Party Autonomy in the Private International Law of Contracts

Giesela Ruehl (Max Planck Institute for Comparative and Private International Law) has posted *Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency* on SSRN. Here's the abstract:

It is commonly acknowledged that during the 20th century American and European choice-of-law theory have drifted apart: in the United States the American conflicts revolution swept the traditional vested rights theory out of the courts and the classrooms and gave way to a variety of novel approaches. In Europe, in contrast, legal systems decided to adhere to the classical concept of choice of law invented by Carl Friedrich von Savigny. However, the 20th century has not only seen transatlantic divergence. Almost unnoticed, American and European choice of law theory has developed into the same direction in one area of law: contract law. Both the Restatement (Second) of Conflict of Laws, which today is the most widely followed conflicts regime for contracts in the United States, and the EC Convention on the Law Applicable to Contractual Obligations (Rome Convention), which establishes uniform conflicts rules for virtually all of Western Europe, provide for free party choice of law.

This article looks at principle of party autonomy in Europe and the United States in more detail. It demonstrates that the trend of convergence extends beyond basic conceptual similarities and that it reaches business reality through the jurisprudence of American and European courts. However, the article does not confine the discussion of party autonomy to a comparative analysis. It also determines the underlying reasons for the convergence of American and European law by looking at the field from an economic perspective. Two basic questions are adressed: first, what is the economic rationale for granting free party choice of law? Second, can limitations of the free party choice of law such as the infringement of public policy, the evasion of mandatory law or the lack of a substantial relationship with the chosen law be justified on economic grounds? In answering these questions the article ventures the hypothesis that the trend of convergence in choice of law can be explained with the help of economic theory.

Full citation: Ruehl, Giesela, "Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency" in CONFLICT OF LAWS IN A GLOBALIZED WORLD, Eckart Gottschalk, Ralf Michaels, Giesela Rühl & Jan von Hein, eds., Cambridge University Press

---

Methods and Approaches in Choice of Law: An Economic Perspective

Giesela Ruehl (Max Planck Institute for Comparative and Private International Law) has posted *Methods and Approaches in Choice of Law: An Economic Perspective* on the Social Science Research Network (SSRN). The abstract reads as follows:

After years of disregard, the law and economics movement has finally taken note of the field of choice of law. However, up until today most of the contributions have focused on specific topics – such as the applicable law in contracts, torts or product liability – and skipped the underlying fundamental issues that determine the general design of choice of law rules: (1) Should courts apply foreign law at all or should they always resort to their own law? (2) Should courts create multistate substantive law specifically designed for international transactions or should they apply the law of one of the states involved? (3) Should choice of law rules resort to the unilateral method and define the reach of forum law only or should they apply the multilateral method and determine the reach of both forum and foreign law? (4) Should courts search for material justice or rather for conflicts justice? (5) Should choice of law strive for legal certainty or rather for flexibility? This article provides a comparative overview as well as an economic analysis of the answers legal scholarship has provided to these questions over time and across countries. It argues that courts should (1) be open towards application of foreign law, (2) apply the law of one of the states involved (3) determine the reach of both

foreign and forum law, (4) strive for conflicts justice, and (5) apply rules instead of standards.

Full citation: Ruehl, Giesela, "Methods and Approaches in Choice of Law: An Economic Perspective" *Berkeley Journal of International Law*, Vol. 24, 2006.

Maccaba v Lichtenstein, and an article

- *Maccaba v Lictenstein* [2006] EWHC 1901 (QB)

The court held that, for there to be an arbitration agreement, there had to be an agreement evidenced in writing between the two prospective parties to the arbitration. In the instant case, no such enforceable agreement as argued for by the applicant had been proved on the evidence placed before the court.

- D. Stringer, "Choice of Law and Choice of Forum in Brazilian International Commercial Contracts: Party Autonomy, International Jurisdiction, and the Emerging Third Way" (2006) 44 *Columbia Journal of Transnational Law* 951-999.

WPP Holdings Italy v Marco Benatti

WPP HOLDINGS ITALY SRL (2) WPP 2005 LTD (3) BERKELEY SQUARE HOLDING BV v MARCO BENATTI (2006) [2006] EWHC 1641 (Comm)

It was held that the question of whether proceedings were correctly issued for the purposes of Council Regulation 44/2001 Art.30 had to be determined by the national law in which they were instituted. There was no doubt that the proceedings had been issued correctly according to English law and consequently the English court was the court first seised of the dispute between the parties.

Source: Lawtel

EU Matrimonial Property and Divorce Proposals

The EU has published a **Green Paper** and a **Proposal** in the fields of matrimonial property, and the jurisdictional rules and law applicable to divorce respectively.

Green paper on conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition

> *The Commission has adopted a new Green Paper to launch a wide-ranging consultation exercise on the difficulties arising in a European context for married and unmarried couples when settling the property consequences of their union and the legal means of solving them. The Green Paper mainly deals with issues concerning the determination of the law applicable to the property consequences of such unions and ways and means of facilitating the recognition and enforcement in Europe of judgments and formal documents relating to matrimonial property rights, and in particular marriage contracts.*

> *In this Green Paper the Commission focuses on questions concerning matrimonial property rights, that is to say the legal rules relating to the spouses' financial relationships resulting from their marriage, both with each other and with third parties, in particular their creditors. We are concerned*

here, for example, with couples not sharing the same nationality who separate and leave property in a Member State, or couples sharing the same nationality who divorce and have property in another Member State. The Green Paper also considers the question of the property consequences of other forms of unions, such as registered partnerships. In all Member States, more and more couples are formed without a marriage bond. To reflect this new social reality, the Green Paper also addresses the question of the property consequences of the separation of unmarried couples in an international context.

New Community rules on applicable law and jurisdiction in divorce matters to increase legal certainty and flexibility and ensure access to court in "international" divorce proceedings

The Commission proposes to introduce harmonised rules on applicable law and to revise the existing jurisdiction rules in divorce matters. The aim is to enhance legal certainty and flexibility for the thousands of couples who are involved in "international" divorce proceedings each year in the European Union. Another aim is to ensure access to court for EU citizens living in third States.

Source: BIICL Mailing List

Harding v Wealands

The House of Lords has handed down its judgment in *Harding v Wealands* [2006] UKHL 32.

The issue is whether damages for personal injury caused by negligent driving in New South Wales should be calculated according to the applicable law selected in accordance with Part III of the Private International Law (Miscellaneous Provisions) Act 1995 (hereafter "Part III") or whether it is a question of procedure which falls to be determined in accordance with English law. The Court of Appeal, by a majority (Arden LJ and Sir William Aldous, Waller LJ

dissenting) held that it should be determined in accordance with the applicable law, which they decided was the law of New South Wales. In my opinion the dissenting opinion of Waller LJ was correct and the question is one of procedure governed by the law of the forum (para. 13 per Lord Hoffman).

The full judgment of the House of Lords can be downloaded from here. Comments on the decision are welcome.

EU Commission Study on "Brussels I"

The University of Heidelberg has been asked to head Study JLS/C4/2005/03 by the EU Commission, concerning the application of Regulation 44/2001/EC ("Brussels I"). The full description of the study is as follows:

The European Commission has asked Prof. Hess, Prof. Pfeiffer and Prof. Schlosser (University of Munich) to elaborate a comparative study concerning the evaluation of the practical application of the " Brussels I" Regulation in the 25 European Member States. The study shall prepare a report for the Commission on the application and on the future revision and improvement of the Regulation (see Article 73 Reg. 44/01/EC). The specific objective of the study is to conduct an empirical analysis of the application of Regulation 44/2001/EC.

For the preparation of the study, three questionnaires have been elaborated: The first aims at collecting statistical data about the application of the Regulation. The second focuses on collecting empirical information about the performance of the Brussels I Regulation. The last questionnaire addresses legal problems of the Regulation. The questionnaires are going to be sent to national reporters in the Member States. They will be transmitted to interested and experienced persons in the respective countries, i.e. judges, lawyers, bailiffs who are practising in the field of the Brussels Regulation. In addition, the collaborators of the project will contact and interview persons and ask them about their practical experience with

the Brussels Regulation.

The organisers of the study are now looking for persons in all EU-Member States who are willing to answer the questions and to provide us with the necessary information. Everyone is invited to answer the questionnaires and to contact the the collaborators of the Institute.

To learn more about the Study, and to contribute, log on to their website.

The Impact of Recent Judgments of the European Court

Adrian Briggs' recent article in the **University of Oxford Faculty of Law Legal Studies Research Paper Series**, entitled *The Impact of Recent Judgments of the European Court on English Procedural Law and Practice*, is now available for download from here.

The abstract reads as follows:

"Writing in 1991 in the Revue critique de droit internationale prive, and analysing three decisions of the English courts on the relationship between jurisdiction under the Brussels Convention and the common law doctrine of forum non conveniens, Professor Gaudemet-Tallon entitled her paper "Forum non conveniens: une menace pour la convention de Bruxelles (a propos de trois arrets anglais recents)". Such a title left the reader in little doubt of the gist of the views which were to follow. But it marked the beginning of a period of intellectual debate, which required English lawyers to consider the extent to which the rules of the common law on the jurisdiction of courts would relate to the new arrangements contained in the rules of the Brussels and Lugano Conventions. By and large it is fair to say that the views of English lawyers were not uniform though, as is the way in England, the most influential view tends to be that of the Civil Division of the Court of Appeal; and it generally adhered to the view that a court could still find that the forum conveniens was in a non-Contracting State

and so stay the proceedings, which had caused Professor Gaudemet-Tallon such alarm. In preparing this paper for the seminar, I had seriously considered giving it the sub-title "La Cour de Justice: une menace pour la moralite du litige commercial (a propos de trois arrets europeens recents)". But it seemed to me that it was a strategic mistake to tell people what they were going to hear for fear that they would stop listening. So let me introduce this paper by observing that, when seen from London, the European Court has just completed fifteen months of infamy. Or, to put it another way, its three recent judgments on matters of acute relevant to commercial litigation in London have left a sense of real disappointment, and more than a little indignation. In part this is attributable to the lamentable quality of the reasoning displayed on the face of the judgments. But in further part, as it seems to me, it proceeds from a realisation that the European Court brings a public lawyers' approach to an issue which ought to be seen as being one of intensely private law, and appears to be unaware or unconcerned that this is itself an issue which is controversial. The structure of this paper is therefore as follows A. The fundamental nature of English law on the jurisdiction of courts (i) Rules of Jurisdiction (ii) Control of forum shopping (iii) The role of consent B. The material judgments of the Court of Justice (i) Failure to enforce jurisdiction agreements: Erich Gasser GmbH v MISAT srl (ii) Failure to prevent wrongdoing in the assertion of jurisdiction: Turner v Grovit (iii) Rejection of the right to apply forum non conveniens: Owusu v Jackson (iv) Summary view C. An explanation for differences in approach of English courts and the European Court D. The limits of the decisions: how far do they go ? (i) Jurisdiction under Article 2 (ii) Jurisdiction under Article 4 (iii) Proceedings between parties who have agreed to arbitrate (iv) Enforcement of jurisdiction agreements by other means (v) Future legislation on choice of law E. Conclusions."

UK Government to opt-out of Rome I Regulation

In a controversial decision, the UK Government has decided **not** to opt-in to the proposed Regulation on the law applicable to contractual obligations

("Rome I").

- Information on Rome I (press release)
- The Report of the Financial Markets Law Committee (which may have had an impact on the UK decision)

Further information will be posted as it becomes available.

Source: BIICL Mailing List

Cambridge Law Journal Case Notes

The new edition of the **Cambridge Law Journal**, **VOL 65; PART 1; 2006**, discusses two recent cases:

- Domicile – illegal resident: *Mark v. Mark*. (pp. 35-36)
- Renvoi – proof of foreign law: *Neilson v. Overseas Projects Corporation of Victoria Ltd*. (pp.37-39)

More details on the CLJ can be found at its website.

Source: Zetoc alerts