German Article on the Principle of Mutual Recognition

A very interesting article on the principle of mutual recognition by *Heinz-Peter Mansel* (Cologne) has been published in the latest volume of the German legal journal Rabels Zeitschrift (70 RabelsZ (2006), 651 et seq.): "Mutual Recognition as Basic Principle of the European Area of Justice" ("Anerkennung als Grundprinzip des Europäischen Rechtsraums").

Mansel gives first a short review on the European area of freedom, security and justice before differentiating the two forms of recognition as understood by the European Commission: The (procedural) recognition of judgments and the "recognition" of legal statuses and documents by means of choice of law rules. Subsequently he gives a definition of and an overview on the principle of mutual recogntion as well as its effects and its (possible) scope of application. Further, he attends to the developments in European primary legislation and in particular to the ECJ´s decisions in "Avello" and "Niebüll" (see concerning this case also our older posts which you can find here) and asks whether the findings of the ECJ concerning names might be applied also with regard to other questions relating to the personal status. This is followed by an analysis of possible developments at the level of European secondary legislation de lege ferenda. He concludes – inter alia – that the principle of mutual recognition could only be realised to a certain extent. He argues in particular that it could only complement, but not substitute the communitarisation of choice of law rules. He regards the proposal for a regulation introducing a "European certificate of inheritance" as a successful model for a possible rule on recognition de lege ferenda since it combines the communitarisation of choice of law rules with rules on recognition as well as uniform law.

Supreme Court of Canada Decision on Foreign Non-Monetary Orders

On November 17, 2006, the Supreme Court of Canada released its decision in *Pro Swing Inc. v. Elta Golf Inc.* (available here). It had been eleven months since the court reserved its decision. At issue was whether the Ontario court should recognize and enforce a consent decree and a contempt order made by the United States District Court for the Northern District of Ohio (Eastern Division). At first instance the Ontario Superior Court of Justice had enforced the decree and order, but on appeal the Court of Appeal for Ontario had refused to do so.

The central issue in the case was whether the Canadian common law rule requiring a foreign decision to be for a fixed sum of money before it could be enforced would evolve to encompass non-monetary orders. On this issue all seven justices agreed that the time had come to change the rule so that non-monetary orders could be enforced.

However, the court divided 4-3 on whether this particular decree and order should be enforced, with a majority affirming the Court of Appeal for Ontario's negative answer. Justice Deschamps set out several reasons for the refusal, including that: (a) the contempt order was quasi-criminal in nature and so violated the rule on not enforcing foreign penal law; (b) the wording of the consent order was unclear; and (c) other judicial assistance mechanisms (particularly letters rogatory) were a more appropriate way of assisting the Ohio proceedings.

The dissent would have restored the first-instance decision and allowed enforcement. Chief Justice McLachlin held that civil contempt orders were not penal in nature and that the wording of the consent order was sufficiently clear.

The court refers to several issues which are left unresolved. What test will apply to whether a particular foreign non-monetary order is enforceable? Will new or expanded defences to enforcement be necessary to address the greater complexity involved in equitable orders? Does the requirement that the order be final require reconsideration outside the traditional scope of monetary orders? These issues will need to be worked out in subsequent cases.

The "Comments" Feature: A Forum for Discussion

Readers of this site will, I'm sure, be pleased to learn that there is now a **fully operational "comments" feature** in place on the site, that enables readers to **discuss** the news items published on **CONFLICT OF LAWS .NET**. Under *each news item* you will find a **link** to the comments feature, which looks like this (the link is circled in red):



The number in brackets after "Comments" will tell you how many readers have already left comments about that news item. Clicking on the link will take you to the individual webpage for that particular news item, where you can discuss that item by leaving comments in the **window** provided. The comments window looks like this:



Once you have filled in your "Name" and "Email" once, the site will remember it for future occasions. Simply type your "Message" in the window provided, choose whether or not you want to be notified of any other comments left by other readers about that news item via email (by checking the box), and click "Submit." Your comment will then be published on the site, underneath the news item.

We very much hope that this will serve as a useful and effective forum for discussion amongst our international readership. If you have any questions about the comments feature, then by all means contact us. Let the discussion commence!

Enforcing International Arbitration Agreements: the Remedial Powers of Federal Courts

Daniel S. Tan (*O'Melveny & Myers LLP*) has posted an article on "**Enforcing International Arbitration Agreements in Federal Courts: Rethinking the Court's Remedial Powers**" on the Social Science Research Network (SSRN) that will be published in the *Virginia Journal of International Law* in Spring 2007. The abstract reads:

> *The area of remedies in private international law is largely unexplored, but provide the very means by which the courts can advance private international law aims such as controlling international litigation and enforcing forum selection. The contractual nature of arbitration agreements and the policy in favor of arbitration make this a good starting point from which a wider remedial framework can be developed.*
>
> *In practice, the U.S. federal courts invariably enforce arbitration agreements with the statutory remedies in the Federal Arbitration Act. Yet, there is no reason why this should be. Where the statutory remedy is deficient or inappropriate, the courts may appeal to their wider inherent remedial powers to fashion suitable relief. The domestic law of remedies suggests that the courts may use specific and (antisuit) injunctive relief to enforce the parties' right to the arbitral forum, or to award ordinary contractual damages to vindicate what is a straightforward breach of contract. Private international law remedies such as stays of proceedings and nonrecognition of judgments obtained in breach of arbitration agreements are other remedial alternatives that can be used to enforce such agreements. All the same, development of each of these remedies must be done within the context of an overarching remedial scheme – akin to that which exists in domestic law. The domestic law of remedies offers an interlocking set of remedial responses to vindicate wrongs. To effectively control international litigation and improper attempts at forum shopping, the courts must endeavor to develop a similar remedial framework in the private international law context, in order that they may be able to render the most appropriate remedial relief to enforce agreements to arbitrate and advance the*

policy in favor of arbitration.

You can download the full article here.

Forum Non Conveniens and Choice of Law in Tort & Equity in the Singapore Court of Appeal

In *Rickshaw Investments Ltd and Another v Nicolai Baron von Uexkull* [2006] SGCA 39 (handed down on 3rd November 2006), there was an appeal against the first-instance decision that the appellant's (Rickshaw Investments Ltd) action against the respondent (Nicolai Baron von Uexkull) be stayed on the ground of *forum non conveniens*. The appellants had hired the respondent in 2001 to sell dynasty artefacts from the "Tang Cargo". The employment contract was subject to German law and the competence of the German courts. When the appellant terminated the contract in 2004, the respondent commenced proceedings in Germany against the first appellant on the basis of a claim in contract.

The appellants, meanwhile, commenced an action against the respondent in Singapore on 10 June 2005. The appellants stated four causes of action, as follows:

- conversion of 25 pieces of the Tang Cargo by the respondent;
- breach of the respondent's equitable duty of confidentiality towards the appellants;
- breach of the respondent's fiduciary duties as agent of the appellants; and
- deceit arising from the respondent's misrepresentations.

In deciding whether or not the appellant's claim in Singapore should be stayed on the ground of *forum non conveniens*, the Singapore Court of Appeal looked to the classic test given by the House of Lords in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460, stage one of which is that:

> *a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interest of all the parties and the ends of justice*

In order to determine whether Singapore was the appropriate forum for the present proceedings, the court stated the relevant factors for consideration were the **general connecting factors**; the **jurisdiction in which the tort occurred**; **choice of law**, ie, whether the choice of law clause in the contract was exclusive, and if not, which law should be applied to the claims in tort and equity; and the **effect of the concurrent proceedings in Germany**.

The court found that, under the *general connecting factors*, Singapore was the appropriate forum to hear the substantive dispute, as the location of the key witnesses was Singapore, and the respondent was a permanent resident of Singapore and resided in Singapore at the time the alleged tortious acts and equitable breaches took place.

In deciding *whether the natural and most appropriate forum is that in which the tort occurred*, the court placed considerable reliance on *Cordoba Shipping Co Ltd v National State Bank, Elizabeth, New Jersey (The Albaforth)* [1984] 2 Lloyd's Rep 91 and *Berezovsky v Michaels* [2000] 1 WLR 1004, which held that, inter alia, "…if the substance of an alleged tort is committed within a certain jurisdiction, it is not easy to imagine what other facts could displace the conclusion that the Courts of that jurisdiction are the natural forum" (per Goff LJ in the Alberforth at 96). In agreeing with that general principle, the court held that

> *we must emphasise that the result that is arrived at through the application of the Albaforth principle is only the prima facie position and/or a weighty factor pointing in favour of that jurisdiction. Applying this to the present case, the fact that the respondent's alleged torts were committed in Singapore does point towards Singapore as being the natural forum to hear the dispute, but this is only one of the factors to be taken into account in the overall analysis, albeit a significant one.*

In the *choice of law* analysis (looked at on the basis that where a dispute is

governed by a foreign *lex causae*, the forum would be less adept in applying this law than the courts of the jurisdiction from which the lex causae originates), a key issue was whether the appellant's choice to sue in tort was tantamount to an avoidance of the governing law provision in the contract of employment. The court held that, absent bad faith on the part of the appellants,

> *…we see no reason why they should be denied the freedom of choice to frame their causes of action in the way they have. This has in fact been made clear in the case law. It is, for example, established law that the mere presence of a contractual relationship does not in itself preclude the existence of an independent duty of care in tort: Henderson v Merrett Syndicates Ltd [1995] 2 AC 145 as well as the decision of this court in The Jian He [2000] 1 SLR 8 at [26]….In other words, although the allegedly tortious acts were committed in the course of the respondent's employment in fact, the acts had a separate legal existence from his contractual obligations and breaches thereof.*

The claims in *conversion*, the other for *fraudulent misrepresentation or deceit* were claims in **tort**, and so the **double actionability rule** applied, subject to the double flexibility exception (see Briggs (1995) 111 LQR 18 at 21); i.e. the decision in *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190 meant that the tort might nevertheless be actionable even though it was not actionable under the *lex fori* or the *lex loci delicti*, and even heralded the possibility that the *lex causae* of a tort could be the law of a *third* jurisdiction (other than the *lex fori* or the *lex loci delicti*), which has the most significant relationship with the occurrence and with the parties. The court held that it might, in certain exceptional circumstances, be possible for a law other than Singapore law to apply, even in the case of a local tort (i.e. a tort committed in Singapore). That said, the claim in conversion was held to be governed by the *lex fori* – Singapore law, as that was also the lex loci delicti.The Red Sea exception did not apply, as most of the connecting factors (as discussed above) pointed to Singapore. The claim for fraudulent misrepresentation or deceit likewise fell wholly within Singaporean law under the double actionability rule.

The claims in *breach of confidence*, and *breach of fiduciary duties*, were claims in **equity**. In identifying the choice of law principles, the court relied heavily on T M Yeo, *Choice of Law for Equitable Doctrines* (Oxford University Press, 2004). The court decided that:

> *We would, however, accept the more limited proposition to the effect that where equitable duties (here, in relation to both breach of fiduciary duty and breach of confidence) arise from a factual matrix where the legal foundation is premised on an independent established category such as contract or tort, the appropriate principle in so far as the choice of law is concerned ought to be centred on the established category concerned.*

On that basis, as the allegations of breach of fiduciary duty as well as breach of confidence arose from the contract of employment itself, German law (as the governing law of the contract) should govern the claims in equity.

The court therefore concluded that, as a whole, the connecting factors clearly pointed to Singapore as being the appropriate forum for the hearing of the substantive issues concerned. On that basis, the appellants' action in the Singapore courts against the respondent ought **not** to be stayed.

> *It is also clear that Singapore is the most natural and appropriate forum to hear the claims in tort. The issue of choice of law appears, as we have noted, to be neutral and, although there is a risk of conflicting decisions by the Singapore and German courts, this factor does not weigh decisively in the respondent's favour, having regard to the other factors.*

German Federal Supreme Court affirms Jurisdiction based on Art. 5 Nr. 1 Brussels Convention with regard to Claims based on Prize

Notifications

The German Federal Supreme Court had to deal with the legal qualification of prize notifications, i.e. communications which are sent to consumers and give the impression that the consumer has won a particular prize, in its judgment of 1st December 2005 (III ZR 191/03). The Court held that jurisdiction concerning a claim based on a prize notification (sec. 661a German Civil Code) which did not lead to the order for goods can be grounded on Art. 5 Nr. 1 Brussels Convention. Before, the Federal Supreme Court has left open how sec. 661a German Civil Code has to be classified and has based jurisdiction on Art. 5 Nr. 3 Brussels Convention and Art. 13 Brussels Convention alternatively.

In the present case, jurisdiction over a consumer contract according to Art. 13 Brussels Convention (now: Art. 15 Brussels I Regulation) has been refused since this rule had to be interpreted strictly due to its qualification as lex specialis. Here, the requirements of Art. 13 I Nr. 3 Brussels Convention are – according to the Court – not fulfilled since a "contract for the supply of goods or a contract for the supply of services" has not been concluded. The Court regarded it not to be sufficient that the prize notification in question was directed at the arrangement of such a contract, but left open explicitly whether this interpretation also applies with regard to the broader Art. 15 I c) Brussels I Regulation. By refusing Art. 13 Brussels Convention, the Court departs from its former jurisprudence. According to the Federal Supreme Court, jurisdiction has to be based on Art. 5 Nr. 1 Brussels Convention since the term "contract" has to be interpreted widely in view of the ECJ´s case law according to which it is regarded to be sufficient if one person incurs liabilities voluntarily towards another person. Due to the affirmation of Art. 5 Nr. 1 Brussels Convention it could be left open by the Court whether jurisdiction could also be based on Art. 5 Nr. 3 Brussels Convention.

The full judgment can be found in IPRax 2006, 602 (including an annotation by *Jordans*, IPRax 2006, 582) as well as on the website of the Federal Supreme Court.

Brussels Convention, the Law of War and Crimes Against Humanity

Advocate General Ruiz-Jarabo Colomer has given his Opinion in Case C-292/05 Lechouritou and Others.

The case is concerned with whether claims for compensation which are brought by a number of Greek citizens against a Contracting State (Germany) as being liable under civil law for acts or omissions of its armed forces fall within the scope *ratione materiae* of the Brussels Convention. The following questions were referred to the ECJ by order of the *Efetio Patron* (Court of Appeal, Patras):

> *1. Do actions for compensation which are brought by natural persons against a Contracting State as being liable under civil law for* ***acts or omissions of its armed forces*** *fall within the scope ratione materiae of the Brussels Convention in accordance with Article 1 thereof* ***where those acts or omissions occurred during a military occupation of the plaintiffs' State of domicile following a war of aggression on the part of the defendant, are manifestly contrary to the law of war and may also be considered to be crimes against humanity****?*
>
> *2. Is it compatible with the system of the Brussels Convention for the defendant State to put forward a plea of immunity, with the result, should the answer be in the affirmative, that the very application of the Convention is neutralised, in particular in respect of acts and omissions of the defendant's armed forces which occurred before the Convention entered into force, that is to say during the years 1941-44?*

The Advocate General's answer to the first question referred to the ECJ was that, even if the term “civil and commercial matters” is not defined in the Brussels Convention, it has been held that this term has to be interpreted autonomously and does not include acts *iure imperii*. The Advocate General establishes two criteria which decide whether an act *iure imperii* – which does not fall within the scope of the Brussels Convention – has to be identified as such: Firstly, the official role of the parties involved, and secondly the origin of the claim, i.e. whether the exercise of authority by the administration is exorbitant. In the present case, the

official character of one of the parties was beyond doubt because the action is directed as against a state. Concerning the second criteria, the exercise of exorbitant authority, it has been stated that martial acts constitute a typical example of a state´s authority. Thus, claims directed at the restitution of damages which have been caused by armed forces of one of the war conducting parties are not "civil matters" for the purposes of Art. 1 of the Brussels Convention.

As – according to the Advocate General´s opinion – the first question has to be answered negatively, the second question referred to the ECJ does not have to be dealt with. However, the Advocate General points out that immunity precedes the Brussels Convention since if it is – due to immunity – not possible to file a suit, it is irrelevant which court has jurisdiction. Further, the examination of immunity and its effects on human rights was beyond the Court´s competence.

In the Advocate General's words,

> *...a claim for compensation, which is raised by natural persons against a Contracting State of the Brussels Convention, in order to attain compensation for damage caused by armed forces of another Contracting State during a military occupation, does* ***not*** *fall within the material scope of the Brussels Convention, even if those actions can be regarded as crimes against the humanity (approximate translation from the German text of the judgment, para. 79. An English translation is not available.)*

This post has been written jointly by Martin George and Veronika Gaertner. There is more coverage of the case on the EU Law Blog.

Seminar: Substance and Procedure in the Law Applicable to Torts –

Harding v Wealands & the Rome II Regulation

Substance and Procedure in the Law Applicable to Torts – *Harding v Wealands* and the Rome II Regulation

Seminar at the British Institute of International & Comparative Law

Tuesday 21 November 2006 17:00 to 19:00
Location: Charles Clore House, 17 Russell Square, London WC1B 5JP

Participants:

- Chair: Mr Justice Lawrence Collins
- Dr Janeen Carruthers, University of Glasgow
- Charles Dougherty (2 Temple Gardens)
- George Panagopoulos (Richards Butler)

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, sponsored by Herbert Smith.

For more information, see the BIICL website.

Those who attended the launch seminar on 24th October may be interested to know that a transcript is now available on the BIICL website (Institute members only.)

German Federal Supreme Court:

Contest of Local Jurisdiction Implies Contest of International Jurisdiction

The German Federal Supreme Court dealt with **questions concerning Art. 24 Regulation 44/01/EC** in its judgment of 1 June 2005 (VIII ZR 256/04). According to Art. 24 Reg. 44/01/EC a court of a Member State before which a defendant enters an appearance shall have jurisdiction. However, this shall not be the case if appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Art. 22 Reg. 44/01/EC.

After stating that Art. 22 Reg. 44/01/EC was not relevant in the case in question, the Court addressed the question which requirements have to be fulfilled "to contest the jurisdiction" in terms of Art. 24 Reg. 44/01/EC. Here the Court agreed with the prevailing opinion among German legal writers according to a which it is unnecessary to contest international jurisdiction explicitly. Rather, contesting the local jurisdiction of the respective court can – taking account of the concrete situation – also imply that the court's international jurisdiction will be contested. Further, the Court held that the requirements of Art. 24 s. 1 Reg. 44/01/EC (entering an appearance) are not fulfilled if the defendant enters an appearance only in the alternative, i.e. just providently in case the court affirms jurisdiction despite the fact that he is contesting the jurisdiction.

The full judgment can be viewed on the website of the Federal Supreme Court, as well as in IPRax 2006, 594 (including an annotation by *Leible/Sommer*, IPRax 2006, 568).

Conference in Germany: Recent

Developments in Private International Law

From 9th to 10th November a conference will take place at the Academy of European Law (ERA) in Trier, Germany where recent developments in private international law will be presented.

Here are the areas which will be discussed:

- Legal and Practical Consequences of Landmark ECJ Decisions (e.g. Lugano Convention Opinion (1/03); Owusu)
- The European Enforcement Order in Judicial Practice
- (The Revision of) the Regulation on Service of Documents
- Cross-border Attachment of Bank Accounts
- International Insolvency Law
- Hague Convention of 30 June 2005 on Choice of Court Agreements
- European Payment Order
- Towards a European Small Claims Procedure – The State of Play
- Future Developments in European Private International Law: Rome I & Rome II

See for the full programme, the list of speakers and further information the website of ERA.