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.

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)

Ontario’s Top Court Confirms Importance of Jurisdiction Agreements

In *Crown Resources Corp SA v National Iranian Oil Corp* [2006] OJ No 3345 (CA), decided August 22, 2006, the Court of Appeal for Ontario overturned a lower court decision which had not given effect to a jurisdiction clause in favour of litigation in Iran. The Court of Appeal confirmed that a "strong cause" had to be shown before the court could disregard such a clause, and that no such cause had been made out in this case. Throughout its reasons, the court stresses the importance of upholding jurisdiction agreements. The case also illustrates how related tort claims can be found to fall within the scope of the agreement. The decision is available here.

German Article on the Applicable Law concerning Maintenance Obligations

Rolf Wagner (Berlin) gives an overview on new developments concerning the law applicable regarding maintenance obligations in the German legal journal FamRZ 2006, 979 et. seq. He addresses two new measures which deal with this field of law: On the one hand the plans of the Hague Conference to draft a new Convention on Maintenance Obligations which is planned to replace the two Hague Conventions from 1958 and 1973, and on the other hand the Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, COM(2005) 649 final. *Wagner* compares the conflict of law rules of both drafts and attends to the relationship between these two instruments.

Overseas Workers: Employment without Borders

Robin Jeffcott and Dan Peyton (Richards Butler) have published the second instalment of their summary on "**Overseas Workers: Employment without Borders**" in the *Employment Law Journal*. Here's the abstract:

> *This, the second of a two part article, examines the legal issues which can arise where employees work in other jurisdictions as well as in the UK, considering the use of choice of law provisions in employment contracts, the jurisdiction of UK courts to hear breach of contract claims, jurisdiction governing employers' proceedings against overseas employees, and the protection of employers' business interests through the use of restrictive covenants and garden leave.*

Emp. L.J. (2006) No.73 September Pages 17-19 (available on Lawtel).

German Publication: Expert Opinions on Foreign Family Law and the Law of Succession

Omaia Elwan, *Bruno Menhofer* and *Dirk Otto* published a collection of expert opinions which have been given by *Prof. Dr. Elwan* (Institute for private international law, University of Heidelberg) between 1982 and 2002 on the family law and the law of succession of the Middle East, Africa and Asia: "Gutachten zum ausländischen Familien- und Erbrecht".

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

Journal of Private International Law Conference 2007

We are pleased to announce the

Journal of Private International Law Conference 2007

to be held at the University of Birmingham

on

26th -27th June 2007

———————

Call for Papers

The editors, Professor Jonathan Harris (University of Birmingham) and Professor Paul Beaumont (University of Aberdeen), would be delighted to receive applications from scholars to present papers at the conference. There are two presentation categories:

Academic Conference Papers

The greater part of the conference will focus on academic papers in all areas of private international law. An academic paper will be expected to last for approximately 30 minutes at the conference.

To submit an abstract of the proposed paper, contact:

Jonathan Harris
Professor of International Commercial Law
School of Law
University of Birmingham
Edgbaston, Birmingham, B15 2TT, UK
Email: j.m.harris.law@bham.ac.uk

———–

Postgraduate Research Papers

The morning of 26th June will be devoted to papers given by postgraduates on their current research topic. A postgraduate research paper will be expected to last for approximately 15 – 20 minutes at the conference.

To submit an abstract of the proposed paper, contact:

Martin P. George
School of Law
University of Birmingham
Edgbaston, Birmingham, B15 2TT, UK
Email: mpg514@bham.ac.uk

———–

More information on booking and prices to follow. To register your interest in attending the conference, and receive more information via email, please contact:

conflicts-conference@contacts.bham.ac.uk

USEFUL LINKS:

The official website of the 2007 conference.

For more information on the Journal of Private International Law, and to subscribe, visit the Journal website.

German Annotation on “Facts of

Multiple Relevance”

Peter Mankowski (Hamburg) takes the occasion of a judgment of the District Court Tübingen (judgment of 30.3.2005 – 5 O 45/03) to reveal weaknesses of the theory of "facts of multiple relevance” (IPRax 2006, 454 et seq.). According to the theory of "facts of multiple relevance” which is rather popular in German – but also Swiss and Swedish – courts, facts which are relevant with regard to jurisdiction as well as the substance of the case do not have to be proved in order to assume jurisdiction. It is sufficient if they are alleged by the claimant – they are examined only in the context of the substance of the case. This theory might be compared with the English approach to allow a lesser burden of proof to assume jurisdiction which is satisfied by a showing of probability ("good arguable case"). *Mankowski* reveals in his comment *inter alia* that the theory of "facts of multiple relevance" leads to difficulties if the term in question becomes relevant for the second time only in the context of the applicable law – and not in the context of conflict of law rules. This is problematic since then the question whether it is examined at all if the conditions of the respective term are met, depends on whether the applicable law knows this term. If a law is declared to be applicable which does not know the respective term, it might happen that the term in question is not examined at all: Neither with regard to jurisdiction – due to the theory of "facts of multiple relevance" which shifts the examination to the substance of the case – nor with regard to substantive law.

In the case in question (District Court Tübingen) the "fact of multiple relevance” was, whether the transaction was a door-to-door-selling. This term was relevant with regard to jurisdiction as well as the substance of the case. Since in this case German substantive law – which knows the term “door-to-door-selling” – was applicable, the problem described above did not occur. However, *Mankowski* points out rightly that this judgment reveals one weakness of the theory of "facts of multiple relevance". This is true because if, in the concrete case, Turkish substantive law – which does not know the term of "door-to-door-selling" – would have been applicable, this term would have been relevant only with regard to jurisdiction, but would not have appeared again with regard to the substance of the case. Therefore the question whether the transaction in question could be classified as a door-to-door-selling would not have been examined at all.