State Immunity and Sovereign Debt Developments

There is a short note by Katherine Reece Thomas in *Butterworths Journal of International Banking & Financial Law* (B.J.I.B. & F.L. 2006, 21(10), 432-434) on "**State immunity and sovereign debt developments**". Here's the abstract:

> *Reviews case law on state immunity for sovereign debts, including: (1) Grovit v De Nederlandsche Bank on whether a state bank was immune from the jurisdiction of the court in a libel action; (2) AIG Capital Partners Inc v Kazakhstan on whether assets held by a third party bank in an account belonging to a central bank were immune from attachment; and (3) Svenska Petroleum Exploration AB v Lithuania (No.2) on whether the State Immunity Act 1978 s.3 permitted the registration or enforcement of a foreign arbitration award. Comments on public policy concerns.*

Observations from the Intersection of Private International Law and Civil Procedure in the USA

Richard D. Freer (*Emory University*) has posted an article on SSRN entitled, "**Pondering the Imponderable and Other Observations from the Intersection of Conflicts and Civil Procedure**". The abstract reads:

> *In honor of the scholarship of Peter Hay, this essay explores some substantive areas of interest to scholars both of conflict of laws and civil procedure, including full faith and credit, federal common law, claim and issue preclusion, the Erie doctrine, and the efficient packaging of complex litigation. Though some have criticized conflict of laws scholarship as basing theory upon fact*

patterns that do not arise in the empirical world, this essay points out that Supreme Court treatment of full faith and credit has created real-world problems for which governing law simply cannot exist. In addition, while procedure often creates a structure permitting joinder of related claims in a single case, choice of law doctrine defeats the goal of efficiency by requiring the application of different substantive law. Moreover, the Supreme Court instruction to apply federal common law to determine the preclusive effect of a federal civil judgment creates an ersatz body of law by engaging in the assumption that state law provides the content of the federal prescription.

The full article is available here.

The Quest for the Optimum in Resolving Product-Liability Conflicts

Symeon C. Symeonides (*Williamette University, College of Law*) has just posted "**The Quest for the Optimum in Resolving Product-Liability Conflicts**" on SSRN. Here's the abstract:

This essay reports the findings of a comprehensive study of product-liability conflicts cases decided by American courts from 1990 to 2004. One of the findings is that choice-of-law methodology plays a less significant role in the courts' choice of the governing law than other factors, such as the number and pertinence of factual contacts with a given state.

For example, regardless of methodology, in 79% of the cases in which the product's acquisition and the victim's domicile and injury were in the same state, the courts applied that state's law, regardless of whether it favored the plaintiff or the defendant, and regardless of whether that state was also the forum. Another finding is that, contrary to prevailing perceptions, American

courts do not unduly favor plaintiffs as a class, nor the law or the domiciliaries of the forum state. Indeed, on the whole, the record of American courts in resolving these most intractable of conflicts is much better than one might assume from a selective reading of a few cases.

However, this record comes at a heavy cost in time and resources for courts and litigants. One way to remedy this problem is to provide courts with specific guidance in the form of choice-of-law rules. This essay proposes such a rule, and then examines how that rule would have resolved the cases of the study period. The answer: much in the same way (good or bad), but much more quickly, and at a lower cost.

You can download the full article here. The paper forms part of the forthcoming publication, *ESSAYS IN HONOR OF JOHN P. KOZYRIS, Ana Grammatikaki-Alexiou, ed., Sakoulas-Kluwer Publishers, 2006*. Recommended reading.

New Site Feature: Search by Jurisdiction, and New Editors

We have now implemented another way of finding the material you need on **CONFLICT OF LAWS .NET** quickly and efficiently. There are readers of this site located on every continent, and in every major jurisdiction; as a result, it makes sense for the news items to be **searchable by jurisdiction**, as well as by date and subject.

If you scroll down to the "ARCHIVES" section of the menu on the left-hand side, you will see two drop-down boxes, one of which will allow you to "Select by Date", and the other to "**Select by Category**". In the latter drop-down box, you will find a list of categories that the news items on **CONFLICT OF LAWS .NET** are allocated to, and, as of today, a **list of jurisdictions** that the news items are placed into.

Clicking on “EU”, for example, will take you to all those news items that relate to the European Union (be it judgments of the ECJ, or new versions of proposed Regulations). We hope that this will make the site even more accessible to its users. Let us know what you think.

On a related note, we have appointed several more **editors**, who will be posting news and views in private international law from **Belgium**, **Croatia**, **Russia** and **Australia**, in addition to the jurisdictions we already have covered: the **UK**, the **USA**, **Germany**, **Canada** and **France**. All of the editors are very qualified scholars in their respective jurisdictions; for a full list of the editors, along with their profiles, see the Editors’ page. If your jurisdiction is not yet represented on **CONFLICT OF LAWS .NET**, and you feel that you are able and willing to take on an editorial role, please send an email with your details and CV to the General Editor, Martin George.

Some Case Comments And Practitioner Articles in November

There are a few case comments and articles on private international law in various practitioner updates this month in the UK. These include:

1. "**Court authority over internet sites based abroad**" *E-Commerce Law and Policy* (E.C.L. & P. 2006, 8(10), 6-7) by Hubert Best and Martin Soames. Abstract:

> *Examines courts' jurisdiction, and which laws should apply, where wrongdoing is committed by web based companies or individuals based in other countries. Provides examples from the US and other countries of the differing criteria used to determine courts' jurisdiction. Highlights the refusal of UK based software company, Spamhaus, who have a website but no physical presence in the US, to comply with a US District Court injunction and order for damages for listing a US bulk emailing company as a spammer. Suggests that international harmonisation of internet laws is unlikely to keep pace with internet development.*

2. "**Marriage and non-marital registered partnerships: gold, silver and bronze in private international law**" *Private Client Business* (P.C.B. 2006, 6, 352-362) by Richard Frimston. Abstract:

> *Examines the extent to which private international law grants cross border recognition to civil and other non marital registered partnerships involving same sex couples. Reviews the definitions of "marriage", the countries in which same sex marriage is now lawful and the human rights implications of non recognition in EC Member States, highlighting the discrimination issues raised by the Family Division ruling in Wilkinson v Kitzinger. Considers the position regarding quasi marriages such as non marital registered relationships (NMRRs) or civil partnerships, including the registration requirements, the position where one party is a non national and the scope for mixed sex NMRRs.*

3. "**Stays of Proceedings: Foreign Arbitrations**" *Arbitration Law Monthly* (Arb. L.M. 2006, Nov, 1-3). Abstract:

> *Examines the Commercial Court judgment in Abu Dhabi Investment Co v H Clarkson & Co Ltd on the jurisdiction of the court under the Arbitration Act 1996 s.9 to stay UK proceedings brought contrary to an arbitration clause which was subject to foreign law. Considers the terms of a joint venture to run an express liner service, focusing on whether the arbitration agreement in the memorandum of association and the shareholders' agreement applied to allegations that the contract was induced by misrepresentation. Examines the interpretation of arbitration clauses under United Arab Emirates law.*

Conference: Croatia on its Way to the European Judicial Area –

Settlement of Commercial and Consumer Disputes

The conference is organized by the Institute of European Law and Comparative Legislation and the University of Rijeka Faculty of Law. It will take place in the Hotel Ambasador in **Opatija, Croatia** on **7 and 8 December 2006**. The speakers at the conference are experts from Croatia as well as from several EC Member States including Germany, Italy, and the Netherlands. The simultaneous English-Croatian interpreting is provided.

Programme

7 December 2006

WELCOMING NOTE

Prof. dr. sc. Miomir Matulovi?, Dean of the Faculty of Law Rijeka, Croatia

INTRODUCTORY PRESENTATIONS

- **Is Croatia Prepared to Enter European Judicial Area?** Ljiljana Vodopija ?engi?, Vice-Minister, Ministry of Justice of Republic of the Croatia
- **Current State of Play of Consumer Protection Law in the Republic of Croatia** Ema Culi, Vice-Minister, Ministry of Economy, Labor and Entrepreneurship of the Republic of Croatia
- **Republic of Croatia on its Way to the European Union – Negotiations**Neven Pelicari?, Vice-Minister, Ministry of Foreign Affairs and European Integrations of the Republic of Croatia

FAIR ADMINISTRATION OF JUSTICE IN CROATIA AS A PRECONDITION OF ITS ENTERING INTO THE EUROPEAN JUDICIAL AREA

- **Key Elements of European Judicial Area** Prof. dr. sc. Werner Meng, Director of the Europa Institut, University of Saarbrücken, Germany
- **European Enforcement Order**Prof. dr. sc. Tito Ballarino, Law Faculty Milan, Italy
- **Creating the European Judicial Area in Civil and Commercial Matters – The ECJ's Powers and Limitations** Mr. sc. Ivana Kunda, Law

Faculty Rijeka, Croatia

- **Reasonable Length of Civil Proceedings in Croatia** Prof. dr. sc. Aldo Radolovi?, President of the County Court Pula, Croatia
- **Fundamental rights as General Legal Principles in EU** Štefica Stažnik, President of the Croatian Judicial Academy, Ministry of Justice of the Republic of Croatia
- **Implementation and Application Requirements of EU law for NationalAuthorities** Prof. dr. sc. Linda Senden, Law Faculty Tilburg, the Netherlands

SETTLEMENT OF COMMERCIAL DISPUTES·

- **International Jurisdiction for Commercial Disputes – Differences between Croatian Law and Brussels I Regulation** Doc. dr. sc. Davor Babi?, Law Faculty Zagreb, Croatia
- **International Jurisdiction for Opening of Insolvency Proceeding** Doc. dr. sc. Jasnica Garaši?, Law Faculty Zagreb, Croatia
- **Extrajudicial Settlement of Commercial Disputes in Italy** Prof. dr. sc. Fabio Padovini, Law Faculty Trieste, Italy
- **Conciliation as a Tool for effective Settlement of Commercial Disputes – Newly Adopted Practice of the Croatian High Commercial Court** Mr. sc. Sr?an Šimac, President of the High Commercial Court Zagreb, Croatia

8 December 2006

SETTLEMENT OF CONSUMER DISPUTES

- **New Perspectives of Extrajudicial Settlement of Consumer Disputes in Croatia** Željka Luka?evi?-Suboti?**,** Head of the Consumer Protection Department, Ministry of Economy, Labor and Entrepreneurship of Republic of Croatia
- **Legal Remedies Available to the Croatian Consumer – Individual Action v. Collective Action** Dr. sc. Marko Bareti?, Law Faculty Zagreb, Croatia
- **Group Litigation as an Efficient Mechanism for Consumer Protection** Prof. dr. sc. Vesna Tomljenovi?, Law Faculty Rijeka, Croatia
- **Extrajudicial Settlement of Consumer Disputes in Croatia** Dr. sc.

Nina Tepeš, Law Faculty Zagreb, Croatia

- **Extrajudicial Settlement of Consumer Disputes in Italy**Prof. dr. sc. Gian Antonio Benacchio, Law Faculty Trento, Italy
- **Collective Legal Remedies beyond Injunctions against Unfair Trade Practices – German Perspective** Prof. dr. sc. Helmut Rüssmann, Law Faculty Saarbrücken, Germany
- **Injunction for Protection of Consumer Interests in EU Law** Prof. dr. sc. Silvija Petri?, Law Faculty Split, Croatia
- **Extrajudicial Settlement of Financial Services Disputes with Consumers – European Experiences and Croatian Law** Prof. dr. sc. Edita ?ulinovi?-Herc, Law Faculty Rijeka, Croatia & doc. dr. sc. Nataša Žuni? Kova?evi?, Law Faculty Rijeka, Croatia

Registering the participation is possible via fax (+385 51 359 595), or e-mail tempus@pravri.hr Participation fee is **800,00 kn**. There are also special rates for rooms at the Hotel Ambasadors available for the participants at the conference.

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The Making of European Private Law: Regulation and Governance Design

Horatia Muir-Watt (*Université Paris I Panthéon-Sorbonne*) and Fabrizio Cafaggi (*European University Institute – Department of Law*) have posted an interesting

article on SSRN, entitled "**The Making of European Private Law: Regulation and Governance Design**". Here's the abstract:

> *The current debate on the desirability and modes of formation of EPL ("EPL") is engaging a wide number of scholars and institutions. Current work concerns the search for a common core of EPL, the rationalisation of the acquis communautaire, the design of a European Civil Code. These ongoing projects raise at least two related questions concerning the challenges to Europeanisation of private law: First, what is the often implicit definition of private law standing behind the debate about the creation of EPL? Second, does the process of creation of EPL need some type of governance structure?*
>
> *In this paper, we thus intend to contribute to a better understanding of these two dimensions of the debate. First, we wish to highlight the internal transformation of private law and its increasing regulatory function to be considered in governance design. If we take into consideration the internal transformation of private law and its increasing regulatory function in addition to the role of private law in regulated sectors, we witness several phenomena that require consideration in the governance design, such as the change of private law sources, and the procedural nature of Europeanisation.*
>
> ***Within this framework it is important to identify the interplay between EPL and private international law. The role of private international law ("PIL") as a vehicle to ensure choice of rules for private parties might change quite considerably depending on the choices concerning private law rules, in particular whether there is harmonisation and which kind of private law rules are adopted. The role of PIL may also depend on the level at which rules are produced.***
>
> *Second, we address the issue of the appropriate governance structure. In other words, does EPL need a governance structure that will accompany its formation, consolidation and changes? More on the point, Is there a link between the governance design and the definition of EPL?*

You can download the full article from here.

Homing Devices in Choice of Tort Law: Australian, British and Canadian Approaches

There is an article in the new issue of the *International & Comparative Law Quarterly* (October 2006; Vol. 55, No. 4) by **Reid Mortenson** (*TC Beirne School of Law, University of Queensland*) on "**Homing Devices in Choice of Tort Law: Australian, British and Canadian Approaches**". The abstract reads:

Since 1994, Canada, the United Kingdom and Australia have adopted new choice of law rules for cross-border torts that, in different ways, centre on the application of the law of the place where the tort occurred (the lex loci delicti). All three countries abandoned some species of the rule in Phillips v Eyre, which required some reference to the law of the forum (the lex fori) as well as the lex loci delicti. However, predictions were made that, where possible, courts in these countries would continue to show a strong inclination to apply the lex fori in cross-border tort cases—and would use a range of homing devices to do so. A comprehensive survey and analysis of the cases that have been decided under the Australian, British and Canadian lex loci delicti regimes suggests that courts in these countries do betray a homing instinct, but one that has actually been tightly restrained by appeal courts. Where application of the lex fori was formally allowed by use of a 'flexible exception' in Canada and the United Kingdom, this has been contained by courts of first appeal. Indeed, only the continuing characterization of the assessment of damages as a procedural question in Canada and the United Kingdom, seems to remain as a significant homing device for courts in these countries.

For those with online access to the ICLQ, the full article can be downloaded from here.

There is also a shorter article by **Richard Frimpong Oppong** (*PhD candidate, University of British Columbia*) in the latest issue of the ICLQ on "**Private International Law and the African Economic Community: A Plea for Greater Attention**". The full article, again for those with a subscription, can be found here.

Rome II: Draft Recommendation for EP Second Reading

Diana Wallis MEP and the Committee on Legal Affairs have published the Draft Recommendation for the European Parliament's Second Reading, following the Council's Common Position, on adopting a regulation on the law applicable to non-contractual obligations (Rome II).

Much that was removed by the Commission and Council has been reinserted by the Rapporteur; she has, for example, "decided to continue to press for inclusion" of rules relating to road traffic accidents and violations of privacy and rights relating to the personality. For the latter, new Recital 25a identifies the country where the most significant element(s) occur as:

> *the country to which the publication or broadcasting service is principally directed or, if this is not apparent, the country in which editorial control is exercised, and that country's law should be applicable. The country to which a publication or broadcast is directed should be determined in particular by the language of the publication or broadcast or by sales or audience size in a given country as a proportion of total sales or audience size or by a combination of those factors. Similar considerations should apply in respect of publication via the Internet or other electronic networks.*

The Rapporteur is not put off by its removal in both the amended Commission proposal and the Council's Common Position; indeed, it is suggested that "this issue should not be shirked".

Perhaps even more controversially, provisions have been introduced that would seem to be procedural rules on the pleading and proof of foreign law: new Articles 15a states that:

> *Any litigant making a claim or counterclaim before a national court or tribunal which falls within the scope of this Regulation* ***shall notify*** *the court or tribunal and any other parties by statement of claim or other equivalent originating document of the law or laws which that litigant maintains are applicable to all or any parts of his claim.*

New Article 15b requires the court seised to

> *establish the content of the foreign law* ***of its own motion****. To this end, the parties' collaboration may be required.*

The icing on the cake, however, comes with new Article 21a, innocently entitled "Damages". It states that:

> *In* ***quantifying damages in personal injury cases****, the court seised shall apply the principle of restitutio in integrum, having regard to the victim's actual circumstances in his country of habitual residence.*

The Rapporteur admits, in new Recitial 29a, that the amendments to the damages provisions that have been drafted seek the same result as those contained in Parliament's first-reading amendments, but simply by different means. The reintroduction is justified on the basis that:

> *...it is vital to take account of the circumstances in which the victim will find him or herself in his or her country of habitual residence: the actual cost of nursing and carers, medical aftercare and so on. This provision will assist in making free movement of persons within the internal market more attractive for citizens, while showing an awareness of citizens' concerns. It will also avoid placing an unfair burden on the social security and assistance schemes of the*

country of habitual residence of an accident victim.

The full draft recommendation, with all of the amendments, can be found here.

Party Autonomy and Private Law-Making in Private International Law: The Lex Mercatoria that Isn’t

Symeon C. Symeonides (Williamette University, College of Law, USA) has just posted an article on SSRN entitled, "**Party Autonomy and Private-Law Making in Private Intrernational Law: The Lex Mercatoria that Isn't**". Here's the abstract:

This essay discusses “non-state norms” from the perspective of American conflicts law. Commonly referred to as the “new lex mercatoria,” these norms are drafted by various international or intra-national non-governmental organizations and are proposed for incorporation by contracting parties or for application by arbitrators, with or without the parties' prior consent.

Understandably, these norms are popular among many arbitrators who tend to place them on the same footing as law. Current U.S. arbitration law uncritically permits this treatment to the extent it does not allow judicial review of an arbitrator's choice of law (or non-law). The fact that, unlike the law of most countries, American law generally enforces pre-dispute arbitration clauses in consumer contracts and most employment contracts can further exacerbate the situation. In contrast, in contracts that are not subject to arbitration, American courts apply non-state norms only to the extent they have been expressly incorporated into the contract and only if their application would not displace non-waivable rules of the law that would otherwise govern the contract.

This essay applauds the latter position of American conflicts law but suggests

that U.S. arbitration law should be reformed so as to provide needed protection to consumers, employees, and other presumptively weak parties.

You can download the article from here. *Highly recommended*.