ECJ on Hassett v South Eastern Health Board and Art 22(2) Brussels I

The European Court of Justice handed down judgment in ***Hassett v South Eastern Board*** on 2nd October 2008. It doesn't make for particularly interesting reading, so I'll be brief. The Irish Supreme Court referred the following question to the ECJ:

> *Where medical practitioners form a mutual defence organisation taking the form of a company, incorporated under the laws of one Member State, for the purpose of providing assistance and indemnity to its members practising in that and another Member State in respect of their professional practice, and the provision of such assistance or indemnity is dependent on the making of a decision by the Board of Management of that company, in accordance with its Articles of Association, in its absolute discretion, are proceedings in which a decision refusing assistance or indemnity to a medical practitioner practising in the other Member State pursuant to that provision is challenged by that medical practitioner as involving a breach by the company of contractual or other legal rights of the medical practitioner concerned to be considered to be proceedings which have as their object the validity of a decision of an organ of that company for the purposes of Article 22, [point] 2, of [Regulation No 44/2001] so that the courts of the Member State in which that company has its seat have exclusive jurisdiction?*

Which the ECJ took to mean:

> *By that question, the national court is essentially asking the Court whether point 2 of Article 22 of Regulation No 44/2001 is to be interpreted as meaning that proceedings, such as those at issue before the referring court, in the context of which one of the parties alleges that a decision adopted by an organ of a company has infringed rights that it claims under that company's Articles of Association, concern the validity of the decisions of the organs of a company within the meaning of that provision.*

And to which they answered:

> *Point 2 of Article 22 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 is to be interpreted as meaning that proceedings, such as those at issue before the referring court, in the context of which one of the parties alleges that a decision adopted by an organ of a company has infringed rights that it claims under that company's Articles of Association, do not concern the validity of the decisions of the organs of a company within the meaning of that provision.*

The reasoning, such that it was, centred on the fact that allowing all disputes involving a decision by an organ of a company to come within Article 22(2) of the Brussels I Regulation (which is primarily there, so says the Jenard Report, to prevent conflicting judgments) would mean that it would apply to those disputes where conflicting judgments would *not* arise. That is beyond the scope of Article 22(2). As the doctors had not challenged the validity of a decision before the national courts (they were instead challenging the process (or lack thereof) of that decision, and so did not come within the defined scope of Art 22(2). Fair point, really.

(Hat-tip to Andrew Dickinson.)

Conference: "La matière civile et commerciale, socle d'un code européen de droit international privé?" (Toulouse, 17 October

2008)

An interesting conference will be hosted in **Toulouse, on 17 October 2008**, by the *Institut de Recherche en droit européen, international et comparé* (IRDEIC) of the University of Social Sciences of Toulouse: **"La matière civile et commerciale, socle d'un code européen de droit international privé?"** (The civil and commercial matters, core of a European Code of Private International Law?).

The symposium will focus on the three cornerstones of the EC Private International Law in civil and commercial matters, namely the Rome I, Rome II and Brussels I regulations, evaluating their consistency under the point of view of basic principles, structure and solutions. The underlying question is whether these pieces of European legislation can be constructed as the hard core of a European PIL code, with its own general theory and specific principles and methods, which could be extended to other fields of the conflict of laws, towards the establishment of the area of freedom, security and justice envisaged by the EC Treaty.

A more detailed presentation (in French) of the colloquium, and the complete programme are available on the conference's webpage. Here's an excerpt:

Ouverture du colloque: *H. Roussillon*, Président de l'Université des Sciences Sociale de Toulouse I; *B. Beignier*, Doyen de la faculté de droit de l'Université de Toulouse I.

Président de séances: *M. Bogdan* (Université de Lund)

- 9:00 – *M. Fallon* (Université Catholique de Louvain): "Les éléments d'un code européen de droit international privé".
- 9:20 – *C. Hahn* (DG JLS, Commission européenne): "Les objectifs visés et les fondements de la compétence dans les textes de référence".
- 9:40 – *S. Francq* (Université Catholique de Louvain): "Les champs d'application (matériel et spatial) dans les textes de référence".
- 10:00 – Débats
- 11:00 – *F. Pocar* (Université de Milan): "Le choix des sous catégories et des éléments de rattachement dans les textes de référence".
- 11:20 – *H. Muir Watt* (Université Paris I): "L'autonomie de la volonté dans

les textes de référence".

- 11:40 – *S. Poillot Peruzzetto* (Université de Toulouse I): "L'ordre public et les lois de police dans les textes de référence".
- 12:00 – Débats

Présidente de séances: *H. Gaudemet-Tallon* (Université de Paris II)

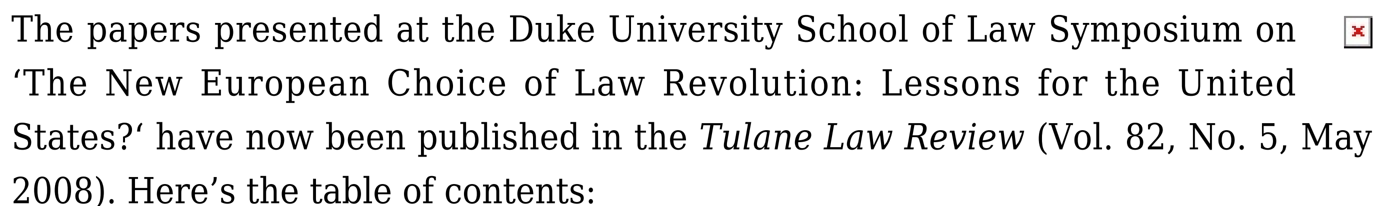
- 14:00 – *C. Kessedjian* (Université Paris II): "La relation des textes de référence avec le droit primaire".
- 14:20 – *M. Wilderspin* (Commission européenne): "La relation des textes de références avec le droit dérivé (et principalement les directives service et commerce électronique".
- 14:40 – *A. Borrás* (Université de Barcelone): "La relation des textes de référence avec les textes internationaux".
- 15:00 – Débats
- 16:00 – *J.S. Bergé* (Université de Paris Ouest Nanterre La Défense): "Les textes de référence et la dynamique interprétative de la Cour de justice".
- 16:20 – *L. Idot* (Université de Paris II): "Le cas du droit de la concurrence dans les textes de référence".
- 16:40 – Débats
- 17:00 – Synthèse: *P. Lagarde* (Université de Paris I).

No participation fee is required. Participants should register before 30 September (see the conference's leaflet).

(Many thanks to Federico Garau, Conflictus Legum blog)

Papers Published from the Duke Symposium on the European

Choice of Law Revolution



The papers presented at the Duke University School of Law Symposium on 'The New European Choice of Law Revolution: Lessons for the United States?' have now been published in the *Tulane Law Review* (Vol. 82, No. 5, May 2008). Here's the table of contents:

- *Ralf Michaels*, Introduction – The New European Choice-of-Law Revolution (available on SSRN);
- *Patrick J. Borchers*, Categorical Exceptions to Party Autonomy in Private International Law (available on SSRN);
- *Jan von Hein*, Something Old and Something Borrowed, but Nothing New? Rome II and the European Choice-Of-Law Evolution;
- *Dennis Solomon*, The Private International Law Of Contracts In Europe: Advances And Retreats;
- *Symeon C. Symeonides*, The American Revolution and the European Evolution in Choice of Law: Reciprocal Lessons (available on SSRN: see our dedicated post here);
- *Larry Catá Backer*, The Private Law of Public Law: Public Authorities as Shareholders, Golden Shares, Sovereign Wealth Funds, and the Public Law Element in Private Choice of Law (available on SSRN);
- *Jens Dammann*, Adjudicative Jurisdiction and the Market for Corporate Charters;
- *Onnig H. Dombalagian*, Choice Of Law and Capital Markets Regulation (available on SSRN);
- *Katharina Boele-Woelki*, The Legal Recognition of Same-Sex Relationships within the European Union;
- *Horatia Muir Watt*, European Federalism and the "New Unilateralism";
- *Linda J. Silberman*, Rethinking Rules of Conflict of Laws in Marriage and Divorce in the United States: What Can We Learn from Europe?;
- *Richard Fentiman*, Choice of Law in Europe: Uniformity and Integration;
- *William A. Reppy, Jr.*, Eclecticism in Methods for Resolving Tort and Contract Conflict Of Laws: the United States and the European Union;
- *Jürgen Basedow*, Federal Choice of Law in Europe and the United States – A Comparative Account of Interstate Conflicts;
- *Erin Ann O'Hara – Larry E. Ribstein*, Rules and Institutions in Developing

a Law Market: Views from the United States and Europe (available on SSRN);
- *William M. Richman*, A New Breed of Smart Empirically Derived Conflicts Rules: Better Law Than "Better Law" in the Post-Tort Reform Era: Reviewing Symeon C. Symeonides, The American Choice-Of-Law Revolution: Past, Present And Future (2006).

Information on subscribing to the *Tulane Law Review* can be found here.

For those who could not attend the event, **the webcast of the conference is available for viewing on the Duke University's website**, in five parts (RealMedia format):

1. **Welcome and Opening Remarks** (*Dean David F. Levi*, *Ralf Michaels*, and *Haller Jackson*) and **Panel 1: Contract and Tort Law**. Moderated by *Paul Haagen*. Panelists include *Jan von Hein*, *Symeon Symeonides*, *Dennis Solomon*, and *Patrick Borchers*.
2. **Panel 2: Corporate Law**. Moderated by *Jim Cox*. Panelists include *Larry Cata Backer*, *Jens Dammann*, and *Onnig Dombalagian*.
3. **Panel 3: Family Law.** Moderated by *Kathy Bradley*. Panelists include *Marta Pertegas*, *Katharina Boele-Woelki*, and *Linda Silberman*.
4. **Panel 4: Methods and Approaches**. Panelists include *Richard Fentiman*, *Ralf Michaels*, and *William Reppy, Jr*.
5. **Panel 5: Internal and External Conflicts, Federalism, and Market Regulation**. Panelists include *Jürgen Basedow*, *Mathias W. Reimann*, *Erin O'Hara*, and *Larry Ribstein*.

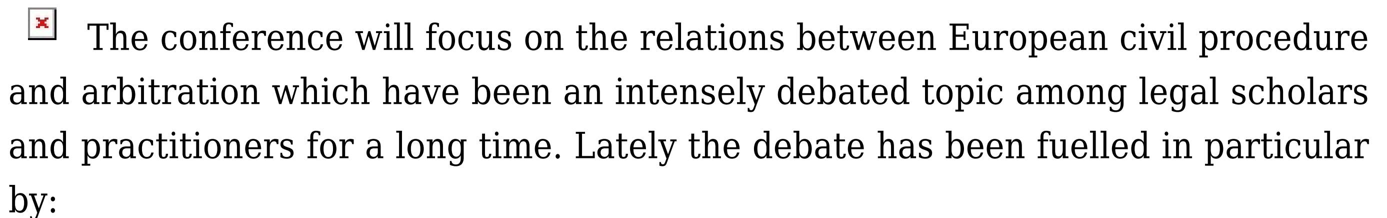
(Many thanks to Martin George.)

Conference: Arbitration and EC

Law

The Heidelberg Centre for International Dispute Resolution at the Institute for Private International and Comparative Law will host a conference with the topic

"Arbitration and EC Law – Current Issues and Trends".



The conference will focus on the relations between European civil procedure and arbitration which have been an intensely debated topic among legal scholars and practitioners for a long time. Lately the debate has been fuelled in particular by:

- the upcoming decision of the European Court of Justice which will decide on the availability of anti-suit injunctions for the protection of arbitral agreements (case C-185/07) – on September 4, 2008 GA Kokott proposed in her conclusions not to permit such remedies in the European Judicial Area,
- recent case law in several EC Member States addressing the arbitrability of EC antitrust law,
- the publication of a report, commonly known as the Heidelberg Report, analyzing – in view of the European Commission's upcoming proposals on possible improvements of the Brussels I Regulation in 2009 – the application of the Regulation in 25 Member States, which proposes to delete the arbitration exception in article 1 no. 2d in order to bring ancillary proceedings relating to arbitration under the scope of the Brussels I Regulation

The conference will take place from 5th to 6th December 2008 in Heidelberg. Here is the **conference program**:

Friday, Dec. 5, 2 p.m.

1. Free movement of arbitral awards: European challenges

Prof. Gomez Jene, Madrid

2. West Tankers Litigation – the present state of affairs

Att. Prof. H. Raeschke-Kessler, Karlsruhe

3. Articles 81 and 82 EC-Treaty and arbitration

Prof. P. Schlosser, Munich

4. The Regulations Rome I and Rome II: Their impact on arbitration

Prof. T. Pfeiffer, Heidelberg

Dinner

Saturday, Dec. 6, 9.30 a.m.

5. Roundtable: The Brussels I Regulation and arbitration

(Chair: *Prof. H. Kronke*)

5.1 Findings and proposals of the Heidelberg Report on the Regulation (EC) 44/01

Prof. B. Hess, Heidelberg

5.2 A French reaction

Att. Alexis Mourre, Paris

5.3 An English reaction

Att. VV. Veeder, London

5.4 A Belgian perspective

Prof. H. van Houtte, Leuven

5.5 An Italian reaction

Prof. C. Consolo, Verona.

The conference will end at 12.00.

Further information, in particular on registration and accomodation, can be found at the website of the Institute for Private International and Comparative Law Heidelberg.

Conferences: Organized by ERA Spring/Summer 2008

The Academy of European Law (ERA) organizes a number of private international law related conferences, seminars and courses during the spring and summer of 2008:

3rd European Forum for In-house Counsel, *Brussels, 24-25 Apr 2008*

- Description from the ERA website: For the third consecutive year, ERA and ECLA are organising the European Forum for In-House Counsel, combining the pragmatism of an in-house lawyer association with the expertise of a first-class European training institute. The European Forum for In-House Counsel provides a forum for the exchange of practical experience, knowledge and views between all in-house counsel and other lawyers involved in business affairs. The aim is to provide in-house counsel, through expert input, with a comprehensive overview of and a practical insight into issues of European Community law with which an in-house counsel is confronted. The latest developments and the recent relevant case law of the Community courts in areas such as European competition law, European company law, European private law, as well as the topic of legal privilege, will be analysed during the forum. Interaction among participants will be encouraged through periods of discussion and case studies.
- Target audience: In-house counsel and lawyers specialised in business affairs

Cross-Border Debt Recovery, *Trier, 15-16 May 2008*

- Description from the ERA website: Dr Angelika Fuchs (ERA) and Professor Burkhard Hess (University of Heidelberg) are organizing a conference on Cross-Border Debt Recovery. Freezing or “attaching” a debtor’s bank account(s) is a very effective way for creditors to recover the amount owed to them. Most Member States have legislation, which provides for the attachment of bank accounts. Debtors can, however, transfer funds very quickly to other accounts that the creditor may not know about. The creditor is often not able to block such movements of funds as quickly and therefore loses a powerful weapon against recalcitrant debtors. The European Commission feels that problems of cross-border debt recovery are an obstacle to the free movement of payment orders within the European Union and to the proper functioning of the internal market. Late payment and non-payment are a risk for businesses and consumers alike. The Commission therefore proposes the creation of a European system for the attachment of bank accounts. The consultation process initiated by the Green Paper on the attachment of bank accounts has inspired a vivid debate among practitioners, governments and academics. Furthermore, a second Green Paper on measures enhancing the transparency of the debtor’s assets will be published soon.
- Target audience: Lawyers in private practice, in-house lawyers, stakeholders, representatives of national authorities and academics specialised in civil procedure and banking law

Recent Developments in Private International Law and Business Law, *Trier, 5-6 Jun 2008*

- Description from the ERA website: Dr Angelika Fuchs, ERA, organizes a seminar on recent developments in private international law and business law. Private international law and business law continue to be characterised by growing Europeanisation. The purpose of this seminar will be to present the latest developments in both legislation and jurisprudence in the following areas: Brussels I Regulation and anti-suit injunctions; Intellectual property and conflict of laws; New Regulation (EC) No. 1393/2007 on the service of documents; New Directive on certain aspects of mediation in civil and commercial matters; New Regulation (EC) on the law applicable to contractual obligations (“Rome

I"); New Regulation (EC) No. 864/2007 on the law applicable to non?contractual obligations ("Rome II"); Trends in European company law: from Daily Mail to Sevic and Cartesio; Major decisions on cross-border insolvency.

- Target audience: Lawyers in private practice, in-house counsel in companies, associations, ministries and other public authorities, judges, notaries, academics

Summer Course: European Company Law, *Trier, 18-20 Jun 2008*

- Description from the ERA website: Tomasz Kramer, ERA, organizes a summer course on European company law. For the second time European company law will feature in ERA's series of summer courses in Trier. The impact of enlargement and globalisation on the internal market creates a special context for individuals and companies that operate across borders. The European Commission has launched a wide-ranging strategy to adapt and harmonise European company law to meet these new challenges. European law has considerably influenced the shape of modern company law in EU member states. Directives and the case law of the European Court of Justice have helped to harmonise national laws and regulations have introduced new legal forms for businesses. The 'Europeanisation' of company law continues apace. This course will offer an introduction to the principles and framework of European company law. It will provide a comprehensive overview of subjects including the formation of different types of companies, corporate governance and management options, capital requirements, shareholders' rights and insolvency. In addition, topics such as corporate restructuring and mobility as well as the characteristics of transnational financial vehicles will be addressed, albeit taking into consideration national particularities. The course will address current challenges and the latest legislative proposals. The analysis of ECJ case law will be an essential element of the course. Participants will have the opportunity to take a preparatory online e-learning module.
- Target audience: Young lawyers in private practice, public administration or in-house counsel, as well as advanced or postgraduate students, academics, economists or auditors seeking a detailed introduction to European company law

Summer Course: European Private Law, *Trier, 30 Jun-4 Jul 2008*

- Description from the ERA website: Nuno Epifânio, ERA, organizes a summer course on European private law. The purpose of this course is to introduce lawyers to European private law. Among the areas covered during the seminar will be: European Civil Procedure; Private International Law; Contract Law; Insolvency Law; Financial Services; Consumer Protection. This course should prove of particular interest to lawyers who wish to specialise in or acquire an in-depth knowledge of European private law. A general knowledge of EU law is suitable but no previous knowledge or experience in European Private Law is required to attend this course. Participants will be able to deepen their knowledge through case-studies and workshops. The course includes a visit to the European Court of Justice in Luxembourg. Participants will have the opportunity to take a preparatory onlinee-learning module.
- Target audience: Lawyers in private practice, in-house counsel, representatives of national authorities and academics

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Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts"

Recently, the March issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (**IPRax)** was released.

It contains the following **articles/case notes (including the reviewed decisions)**:

- ***R. Wagner/B. Timm*** on the German ministerial draft bill on the law applicable to companies, juristic persons and associations ("Der Referentenentwurf eines Gesetzes zum Internationalen Privatrecht der

Gesellschaften, Vereine und juristischen Personen”). The English abstract reads as follows:

Companies that operate across borders need clarity with regard to which respective national law applies to them. There are some decisions of the European Court of Justice on the right of settlement according to the Treaty which touch this matter. However, no uniform picture has yet emerged in the European Union. A uniform European regulation would be desirable, but the EU-Commission has not taken up this question yet. In order to promote legal certainty, the German Federal Ministry of Justice has therefore presented a ministerial draft bill on the law applicable to companies, juristic persons and associations. The bill might later on serve as the basis for work on a European regulation. As a general rule, the ministerial draft bill provides for the “law of establishment”, i.e. the law at the place of registration, as the law applicable to companies, legal persons and associations. For non-registered companies, legal persons and associations, the applicable law is to be that under which they are organised. Furthermore, the proposed bill clarifies the scope of “the law of establishment” and contains regulations regarding the law applicable to cross-border reorganisations, the change of applicable law and other aspects of cross-border cases.

- ***J. Fingerhuth/J. Rumpf*** on the consequences of the German MoMiG for cross-border relocations of German entities (“MoMiG und die grenzüberschreitende Sitzverlegung – Die Sitztheorie ein (lebendes) Fossil?”). Here is the English abstract:

The German government rendered a top-to-bottom reform of the German Law on Limited Liability Companies (‘GmbHG’) with the governmental draft of the MoMiG dated 23 May 2007. The reform also covers the German law on Stock Corporations (‘AktG’) and general corporate law matters. It is intended by the reform to abandon the required concurrence of statutory seat and seat of the head office of a company and, therefore, to allow German GmbHs and AGs to move their head office to another country (cross-border relocation). Both GmbH and AG will have the same opportunities as entities from countries, where the incorporation theory is applicable. The article discusses the consequences of the MoMiG for cross-border relocations of German entities. In particular, by

using the example of the GmbH & Co KG, the authors illustrate problems arising from the intentions of the MoMiG and the 'real seat' theory as it is currently applied in Germany. Furthermore, the authors discuss the need for German entities to completely apply the incorporation theory in Germany. The article comes to the conclusion that the 'real seat' theory will be entirely abandoned by the MoMiG becoming effective. The authors finally encourage the legislator to express this consequence literally within the reasoning of the MoMiG.

- ***A.-K. Bitter*** on the interpretative connection between the Brussels I Regulation and the (future) Rome I Regulation ("Auslegungszusammenhang zwischen der Brüssel I-Verordnung und der künftigen Rom I-Verordnung")
- ***A. Kampf*** on the implications of the European directive on services on PIL ("EU-Dienstleistungsrichtlinie und Kollisionsrecht"). The abstract reads:

On 28 December 2006, after a period of almost three years of debate and political manoeuvring, the European directive on services (2006/123/EC) came into force. It will have to be implemented by the Member States by 28 December 2009 at the latest. The directive applies to a wide range of service activities based upon the case law of the European Court of Justice relating to the freedom of establishment and the free movement of services. In order to make it easier for businesses to set up in other Member States or to provide services across-border on a temporary basis, each Member State shall set up Points of Single Contact. These shall ensure that providers have access to all necessary information and can complete the formalities necessary for doing business in other Member States. Moreover regulatory and authorization bodies across the EU are meant to cooperate more effectively. The directive is expected to engender consumer confidence in cross-border services through access to information. Restrictive legislation and practices shall be abolished after having been screened. A rather neglected aspect in public discussion are the directive's implications on private international law. Nevertheless they should be examined for both practical and systematic reasons.

- ***A. Fuchs*** on the question of international jurisdiction for direct actions

against the insurer in the courts of the Member State where the injured party is domiciled ("Internationale Zuständigkeit für Direktklagen"), (ECJ, 13.12.2007, C-463/06 (*FBTO Schadeverzekeringen N.V. v. Jack Odenbreit)*; Higher Regional Court Karlsruhe, 7.9.2007 – 14 W 31/07; Local Court Bremen, 6.2.2007 – 4 C 251/06). This is the English abstract:

The injured party may bring an action directly against the insurer in the courts of 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. This follows, according to the judgment of the ECJ, from the reference in Article 11 (2) of the Brussels I Regulation to Article 9 (1) (b). The previous judgment of the first instance court in Bremen was based on the same argument. However, according to a judgment of the court of appeal in Karlsruhe, courts at the place of domicile of the injured party lack international jurisdiction under the Lugano Convention. Fuchs argues that neither the wording nor the historic interpretation support the assumption of jurisdiction of the courts in the state where the injured party is domiciled. This situation has not been altered in the course of the transfer of the Brussels Convention into a regulation. The main argument in favour of admitting direct claims before the courts of the injured party's domicile can be drawn from the systematic interpretation. However, this additional place of jurisdiction will have undesirable consequences such as forum shopping and race to the court. In case of Article 11 (3), it will lead to unforeseeable results for the policyholder or the insured. Furthermore, it may have a negative economic impact for drivers in relatively poor Member States. The author criticizes the European legislator for not having discussed these issues openly in the context of the Brussels I Regulation.

- ***A. Staudinger*** on a decision of the German Federal Supreme Court on the scope of the head of jurisdiction of Art. 15 (2) Brussels I Regulation ("Reichweite des Verbrauchergerichtsstandes nach Art. 15 Abs. 2 EuGVVO"), (Federal Supreme Court, 12.6.2007 – XI ZR 290/06)
- ***E. Eichenhofer*** on a decision of the Higher Labour Court Frankfurt (Main) dealing with the question of international jurisdiction regarding contribution claims of German social security benefits offices against employers having their seat in another EU Member State ("Internationale

Zuständigkeit für Beitragsforderungen deutscher tariflicher Sozialkassen gegen Arbeitgeber mit Sitz in anderen EU-Staaten”), (Higher Labour Court Frankfurt (Main), 12.2.2007 – 16 Sa 1366/06)

- ***J. von Hein*** on the concentration of jurisdiction regarding appeals in cross-border cases according to § 119 (1) No. 1 lit. b GVG (“Die Zuständigkeitskonzentration für die Berufung in Auslandssachen nach § 119 Abs. 1 Nr. 1 lit. b GVG – ein gescheitertes Experiment?”), (Federal Supreme Court, 19.6.2007 – VI ZB 3/07 and 27.6.2007 – XII ZB 114/06)
- ***D. Henrich*** on the question of renvoi in PIL of names occurring due to a different qualification by foreign law (“Rückverweisung aufgrund abweichender Qualifikation im internationalen Namensrecht”), (Federal Supreme Court, 20.6.2007 – XII ZB 17/04)
- ***B. König*** on the requirements of due information as well as the scope of application of the Regulation creating a European Enforcement Order for uncontested claims (“EuVTVO: Belehrungserfordernisse und Anwendungsbereich”), (Regional Court Wels, 5.6.2006 – 1 Cg 159/06m, Higher Regional Court Linz, 4.7.2007 – 1 R 124/07x)
- ***A. Laptew/S. Kopylov*** on the requirement of reciprocity with regard to the enforcement of foreign judgments between the Russian Federation and Germany (Yukos Oil Company) (“Zum Erfordernis der Gegenseitgkeit bei der Vollstreckung ausländischer Urteile zwischen der Russischen Föderation und der Bundesrepublick Deutschland (Fall Yukos Oil Company)”), (Federal Commercial District Court Moscow, 2.3.2006 – KG-A40/698-06P)
- ***H. Krüger*** on the recognition and enforcement of foreign titels in Cameroon (“Zur Anerkennung und Vollstreckung ausländischer Titel in Kamerun”)
- ***A. Jahn*** on PIL questions in the context of withdrawals of wills due to marriage in anglo-american legal systems (“Kollisionsrechtliche Fragen des Widerrufs eines Testamentes durch Heirat in anglo-amerikanischen Rechtsordnungen”)
- ***C. Jessel-Holst*** on the Statute of Private International Law of the Republic of Macedonia (“Zum Gesetzbuch über internationales

Privatrecht der Republik Mazedonien")

Further, this issue contains the following **materials**:

- Statute of Private International Law of the Republic of Macedonia of 4 July 2007 ("Gesetz über internationales Privatrecht – Gesetz der Republik Mazedonien vom 4.7.2007")
- Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock – signed in Luxembourg on 23 February 2007 ("Protokoll von Luxemburg zum Übereinkommen über internationale Sicherungsrechte an beweglicher Ausrüstung betreffend Besonderheiten des rollenden Eisenbahnmaterials – unterzeichnet in Luxemburg am 23.2.2007")

As well as the following **information**:

- ***H.-G. Bollweg/K. Kreuzer*** on the Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock ("Das Luxemburger Eisenbahnprotokoll – „Protokoll zum Übereinkommen über internationale Sicherungsrechte an beweglicher Ausrüstung betreffend Besonderheiten des rollenden Eisenbahnmaterials" vom 23. 2. 2007")
- ***E. Jayme*** on the (critical) debate in France about the Community's competence in PIL which was made public by French PIL professors by means of open letters on this issue ("Frankreich: Professorenstreit zum Europäischen IPR – einige Betrachtungen")
- ***E. Jayme*** on the convention of the Ludwig-Boltzmann-Institutes in Vienna ("Kodifikation des IPR, des grenzüberschreitenden Zivilrechts und Zivilverfahrensrechts in der Europäischen Union – Tagung der Ludwig-Boltzmann-Institute in Wien")
- ***C. Gross:*** report on the 40th UNCITRAL session ("Bericht über die 40. Sitzung der Kommission der Vereinten Nationen zum internationalen Handelsrecht (UNCITRAL)")

For recent information on PIL see also the website of the Institute for Private International Law, Cologne.

(Many thanks to Prof. Dr. Heinz-Peter Mansel, editor of the journal (University of Cologne) for providing the English abstracts.)

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.

Conference: The European Traffic Law Days

From the conference website: The European Traffic Law Days have established themselves as a forum for professional training and the exchange of experience between traffic law experts. The congress will provide experts in liability and insurance law with an opportunity to obtain a comprehensive overview of current developments in European traffic law relevant to daily practice.

The main emphasis of this year's event will be on the development of case law in the European Union on punitive damages. A working group will be set up, initially

to determin the status quo, on the basis of which the fundamental problems involved in punitive damages will be discussed. Further topics are: Experience of the implementation of the fifth Directive; Elements of a sixth Directive (discussion on the progress achieved with the suggestions made during Trier VII); Minor accidents (improved enforcement of low-value claims involving traffic accidents abroad); The statute of limitations (European Parliament initiative); Rome II, the Regulation that governs the law applicable to traffic accidents abroad; The introduction of the recording of accident data Europe-wide; Simpler registration of motor vehicles abroad. Finally, current developments in European law and initiatives and developments in the harmonisation of European civil law will be discussed.

Target audience: All persons professionally involved in traffic law.

This conference to be held in Trier, 17-19 October 2007, is organised by ERA in cooperation with the Institute for European Traffic Law. This event will take place for the eighth time and will continue to be organised on an annual basis. The conference programme can be downloaded from the conference website.

Another article on Spider-in-the-Web doctrine after Roche ruling

Matthias Rößler's article "The Court of Jurisdiction for Joint Parties in International Patent Disputes" published in the *International Review of Industrial Property and Copyright Law (IIC)* Number 4, 2007, pp. 380-400, discusses a recently much debated issue related to the enforcement of international patent disputes against multiple defendants. The abstract of the article states:

> The paper discusses the development – and decline? – of the so-called "Spider-in-the-Web" rulings relating to the simplified filing of lawsuits against several cooperating companies in proceedings for the infringement of respective national patents in Europe. It shows the efforts and arguments that have been used in order to be able to apply Art. 6(1)

> of Council Regulation No. 44/2001 in cross-border patent disputes, and explains how the much-awaited *Roche* decision of the European Court of Justice brought clarity to the issue, yet not a globally viable solution.

The article is accessible on-line via the Beck-Online site.

Here are some of the previous references to the related issues posted here previously: Court Limits Extraterritoriality of Federal Patent Law, U.S. Federal Courts and Foreign Patents: Recent Decisions Affecting the Global Harmonization of Patent Law, CLIP papers on Intellectual Property in Brussels I and Rome I Regulations, Last Issue of Revue Critique de Droit International Privé, Patent Litigation in the EU – German Case Note on "GAT" and "Roche", Is Cross-Border Relief in European Patent Litigation at an End?, Jurisdiction over Defences and Connected Claims, Jurisdiction over European Patent Disputes, and the European Payment Procedure Order.

Maintenance Obligations: EP JURI Committee's Draft Opinion on the Commission's Proposal

On 11 April 2007 **Diana Wallis, in her capacity of draftswoman** appointed by the European Parliament's Committee on Legal Affairs (JURI) **for the maintenance obligations regulation**, has released a Draft opinion to be discussed at the committee's meeting of 2-3 May 2007.

Pursuant to Rule 47 of the European Parliament's Rules of Procedure (provisional version – January 2007), the maintenance regulation is subject to the **enhanced cooperation between committees**, since its subject matter "falls almost equally within the competence of two committees" (as determined in Annex VI to the Rules of Procedure), and it is under the primary responsibility of the Committee on Civil Liberties, Justice and Home Affairs (LIBE).

The amendments proposed by Mrs Wallis in her Draft opinion are thus intended

to be incorporated, after adoption in the JURI Committee, in the Draft Report to be prepared by the rapporteur in the LIBE Committee (Genowefa Grabowska): according to Rule 47,

> *the committee responsible shall accept without a vote amendments from the committee asked for an opinion where they concern matters which the chairman of the committee responsible considers, on the basis of Annex VI, after consulting the chairman of the committee asked for an opinion, to fall under the competence of the committee asked for an opinion, and which do not contradict other elements of the report.*

Mrs Wallis has presented 37 amendments to the original Commission's proposal. Some of them will be addressed in the following, and deal with the legal basis, jurisdiction and applicable law: as stated by the draftswoman in the "short justification" that opens the Draft opinion,

> *The solutions she proposes are pragmatic and intended to be acceptable to the broadest range of Member States. They may offend purists, but in her view the interests of litigants in having a speedy resolution of a problem which causes real hardship, also and in particular to children, must outweigh all other considerations, having due regard to the needs of maintenance debtors and the rights of the defence.*

Mrs Wallis made a similar statement commenting the EP Second Reading on Rome II (see our post on the debate in the Parliament, where she called on the other institutions to bring "the subject of private international law out of the dusty cupboards in justice ministries and expert committees into the glare of public, political, transparent debate"), and some of the proposed amendments to the maintenance regulation are likely to raise a controversial debate vis-à-vis the Council's and Commission's solutions, especially if the codecision procedure will be finally established for the adoption of the act, as envisaged by the Parliament itself and the Commission (see below).

Legal basis

At present, the adoption of the maintenance regulation is subject to an unanimous vote in the Council, after the consultation of the European Parliament: the

codecision procedure, ordinarily set out by the second indent of art. 67(5) of the Treaty for all measures provided for in art. 65, is in fact not applicable to measures involving “aspects relating to family law”.

The situation is deemed unsatisfactory by the Commission itself, that in December 2005 presented a Communication to the Council calling on it to transfer maintenance obligations from the unanimity to the codecision procedure, using the “passerelle” provided for by art. 67(2) TEC. The Commission stressed

> *the hybrid nature of the concept of maintenance obligation – a family matter in origin but a pecuniary issue in its implementation, like any other claim.*

The same view is obviously shared by the Parliament (see the letter from the JURI Committee to the LIBE Committee of 14 February 2007) and reflected in the amendments of the legal basis of the proposed regulation (see amendments 1, 2 and 3 of the JURI Draft opinion).

Jurisdiction (artt. 3-11 of the Commission’s Proposal)

The draftswoman’s main concern is to ensure that any prorogation of jurisdiction has been freely and consciously agreed by the parties, being aware of its legal consequences, and that an *ex ante* choice of forum “is still relevant having regard to the situation of the parties at the time when the proceedings take place” (see amendment 6 to recital 11): it is thus proposed to confer to the court seised a discretionary power to assess the jurisdiction agreement, adding a new paragraph 2a to art. 4 (“Prorogation of jurisdiction”), according to which

> *The court seised must be satisfied that any prorogation of jurisdiction has been freely agreed after obtaining independent legal advice and that it takes account of the situation of the parties at the time of the proceedings (amendment 22).*

As regards the form of the choice-of-forum agreement, communication by electronic means is not deemed equivalent to “writing”, and thus excluded from art. 4(2) (see amendment 21).

Applicable law (artt. 12-21 of the Commission’s Proposal)

A number of important modifications are envisaged by the draftswoman in the

provisions concerning the applicable law. The law of the country of the creditor's habitual residence is maintained as basic rule, but an almost systematic application of the law of the forum is advocated by art. 13(2) and (3), as resulting from the amendments. Moreover, the exception clause set out in art. 13(3) ("General rules") of the Commission's Proposal is given a wider scope, since it is possible to apply the law of another country with which the maintenance obligation is closely connected (such as the law of the country of the common nationality of the parties) also when "it would be inequitable or inappropriate" to apply the law of the country of the creditor's habitual residence or the *lex fori*.

According to the revised text of art. 13 (amendment 25: French and Italian versions differ from the English one, the latter showing some mistakes in the translation),

> *1. Maintenance obligations shall be governed by the law of the country in whose territory the creditor is habitually resident.*
>
> *2. The law of the forum shall apply:*
>
> *(a) where it is the law of the country of the creditor's habitual residence, or*
>
> *(b) where the creditor is unable to obtain maintenance from the debtor by virtue of the law of the country of the creditor's habitual residence, or*
>
> *(c) unless the creditor requests otherwise and the court is satisfied that he or she has obtained independent legal advice on the question, where it is the law of the country of the debtor's habitual residence.*
>
> *3. Notwithstanding paragraph 1, the law of the forum may be applied, even where it is not the law of the country of the creditor's habitual residence, where it allows maintenance disputes to be equitably resolved in a simpler, faster and less expensive manner and there is no evidence of forum shopping.*
>
> *4. Alternatively, where the law of the country of the creditor's habitual residence or the law of the forum does not enable the creditor to obtain maintenance from the debtor or where it would be inequitable or inappropriate to apply that law, the maintenance obligations shall be governed by the law of another country with which the maintenance obligation is closely connected, in particular, but not exclusively, that of the country of the common nationality of*

> *the creditor and the debtor.*

The provision in art. 13(2)(a) seems not necessary; under the conditions set out in art. 13(2)(c) for the application of the law of the forum (as the law of the country of the debtor's habitual residence) it is not clear whether the creditor has a burden to expressly invoke the application of the law of the country of his habitual residence.

The preference expressed by the draftswoman for the *lex fori* is stressed by the conditions set out in art. 13(3) for this law to be discretionary applied by the court, and is clearly stated by Mrs Wallis in the justification accompanying amendment 7 to recital 14:

> *The Regulation's aim of enabling maintenance creditors easily to obtain a decision which will be automatically enforceable in another Member State would be frustrated if a solution were to be adopted which obliged courts to apply foreign law where the dispute could be resolved simpler, faster and more economically by applying the law of the forum.*
>
> *Application of foreign law tends to prolong proceedings and lead to additional costs being incurred in procedures which often involve an element of urgency and in which litigants do not necessarily have deep pockets. Moreover, in some cases application of the law of the creditor's country of habitual residence could give rise to an undesirable result, as in the case where the creditor seeks a maintenance order in the country of which she is a national having sought refuge there after leaving the country in which she had been habitually resident with her husband who is of the same nationality, who is still resident there.*
>
> *On these grounds, this amendment provides for the discretionary application of the law of the forum, whilst safeguarding against forum shopping.*

As regards the choice of the applicable law by the parties, also in respect of a choice-of-law agreement a discretionary power is given to the court seised to assess whether it "has been freely agreed after obtaining independent legal advice" (see amendment 26, inserting a new para. 1a to art. 14).

Finally, the draftswoman proposes the deletion of art. 15, on the non-existence of a maintenance obligation that the debtor may oppose to the creditor's claim

under a law different than the applicable one (see amendment 27: this provision is deemed "to conflict with the principle of mutual recognition and to be discriminatory").

Public policy

An important amendment is proposed as regards the *ordre public* clause provided in art. 20: in the original Commission's proposal, public policy could not operate vis-à-vis the law of a Member State. The draftswoman advocates the deletion of this intracommunity exemption, thus allowing the application of the law of a Member State to be refused on such a ground (see amendment 29).

Alternative means of enforcement

Special attention is devoted by the draftswoman to issues relating to enforcement of maintenance decisions:

> *The draftswoman's chief concern in preparing these amendments to the proposal for a regulation has been to ensure that decisions relating to maintenance obligations, in the broadest sense of the expression, in cross-border cases are recognised and enforced across the Union in the quickest and most effective way at the lowest possible cost. […]*
>
> *While suggesting improvements to the provisions of the proposed regulation, the rapporteur takes the opportunity of calling on the Member States to consider novel forms of enforcement of maintenance decisions which have been found to be highly effective in non-EU jurisdictions.*

An example of these "novel and effective means of enforcement" is given in the justification to amendment 11 (recital 19): confiscation of driving licences.

On the other hand, a new art. 35a is proposed (see amendment 34), which allows courts to "use the full panoply of measures available to them under their national law", not being limited to the orders listed in the regulation:

> *Article 35a – Other enforcement orders*
>
> *The court seised may order all such other measures of enforcement as are provided for in its national law which it considers appropriate.*

The maintenance regulation is scheduled in the plenary session of the European Parliament on 3 September 2007 (see the OEIL page on the status of the procedure); the JHA Council agreed on some political guidelines on the matter in its recent session in Luxembourg on 19 and 20 April 2007 (see our posts here and here).