ECJ also ruled on the res judicata of a decision having infringed community law. English courts ruled on an anti suit injunction in regard of the violation of an arbitration agreement and on jurisdictional immunities. French and Irish courts ruled, on the ground of Article 5.1 of the Brussels Convention, on the issue of courts' jurisdiction in the field of brokerage contracts and sale of goods. The French Cour de cassation, the ECJ and the English High Court ruled, on the ground of Article 5.3 of the Brussels Convention, on territorial jurisdiction in the field of intellectual property rights, damages caused by car accidents, and misleading declarations. The ECJ was also interrogated as to the application of Article 16.1 of the Convention to damages to real estates, while the Cour de cassation was asked to rule upon the application of Article 16.4 of the Convention to registered intellectual property rights. The Cour de cassation also had to rule, on the ground of Article 6.1 of EC Regulation, on the link of connexity between main claims and claims in guarantee. The English High court was referred an issue of lis pendens with regard to the date of accession*

of a State to EC Regulation 44/2001. The Cour de cassation also ruled, on the ground of Article 27.1 of the Brussels Convention, on lis pendens in an action for infringement of intellectual property rights. In the field of recognition and enforcement, French, English and Italian courts ruled, on the ground of Article 27 of the Brussels Convention, on possible breaches of rules of public policy, on the regularity of a notification to the defendants, and on the purported contradiction between national and foreign decisions. The ECJ ruled, on the ground of Articles 34 and 36 of the Convention, on the consequences of an irregularity of the notification of the foreign decision with regard to its exequatur. The French Cour de cassation and the Paris Court of Appeal ruled on the enforceability of foreign judgments in the sense of Article 47.1 of the Convention.

As regard to private international law in the US, the District Court of New York recalled the criteria for American courts to have jurisdiction over class action in securities fraud claims, while the US Court of Appeals of the First Circuit ruled on the extra-territoriality of the Whistleblower provision of the Sarbanes Oxley Act.

Those with access to the IBLJ can download the article, or you can buy the article for 47 Euros from the IBLJ website.

The Regime for the Circulation of Judgments under the EC Insolvency Regulation

Ettore Consalvi (*University of Rome*) has published an article in the latest issue of *International Insolvency Review* on "**The regime for circulation of judgements under the EC regulation on insolvency proceedings**" (Vol. 15, Issue 3, 2006, p. 147-162). Here's the abstract:

The regime for recognition and enforcement of judgements under the EC Regulation 1346/00 on insolvency proceedings raises several issues due to gaps in its provisions (Chapter II). This article analyses these rules and suggests solutions to its principal shortcomings particularly focusing on the prohibition against reviewing decisions as to their merits and conflicts between judgements opening main insolvency proceedings in different member states. This analysis draws on the European Court of Justice's interpretation of the 1968 Brussels Convention in preliminary rulings, which is a valuable tool for dealing with problems concerning recognition and enforcement of judgements as the Regulation is based on a similar framework.

The full article is available on the *International Insolvency Review* website.

Articles on the Conflict of Laws in International Arbitration

There are two articles in the new issue of *Abitration International* that deal with private international law issues arising out of international commercial arbitration. They are:

Thomas Buergenthal, "The proliferation of disputes, dispute settlement procedures and respect for the rule of law" *Arbitration Int*. 2006, 22(4), 495-499. Abstract:

Considers the reasons for the proliferation of disputes, particularly international disputes, and of dispute resolution mechanisms. Discusses whether respect for the rule of law has kept pace with these trends, especially with regard to conflict of laws issues and the selection of arbitrators and judges.

Klaus Peter Berger, "Evidentiary privileges: best practice standards versus/and arbitral discretion" *Arbitration Int.* 2006, 22(4), 501-520. Abstract:

Examines the diverse approaches to evidentiary privileges in international commercial arbitration that are taken in various jurisdictions, and considers conflict of laws issues in this area. Assesses whether there is a need for harmonised best practice standards or whether the resolution of privilege rule conflicts can be left to arbitral discretion.

Those with a subscription to *Arbitration International* can access the full articles online.