Conference on European Tort Law

The European Centre of Tort and Insurance Law will host its annual Conference on European Tort Law in Vienna from 16th-18th April.

Detailed information on the programme, registration and accommodation can be found on their specially-designed [website](#) and on the following [information folder](#).

*Many thanks to Thomas Thiede for the tip-off.*

---

Retaliation in Alien Tort Statute Litigation?

An interesting [case](#) where Chevron is seeking to recover legal costs, including $190,000 in copying expenses, from Nigerian villagers

---

Article on choice of law for intra-Australian torts after the civil liability legislation

Professor Martin Davies, co-author of the leading text on Australian private international law ([Nygh and Davies, *Conflict of Laws in Australia*, now in its 7th edition (2002)](#)), has an article in the most recent *Torts Law Journal*. It concerns the choice of law issues which have been created by the various Acts passed by the Australian states and territories to reform aspects of Australian tort law. As the abstract explains:
The civil liability legislation passed by the states and territories in the early part of this decade was not uniform in form or effect. As a result, choice of law in intra-Australian torts cases has been given a new lease of life. The lex loci delicti (law of the place of the wrong) choice of law test adopted by the High Court in John Pfeiffer Pty Ltd v Rogerson applies only to questions of substance. Thus, it is now necessary to ask whether the statutory reforms made by the civil liability legislation are substantive or procedural. This article suggests some tentative characterisations. No generalisations are possible because each statutory rule must be characterised individually. Because some of the statutory reforms seem clearly to be procedural, they create a new incentive for plaintiffs to go forum-shopping for a jurisdiction that provides a more favourable environment for their claims. Defendants can only protect themselves against that forum-shopping by applying for a venue transfer under the cross-vesting legislation. There is uncertainty about the operation of that legislation, too. Thus, a new set of unsettled questions has been melded to an existing area of uncertainty. The result is a fertile source of disagreement and future litigation.

The article is both interesting and of use to practitioners. The citation is Martin Davies, “Choice of Law after the Civil Liability legislation” (2008) 16 Torts Law Journal 10.

---

Kozyris on Rome II: Tort Conflicts on the Right Track! A Postscript to Symeon Symeonides’ “Missed Opportunity”

Prof. John Phaedon Kozyris (Universities of Thessaloniki and Ohio State) has published a very interesting article on Rome II in the latest issue of the American Journal of Comparative Law (Vol. 56(2), 2008): Rome II: Tort Conflicts on the Right Track! A Postscript to Symeon Symeonides’ “Missed Opportunity”
As the title explains, the article discusses the new European conflict regime on torts, in the light of the assessment made by Prof. Symeonides in his recent works (see in particular “Rome II and Tort Conflicts: A Missed Opportunity”, and the other articles cited in our related post, and “The American Revolution and the European Evolution in Choice of Law: Reciprocal Lessons”). While rejecting some of the critiques addressed by Symeonides to the final text of Rome II, Kozyris commends the EC co-legislators for adopting a “traditional” European approach:

Rome II must be praised for eschewing the “revolutionary” methodologies, especially of the American variety, and for employing definitive, recognizable, and practical connecting factors to determine the applicable law.

In analysing the conflict rules, special attention is given by the author to the provision on product liability (or, as the author deems it more appropriate, “producer liability”).

The abstract reads as follows:

Regulation 864/2007, covering tort conflicts, concludes a long process that had started in the late 1960s to cover the entire field of obligations in the European Community. The author expresses his satisfaction that the final text, with its emphasis on the lex loci damni, with some habitual residence exceptions, escaped the shoals of the so-called “American conflicts revolution” with its parochial and pro-forum implications and its uncertainties. Further, he comments favorably on the particularized treatment of certain areas such as producer liability and environmental protection and on the inclusion of the in-between topics of unjust enrichment, negotiorum gestio and culpa in contrahendo. However, a closer and more detailed study of the key field of producer liability leads him to considerable reservations on the contacts selected and their prioritization.
Symeonides on Rome II: a Missed Opportunity (and other works on tort conflicts)

Symeon C. Symeonides (Dean, College of Law – Willamette University) has posted Rome II and Tort Conflicts: A Missed Opportunity (forthcoming on the American Journal of Comparative Law, Vol. 56, 2008) on SSRN. Here is the abstract:

This article reviews the European Union’s new Regulation on tort conflicts (“Rome II”), which unifies and “federalizes” the member states’ laws on this subject. The review accepts the drafters’ pragmatic premise that a rule-system built around the lex loci delicti as the basic rule, rather than American-style “approaches,” was the only politically viable vehicle for unification. Within this framework, the review examines whether Rome II provides sufficient and flexible enough exceptions as to make the lex loci rule less arbitrary and the whole system more workable.

The author’s answer is negative. For example, the common-domicile exception is too broad in some respects and too narrow in other respects. Likewise, the “manifestly closer connection” escape is phrased in exclusively geographical terms unrelated to any overarching principle and is worded in an all-or-nothing way that precludes issue-by-issue deployment and prevents it from being useful in all but the easiest of cases. The review concludes that, although attaining a proper equilibrium between legal certainty and flexibility is always difficult, Rome II errs too much on the side of certainty, which ultimately may prove elusive.

On the whole, Rome II is a missed opportunity to take advantage of the rich codification experience and sophistication of modern European conflicts law. Nevertheless, Rome II represents a major political accomplishment in unifying and equalizing the member states’ laws on this difficult subject. If this first step is followed by subsequent improvements, Europe would have achieved in a relatively short time much more than American conflicts law could ever hope for.
An interesting comparison can be made with two previous works by Prof. Symeonides, commenting the Rome II Commission’s Proposal and the EP Rapporteur’s Draft: **Tort Conflicts and Rome II: a View from Across** (published in the *Festschrift für Erik Jayme*) and **Tort Conflicts and Rome II: Impromptu Notes on the Rapporteur’s Draft**. Both are available for download on Diana Wallis’ website ([Rome II seminars’ page](http://www.romeii.org/seminars)), together with other works by prominent scholars.

Prof. Symeonides has posted a number of interesting articles on tort conflicts on SSRN (see the complete list of his available works on the [author page](http://ssrn.com/author=916951)), among which: **The Quest for the Optimum in Resolving Product-Liability Conflicts; Territoriality and Personality in Tort Conflicts; Resolving Punitive-Damages Conflicts**.

*(Many thanks to Prof. Lawrence B. Solum – [Legal Theory Blog](http://www.legaltheoryblog.com/) – for pointing out Prof. Symeonides’ latest article on Rome II)*

---


This installment of significant developments will focus on salient issues that have been the subject of frequent, past posts on this website.

First, the United States Court of Appeals for the Second Circuit decided a compendium of Alien Tort Claim cases that raise an interesting question at the intersection of domestic and international law: that is, when determining whether a corporate defendant has “aided and abetted” a violation of international law, what law defines the test for “aiding and abetting.” *Khulumani v. Barclay National Bank* and *Ntsebeza v. DaimlerChrysler* (available [here](http://www.romeii.org/seminars)) concern the tort claims of
a class of persons alive in South Africa between 1948 and 1993 who were affected by the apartheid regime. The defendants are 50 multinational corporations, and the claimed damages total over $400 billion. The basic theory of the case is that defendants’ indirectly caused plaintiffs’ injuries by perpetuating the apartheid system (e.g. by providing loans to a “desperate South African government”), and that they indirectly profited from those acts which violated recognized human rights standards, but not necessarily the law of the place where those acts took place. The District Court dismissed the case as a non-justiciable political question, but also because “aiding and abetting” human rights violations – the gravamen of the indirect causation and indirect harm claims – provided no basis for ATCA liability. A split panel of the Second circuit reversed. Amongst the other decisions intertwined in the 146 page opinion, the court determined that the appropriate test for aiding and abetting liability under the ATCA is set out in the Rome Statute of the International Criminal Court – that is, one is guilty if one renders aid “for the purpose of facilitating the commissions of a . . . crime.” This is a far more stringent test than the one argued by Plaintiffs, founded on the Restatement (Second) of Torts § 876(b), which pins liability if one “gives substantial assistance or encouragement” to another’s actions which he “knows” to “constitute a breach of duty.” While the case was kept alive and remanded for further consideration, commentators have begun to wonder whether Plaintiffs have won a pyrrhic victory: “[i]f the Rome Statute test for aiding and abetting is broadly adopted, few ATCA cases against corporations may clear summary judgment and go on trial.”

In a second notable case, the United States Court of Appeals for the Eleventh Circuit considered does a forum non conveniens dismissal of foreign plaintiffs in favor of Italian courts put the remaining American plaintiffs “effectively out of court” so as to justify appellate review of the dismissal? The panel held that it does. In *King v. Cessna Aircraft Co.*, the personal estates of 70 deceased individuals sued defendant for a tragic air accident in Milan, Italy. Sixty-nine of those plaintiffs were European, with one being American. The district court dismissed the claims of the European plaintiffs on forum non conveniens grounds, and stayed the action of the American plaintiff pending resolution by the Italian courts (because, it is view, the American plaintiff was entitled to “a presumption in favor of its chosen forum”). All plaintiffs appealed. Because one may not generally appeal a decision to stay proceedings, appellate jurisdiction turned on whether the American plaintiff was “effectively out of court” by the imposition of the stay. The Court held that that plaintiff:
“has for all practical effects been put out of court indefinitely while litigation whose nature, extent, and duration are unknown, is pending in Italy. The district court has held its hand while Italian courts assume or continue what amounts to jurisdiction over the merits of the lawsuit. Their decision of Italian law issues will be followed by the district court. The stay order does have the legal effect of preventing [the American plaintiff] from proceeding with his claims in federal court for an indefinite period of time, potentially for years. Because he has been effectively put out of court, we have jurisdiction to review the order that did put him out. We do not mean that there are no differences between federalism and international comity for purposes of evaluating the merits of a stay order, as distinguished from deciding whether appellate jurisdiction exists to review the stay order . . . : “The relationship between the federal courts and the states (grounded in federalism and the Constitution) is different from the relationship between federal courts and foreign nations (grounded in the historical notion of comity).” . . . Those important differences do not, however, affect the extent to which a plaintiff is placed “effectively out of court,” which is the measure that defines our appellate jurisdiction over stay orders.”

On the merits, the court vacated the stay as improvident because “there is no indication when, if ever, the Italian litigation will resolve the claims raised in this case, and whether [the American plaintiff] will have a meaningful opportunity to participate in those proceedings.” The court did not consider the merits of the European plaintiff’s appeal of the forum non conveniens decision, preferring instead to remand the entire case for reconsideration in the event that the vacation of the stay, and the continuation of the lone American case here in the U.S., affects that decision.

Finally, in the latest salvo into the propriety and extent of punitive damage awards, the Supreme Court just granted certiorari in Exxon Shipping Co., et al., v. Baker, et al. (07-219). This case concerns a $2.5 billion punitive damages award against Exxon Mobil Corp. and its shipping subsidiary for the massive oil spill in Alaska’s Prince William Sound in 1989. In agreeing to hear Exxon’s appeal, the Court will decide whether the company should be subject to punitive damages solely upon judge-made maritime law, which is in apparent contradiction of decades of legal history and subject to considerable discordance in the federal courts. The case also raises the question of whether, if maritime law does govern,
this specific award is too high because it is said to be “larger than the total of all punitive damages awards affirmed by all federal appellate courts in our history.” The appeal also included the question of whether a verdict of that size was unconstitutional; separating this case from recent ones (see here), the Court did not agree to hear that last question. Nevertheless, this decision will have significant ramifications for international maritime concerns. Early reactions can be found here, here, and here. SCOTUSblog has a brief discussion and links to the briefs as well here.

A New Mandatory Rule in the French Law of Torts

The French Supreme Court for private and criminal matters (Cour de cassation) has recognised a new mandatory rule in the French law of torts. As a consequence, the Court held that it applied necessarily, and that it was an exception to the applicable choice of law rule, i.e. the law of the place were the tort was committed.

Background

This new mandatory rule is in fact an entire scheme allowing victims of certain criminal offences (basically those resulting in personal injury) to claim compensation from a public fund. The fund compensates victims irrespective of any negligence committed by the tortfeasor. After payment, the fund is subrogated in the rights of the victim and may sue the tortfeasor to recover the monies paid to the victim, but on condition that the tortfeasor was liable to the victim in the first place.

The fund is obviously a French public fund. But it does not only protect French victims. It also protect foreigners when the offence was committed in France. For French victims, however, the statute does not lay down any territorial condition. It seems to follow that French nationals are eligible even when the offence was committed abroad.
The translation of the provisions of the French Code of Criminal Procedure which govern the scheme can be found [here](#).

**The case**

In this case, the plaintiff was a French national who had suffered a loss in the United States. While jet-skiing, he was hurt by another jet-ski from behind. He sought recovery in France before the special body set up in each first instance court to rule on the eligibility of plaintiffs. What happened before this body is not known, but the Versailles court of appeal denied compensation. It held that the plaintiff had not demonstrated that the conduct which caused him harm could be characterised as a criminal offence under American law. In a [judgment of 22 January 2007](#), the Cour de cassation reversed. It ruled that the content of American law was irrelevant, as the French rule was “of necessary application” (*loi d’application nécessaire*) and thus governed.

French conflict lawyers have traditionally used several terms to refer to mandatory rules. The most famous internationally is certainly *lois de police*, but they have also been called rules of necessary application, or of immediate application. The concept, however, has always been the same. *Lois de police* are applied necessarily and immediately, as opposed to after determining whether the applicable choice of law rule provides for the application of French law. *Lois de police* are thus exceptions to the normal operation of the traditional choice of law rule, here the *lex loci delicti*.

The judgment justifies the characterization of the French scheme by stating that the rationale of the scheme is to establish a mechanism of national solidarity for victims of criminal offences, which compensates victims because of the existence of a specific social risk (criminality).

**Comment**

The characterization of the scheme as a mandatory set of rules is only partly convincing. Under the French theory of mandatory rules, a rule is considered mandatory when it is so important that the French legal order could not tolerate the application of any other rule. Here, it seems that the reason why French law must govern is different. The scheme does not really belong to the law of torts. It is a public scheme playing with French money. As with any public law, it is only for the State which instituted such fund to determine the conditions of its
application. The application of French law is no exception to the choice of law rule governing torts. The issue of whether a French public fund should compensate a victim is not an issue of tort in the first place, but rather an issue of public law.

---

The Cost of Transnational Accidents: Evolving Conflict Rules on Torts

Antonio Nicita (Professor of Economic Policy at University of Siena) and Matteo Winkler (LLM, Yale Law School; Ph.D., Bocconi University) have written an interesting paper on the economic analysis of the conflict of laws rules concerning transnational accidents, in particular domestic and supranational rules on tort liability. A preliminary version of the paper (“The Cost of Transnational Accidents: Evolving Conflict Rules on Torts”) was presented on September 13th at the annual conference of the European Association of Law & Economics (EALE), held in Copenhagen.

An abstract has been kindly provided by the authors:

The paper is divided into two parts. In the first part, the authors show the main conflict rules concerning torts at the domestic level: loci commissi delicti (place of accident), lex loci laesionis (place of injury), forum shopping and forum non conveniens, parties’ freedom of choice (before and after the accident), victim’s freedom of choice. Then, the authors describe the problems pertaining to each of these rules. In the second part, they analyse two cases, Bhopal and Amoco Cadiz, and conclude that when State courts are called to settle disputes concerning transnational accidents, they tend to protect their own community from the accident’s consequences, if negative, or alternatively, to discharge the accident’s negative externalities to other States’ community. Both approaches raise problems from the standpoint of externalities regulation: they lead either to underregulation or overregulation.
In particular, Nicita and Winkler maintain that when, like in Bhopal, State courts strictly enforce the lex loci rule, they might both favor the flux of investment towards developing countries – although the damages in favor of these countries’ victims are likely to be undercompensated, or protect the delocalized activities of multinational enterprises, while when courts refer to the lex loci laesionis rule, they are likely to regulate the transnational activity and therefore to increase the costs of compliance borne by multinational enterprises.

As a third case study, finally, the authors examine the EC Regulation on the law applicable to torts, Rome II. According to this Regulation, they point out that there are some underlying policies, that attempt to supersede the policies enforcement by State courts.

The paper is available on the EALE Conference’s website, and will be revised by the authors according to the observations coming from the conference’s public.

On the economic analysis of conflict of laws, see also some of our previous posts at the following links: 1, 2, 3, 4, 5, 6, 7.

Broad Grounds for Service of Australian Originating Process Outside of Australia in Tort Cases

Heilbrunn v Lightwood PLC [2007] FCA 433 is a recent Federal Court of Australia decision which evidences the breadth of rules for service of originating process outside of Australia in tort cases, which are common to all Australian superior courts except the Supreme Court of Western Australia.

A vintage Vauxhall motor car made in 1921, owned by the Australian-resident plaintiff, was damaged while being loaded into a container in England by an
employee of the English-based defendant. The Vauxhall had been shipped to England from Australia to participate in a celebration of the centenary of production of Vauxhalls and the damage occurred while it was being loaded for the return journey. Repairs to the car were undertaken in Australia upon its return.

The plaintiff sought leave to serve the defendant, which did not carry out business in Australia, in England pursuant to the provision of the Federal Court Rules permitting service overseas in a proceeding ‘based on, or seeking the recovery of, damage suffered wholly or partly in Australia caused by a tortious act or omission (wherever occurring)’. Unlike the rules of some other Australian superior courts, the Federal Court Rules require leave of the Court before service can be made out of the jurisdiction.

Following the interpretation adopted in relation to similar rules by other Australian courts, the Federal Court held that the rule did not require that the injury which completed the tort occur in Australia, but only that the disadvantage or detriment suffered by the plaintiff as a result of the tort occur in Australia. This can be satisfied where a degree of personal suffering or expenditure has occurred within the jurisdiction, as took place in this case by virtue of the fact that the repairs to the car were undertaken and paid for by the plaintiff in Australia.

On the basis of the broad interpretation of the rule evidenced by this case, Australian courts have jurisdiction based on service overseas in many tort cases where the only connection to Australia is the fact that the plaintiff has come to Australia (even where they were not previously resident in Australia) and personal suffering or expenditure has occurred in Australia. Indeed, the Federal Court Rules make it clear that service out is permitted where a tort claim causing damage in Australia is only one of several causes of action alleged in a proceeding, even if service out would not be authorised in respect of the other causes of action. The rules of some other Australian superior courts are narrower on this point, requiring that service out be authorised in respect of each of the causes of action alleged.

Or course, even if an Australian court would have jurisdiction based on service overseas, it may decline to exercise jurisdiction on the basis that the court is a clearly inappropriate forum pursuant to the narrow Australian doctrine of forum
non conveniens, but this is a relatively difficult test to satisfy: see the High Court of Australia decision of Regie National des Usines Renault SA v Zhang (2002) 210 CLR 491; 187 ALR 1; [2002] HCA 10.

---

**Article on Rome II - Liability for Cross-Border Torts**

A very interesting article on Rome II written in German by Thomas Thiede and Katarzyna Ludwichowska (both Vienna) has been published recently in the "Zeitschrift für vergleichende Rechtswissenschaft" (106 ZVglRWiss (2007), 92 et seq.):

"Die Haftung bei grenzüberschreitenden unterlaubten Handlungen" (Liability for cross-border torts).

An abstract has kindly been provided by the authors:

*The article is a critical analysis of a proposal to apply the law of the victim’s place of habitual residence to the compensation for personal injuries arising out of tort. The proposal, which was introduced by the European Parliament in the course of work on the EU regulation on the law applicable to non-contractual obligations (Rome II), originally concerned only traffic accidents, but was later modified and extended to all personal injury cases. The authors of the article show the proposal of the European Parliament against the background of solutions accepted in Germany and England. They present the arguments given by the supporters of the proposal and then proceed to strongly criticise the parliamentary solution, inter alia by showing the negative consequences of splitting an otherwise uniform legal relationship as a result of subjecting the prerequisites of liability and part of its consequences (compensation for damage to property) to lex damni and the other part of the consequences of liability (compensation for personal injuries) to the law of the victim’s place of habitual residence.*