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*.

German Federal Supreme Court requests ECJ to give a Preliminary Ruling on Art. 11 (2), 9 (1) b) Brussels I

The German Federal Supreme Court has decided, on 26 September 2006 (VI ZR 200/05), to ask the ECJ to give a preliminary ruling according to Art. 234 EC-Treaty on the question of whether the Regulation 44/01/EC enables the party,

who has been injured in an accident that has taken place within the European Union, to sue the other party´s foreign liability insurance directly at his/her own domicile for compensation on the basis of the reference made in Art. 11 (2) to Art. 9 (1) b) Reg. 44/01/EC (Brussels I).

This question has been answered negatively so far by most legal writers in Germany since a direct action brought against the liability insurance did not constitute a dispute based on a relationship relating to insurance law. However, such a dispute was required by Art. 9 Reg. 44/01/EC.

In contrast to the legal literature, the VI. Civil Division leans towards the legal opinion which has been expressed by the European Council and the European Parliament in Directive 2005/14/EC, namely to regard the injured party as a beneficiary in terms of Art. 9 (1) b) Reg. 44/01/EC by way of an analogous interpretation of this rule so that the injured party has a right of action at his/her domicile.

Since the Court has doubts as to whether a uniform interpretation can be reached without a decision of the ECJ, the Court referred the following question to the ECJ:

> ***Is the reference in Article 11 (2) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters to Article 9 (1) (b) of that regulation to be understood as meaning that the injured party may bring an action directly against the insurer in the courts for the place in a Member State where the injured party is domiciled, provided that such a direct action is permitted and the insurer is domiciled in a Member State?***

The case is registered under nummer C-463/06 (*FBTO Schadeverzekeringen N.V. v Jack Odenbreit*).

European Parliament Votes for Common Rules on Succession and Wills

On 16th November, MEPs voted overwhelmingly (**450 to 51**) in favour of a report by Mr Gargani of the Committee on Legal Affairs, asking the European Commission to draw up a

> *Community legal instrument relating to private international law on successions and wills, as already called for in the 1998 Vienna action plan, the programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters, adopted by the Council and Commission in 2000, the Hague Programme of 4 November 2004 for strengthening freedom, security and justice in the European Union, and the Council and Commission Action Plan implementing the Hague Programme on strengthening freedom, security and justice in the European Union (p.3-4).*

The Report calls on the Commission to submit a legislative proposal to Parliament under Articles 65(b) and 67(5), second indent, of the EC Treaty during 2007, and to launch a call for proposals for an information campaign regarding cross-border wills and succession matters, targeted at legal practitioners in the field. The current problems in transnational testaments are described by the Rapporteur with an example:

> *Let us consider the hypothetical case of a German citizen who, on retirement, moves from Germany to the south of Spain (where he spends the last decade of his life) and dies there, leaving two sons residing in Germany and an estate comprising property in Germany. In a case of this kind, if the jurisdiction were determined solely on the basis of the deceased person's habitual place of residence at the time of death, the heirs – supposing they were in dispute over the will – would be obliged to bring the proceedings in question before the Spanish courts.*

The rules proposed in the Report are fairly wide-ranging; in terms of scope, "the

legislative act to be adopted should aim to regulate succession exhaustively in private international law and at the same time: harmonise the rules concerning jurisdiction, the applicable law (the 'conflict rules') and the recognition and enforcement of judgments and public instruments issued abroad, except for the material substantive law and procedural law of the Member States (*p.5*). The proposed rule for determining a court's *jurisdiction* is the:

> ***habitual place of residence of the deceased at the time of his death*** *as the criterion for establishing both principal jurisdiction and the connecting factor.*

The Report also suggests that the parties be allowed to choose their court (in accordance with Articles 23-24 Brussels I Regulation), and that the testator be able to choose which law should govern the succession, the law of the country of which he is a national or the law of the country of his habitual residence at the time the choice is made; this choice should be indicated in a statement taking the form of a testamentary clause.

The default choice of law rule proposed is that of **the law of the country which was the habitual residence of the deceased at the time of his death**; this would ensure, the Rapporteur argues, that the court with jurisdiction and the applicable law would coincide, which would help to ensure that any disputes concerning the succession were rapidly and effectively resolved. The Rapporteur does, however, admit a problem with reconciling any kind of succession law with the *lex loci rei sitae*: the law of the place where the property is situated, which generally governs the question of *transfer of title*. The Rapporteur simply recommends that those laws should be "coordinated." The suggested method is to ensure that:

> *the instrument to be adopted should make it clear that, for the purpose of acquiring and enjoying inherited property situated in a State other than that whose law applies to the succession, it is necessary to follow the rules of the law of the place where the property is situated only if that law requires further formalities or actions in addition to those required by the law applying to the succession.*

Amongst all this, the EP stress that:

> *if European citizens could have access to a standardised document which had binding force in all the Member States and identified the law applicable to the succession, the property concerned and the heirs and executors, those heirs and executors could exercise their rights in all Member States even more simply, safely and effectively.*

The EP therefore strongly recommend a "European Certificate of Inheritance", which should be issued by a public authority. The Report concludes by stating that,

> *This is obviously a complex and many-sided issue.*

That, at least, is apparent. The full Report by the Committee on Legal Affairs is available here. Also see the discussion in the 37th report of the UK government Committee on European Scrutiny. Does the Rapporteur's Report pick the right conflict of laws rules, and were the MEPs right to vote so strongly in favour of the Report? Comments welcome.

Telemedicine and Robotics in the Conflict of Laws

There is a very unusual article in the latest issue of the *International Journal of Gynecology and Obstetrics* by Bernard Dickens and Rebecca Cook (Faculty of Law, University of Toronto) on "**Legal and Ethical Issues in Telemedicine and Robotics**". The abstract reads:

> *Modern medical concerns with telemedicine and robotics practiced across national or other jurisdictional boundaries engage the historical, complex area of law called conflict of laws. An initial concern is whether a practitioner licenced only in jurisdiction A who treats a patient in jurisdiction B violates B's laws. Further concerns are whether a practitioner in A who violates a contract or treats a patient in B negligently incurs liability in B, A, or both, and, if*

treatment lawful in A is unlawful in B, whether the practitioner commits a crime. Judicial procedures are set by courts in which proceedings are initiated, but courts may decline jurisdiction due to inconvenience to parties. If courts accept jurisdiction, they may apply their own substantive legal rules, but may find that the rules of a conflicting jurisdiction should apply. Cross-border care should not change usual medical ethics, for instance on confidentiality, but may mitigate or aggravate migration of specialists.

You can download the article for free here.

Green Paper on Applicable Law in Divorce Matters Unpopular in Brussels

It seems that the European Commission's proposal to establish common rules on the applicable laws in cross-border divorce ("Rome III") has met with widespread criticism in Brussels amongst the EU member states. The proposal sets out which national legislation should apply in the case of a couple of two nationalities or a couple living in their non-native country, such as an Irish and Finnish pair of EU civil servants living in Brussels. One may immediately ask why the EU needs to legislate for this at all. The Commission answer thus:

An "international" couple who want to divorce are subject to the jurisdiction rules of the new Brussels II Regulation, which allow the spouses to choose between several alternative grounds of jurisdiction (see point 3.6 of the attached working document). Once a divorce proceeding is brought before the courts of a Member State, the applicable law is determined pursuant to the national conflict-of-law rules of that State. There are significant differences between the national conflict-of-law rules (see point 3.4 of the attached working document). The combination of different conflict-of-law rules and the current jurisdiction rules may give rise to a number of problems in the context of

> *"international" divorces. Apart from the lack of legal certainty and flexibility, the current situation may also lead to results that do not correspond to the legitimate expectations of citizens. Moreover, Community citizens who are resident in a third State may face difficulties in finding a competent divorce court and to have a divorce judgment issued by a court in a third State recognised in their respective Member States of origin. There is finally a risk of "rush to court" under the current situation (Green Paper, p.3).*

The Commission's proposal for the default choice of law rule?

> *The objective would be to ensure that a divorce is governed according to the legal order* ***with which it has the closest connection****. A number of connecting factors, which are commonly used in international instruments and national conflict laws, could be envisaged, such as the spouses' last common habitual residence, the common nationality of the spouses, the last common nationality if one spouse still retains it or "lex fori".*

The Swedish Justice Ministry study into Rome III highlights some of the causes for concern; in cases involving non-EU citizens or non-EU states, Rome III would also favour a legislature to which both spouses have a strong connection. For exmaple, a Swedish woman marries an Iranian man in Sweden and emigrates to Iran but after several years decides to leave both her spouse and his country and go home. "The proposal means that Iranian divorce law would be applied by the Swedish court," the justice ministry study states.

Throwing all the different approaches to marriage and divorce into one big melting pot was bound to cause controversies – issues such as forced marriage, or the legality of divorce at all (it is illegal in Malta, for exmaple), or the minimum "separation"period, are all different in each member state, and member states will not want to water down their divoce laws. The Irish Ministry for Justice has, in its press release on the Irish opt-out from Rome III, stated that:

> *If Ireland were to adopt and implement this measure, this would allow EU nationals resident in Ireland to obtain a divorce in our courts on substantially different and less onerous grounds than that provided for in our constitution.*

The cost, and added time needed for finding foreign experts is also a worry, and

one of the reasons behind the UK's opt-out. All in all, Rome III is not the most popular green paper in the playground right now. Is the criticism justified? Comments welcome.

Update: Mark Harper (*Withers*) has written a summary on the UK Government's opt-out of Rome III at legalweek.com. He concludes:

> *This failure by the Government to opt in will mean a two-speed Europe when it comes to family law. The rest of Europe will move forward towards harmonisation of these rules, as opposed to harmonising substantive law, and we will be left behind.*