General Principles of Procedural Law and Procedural Jus Cogens

Professor S.I. Strong has just posted a new paper on international procedural law. From the abstract:

General principles of law have long been central to the practice and scholarship of both public and private international law. However, the vast majority of commentary focuses on substantive rather than procedural concerns. This Article reverses that trend through a unique and innovative analysis that provides judges, practitioners and academics from around the world with a new perspective on international procedural law.

The Article begins by considering how general principles of procedural law (international due process) are developed under both contemporary and classic models and evaluates the propriety of relying on materials generated from international arbitration when seeking to identify the nature, scope and content of general principles of procedural law. The analysis adopts both a forward-looking, jurisprudential perspective as well as a backward-looking, content-based one and compares sources and standards generated by international arbitration to those derived from other fields, including transnational litigation, international human rights and the rule of law.

The Article then tackles the novel question of whether general principles of procedural law can be used to develop a procedural form of jus cogens (peremptory norms). Although commentators have hinted at the possible existence of a procedural aspect of jus cogens, no one has yet focused on that precise issue. However, recent events, including those at the International Court of Justice and in various domestic settings, have demonstrated the vital importance of this inquiry.

The Article concludes by considering future developments in international procedural law and identifying the various ways that both international and domestic courts can rely on and apply the principles discussed herein. In so doing, this analysis provides significant practical and theoretical assistance to judges, academics and practitioners in the United States and abroad and offers

International Protection of Human Rights and Activities of Transnational Corporations

Prof. Dr.Dr. Fabrizio Marrella has just published his course entitled "Protection internationale des droits de l'homme et activités des sociétés transnationales/International Protection of Human Rights and Activities of Transnational Corporations", delivered at The Hague Academy of International Law in 2013, as vol. 385, 2016, of the Recueil des cours/Collected Courses (RCADI).

Here is a short abstract:

Since the 1960's the regulation of multinational corporations has become a hot topic in the international agenda. Fifty years later, the negative (or positive) impact of transnational corporations activities on human rights has steadily increased. Economic globalization has largely involved the activities of transnational corporations and such a trend has even been powered by Nation States. Since the end of the Second World War, Governments have liberalised trade and investment flows and more recently, to cut public deficits, they have started the decentralization, outsourcing and privatization of certain classic functions of the State. International Human Rights Law is based on an inter-State matrix where international responsibilities are imposed on Nation-States, not directly on corporations. Therefore, forum shopping and law shopping strategies have been used by some transnational corporations in order to hide behind State sovereignty while benefiting from dogmas of Public International Law denying any international responsibility for them.

In 2011, the UN Human Rights Council unanimously adopted the UN Guiding

Principles on Business and Human Rights (UNGPs), which is the first global standard for preventing and addressing the risks of adverse impacts on human rights linked to business activities. The UNGPs encompass three pillars outlining how states and businesses should implement the framework: 1) The state duty to protect human rights; 2) The corporate responsibility to respect human rights and 3) Access to remedy for victims of business-related abuses.

Such a framework clearly identifies different roles and "responsibilities" but does not differentiate situations of "accountability" from those of "legal responsibility". It makes Corporate Social Responsibility operative through the obligation of "due diligence" and impact evaluations to identify and remedy adverse effects.

All that has implications both for public international law and for private international law. Private international law analysis, in particular, becomes crucial to explore, as it is done in the second part of the course, the legal meaning of the implementation of the third pillar of the UNGPs, i.e. on access to remedies for victims of violations of human rights committed in the context of business activities. If remedies precede rights, it is regrettable that the third pillar turns out to be the weakest one as compared to the other two. Indeed, it becomes evident that the proliferation of international treaties of protection of human rights, international acts, supervisory bodies, laws, initiatives of RSE or doctrinal studies, risk to remain just different forms of political dialogue if they have no effective legal use for victims on the ground.

Further information, including a table of contents and some extracts, is available on the publisher website.

The Mexican Academy of Private

International and Comparative Law organises its XL Seminar on Private International Law

The Mexican Academy of Private International and Comparative Law (AMEDIP) will be hosting its XL Seminar entitled "The Migration of Persons and Capital within the Framework of Private International Law" at the Universidad Autónoma de San Luis Potosí (San Luis Potosí, Mexico) from 15 to 17 November 2017. The seminar will focus on a wide array of topics such as international legal cooperation, international family law, international contracts, and alternative dispute resolution.

Potential speakers are invited to submit a paper in Spanish, English, French or Portuguese by 1 October 2017. Papers must comply with the criteria established by AMEDIP and will be evaluated accordingly. Selected speakers will be required to give their presentations preferably in Spanish as there will be no interpretation services but some exceptions may be made by the organisers upon request.

The final programme of the seminar will be made available by mid-October. It is envisaged that registration for the seminar will be free of charge for all participants by sending a message to the e-mail included below. Please note that space is limited.

More detailed information will soon be made available on the Mexican Academy website http://www.amedip.org/amedip_mexico/. Some information is already available on the Facebook page of the Mexican Academy, click here. Any queries, as well as registration requests, may be directed to asistencia@amedip.org.

2018 Nygh Hague Conference Internship Award

Applications for the 2018 Nygh Hague Conference Internship Award are open and close on 30 September 2017.

The award contributes towards the costs of a student or graduate of an Australian law school working for up to six months at the Secretariat of the Hague Conference on Private International Law in the Netherlands. It aims to foster Australian involvement in the work of the Hague Conference and is established in honour of the late Hon. Dr. Peter Nygh AM. The Australian Institute of International Affairs and the Australian Branch of the International Law Association sponsor the award.

Further details and information on how to apply is available at: http://www.internationalaffairs.org.au/news-item/2018-nygh-internship-applications-open/.

Recent publications by Prof. Symeonides

Prof. Symeon C. Symeonides, Willamette University - College of Law, uploaded recently two articles on SSRN.

The Third Conflicts Restatement's First Draft on Tort Conflicts

Abstract

This Article discusses the first draft of the proposed Third Conflicts Restatement

dealing with tort conflicts. The Draft's most noteworthy features include: (1) the distinction between conduct-regulating and loss-allocating tort rules; (2) the application of the law of the parties' common home state in loss-allocation conflicts; and (3) a rule giving victims of cross-border torts the right to request the application of the law of the state of injury, if the occurrence of the injury there was objectively foreseeable,

The Draft is a vast improvement from the Second Restatement. It accurately captures the decisional patterns emerging in the more than forty U.S. jurisdictions that have joined the choice-of-law revolution, and which have been cast in statutory form in the successful codifications of Louisiana and Oregon. It strikes an appropriate equilibrium between certainty and flexibility and generally makes good use of the lessons of the revolution without reproducing its excesses.

Suggested citation:

Symeonides, Symeon C., The Third Conflicts Restatement's First Draft on Tort Conflicts (August 5, 2017). Tulane Law Review, Vol. 92, 2017. Available at SSRN: https://ssrn.com/abstract=3014068

What Law Governs Forum Selection Clauses

Abstract

This Article examines how American courts answer the question of which law governs the enforceability and interpretation of forum selection (FS) clauses in cases that have contacts with more than one state. It divides the cases into categories, depending on whether the question is litigated in the court chosen in the FS clause or in another court, and whether or not a choice-of-law clause accompanies the FS clause.

The Article finds that: (1) When the action is filed in the court chosen in the FS clause, all courts ap-ply the internal law of the forum state, without any choice-of-law analysis, both in interpreting the clause and in determining its enforceability; and (2) When the action is filed in another court, most courts apply the internal law of the forum (with or without a choice-of-law analysis) in determining whether

the clause is enforceable and the law that governs the contract in interpreting the clause.

The Article explains why the distinction between interpretation and enforceability is necessary, and why the application of forum law to the question of enforceability is appropriate.

Suggested Citation:

Symeonides, Symeon C., What Law Governs Forum Selection Clauses (August 5, 2017). Louisiana Law Review, Vol. 78, No. 4, 2018. Available at SSRN: https://ssrn.com/abstract=3014070

In addition, mention needs to be made to his recent lecture at the Hague Academy, which was published June this year.

Private International Law: Idealism, Pragmatism, Eclecticism. General Course on Private International Law, Volume 384

More details can be found here.

Jurisdiction, Conflict of Laws and Data Protection in Cyberspace - Conference in Luxembourg, 12 October 2017

The Max Planck Institute for Procedural Law in Luxembourg and the Vrije Universiteit Brussel are jointly organising a Conference on 'Jurisdiction, Conflict

of Laws and Data Protection in Cyberspace' which intends to contribute to the ongoing discussion on the challenges to the protection of privacy in the Digital Age. The organizers describe this event as follows:

"Thanks to the Internet, people who are thousands of miles apart can effortlessly engage in social interactions, business transactions and scientific dialogue. As pointed in by John Perry Barlow in his famous 'Declaration of the Independence of Cyberspace', all these activities rely – more or less consciously – on sophisticated data-exchanges which take place 'both everywhere and nowhere', lying outside the borders of any particular State.

Against this backdrop, the regulatory challenge posed by the ephemeral nature of the information exchanged via the Web – and of the Web itself – is twofold. While Private International Law struggles to frame the allegedly borderless nature of cyberspace within the dominant discourses of law and territoriality, Data Protection Law has to reconcile the individuals' fundamental right to privacy with the public interests connected to the processing of personal data.

The conference will explore some of the most controversial issues lying at the intersection between these two areas of law, by addressing, in particular, the problems arising in connection with cross-border telematics exchanges of data in the field of biomedical research and the contractual relationships stemming from social networking and the use of social media."

The conference will take place at the Max Planck Institute in Luxembourg on Thursday, 12 October 2017. Participation is free of charge. For a list of speakers, the full programme and details on registration, please see here.

Implementation of Art. 56 Brussels IIa in Greece

Following the formation of a specialized law drafting committee nearly 4 years ago, the implementation Act on cross border placement of children in accordance

with Art. 56 Brussels IIa has been published in the Official State Gazette on June 23, 2017. The 'Act' constitutes part of a law, dealing with a number of issues irrelevant to the subject matter in question. The pertinent provisions are Articles 33-46 Law 4478/2017.

Art. 33 establishes the competent Central Authority, which is the Department for International Judicial Cooperation in Civil and Criminal Cases, attached to the Hellenic MoJ. Art. 34 lists the necessary documents to be submitted to the Greek Central Authority. Art. 35-37 state the requirements and the procedure for the placement of a child to an institution or a foster family in Greece. Advance payment for covering the essential needs of the child, and the duty of foreign Authorities to inform the respective Greek Central Authority in case of changes regarding the child's status, are covered under Art. 38 & 39 respectively.

Art. 40 regulates the reverse situation, i.e. the placement of a Greek minor to an institution or a foster family within an EU Member State. A prior consent of the competent foreign State Authority is imperative, pursuant to Art. 41. The necessary documents are listed under Art. 42, whereas the procedure to be followed is explained in Art. 43. The modus operandi regarding the transmission of the judgment to the foreign Authority is clarified in Art. 44. A duty of the Prosecution Office for minors to request information on the status of the child at least every six months is established under Art. 45. Finally, Art. 46 covers aspects of transitional nature.

Prima facie it should be stated that the implementing provisions are welcome. In a country where not a single domestic tool has been enacted in the field of judicial cooperation in civil matters since the Brussels Convention era, this move allows us to hope for further initiatives by the government. However, swiftness is the key word in the matter at stake, and I wouldn't be sure whether the procedure enacted would fully serve the cause.

Beyond that, there are some other hot topics related to the Brussels IIa Regulation and its implementation in Greece, the first and foremost being the rules and procedures for issuing the certificates referred to in Art. 39, 41 & 42 [Annexes I-IV of the Regulation]. Bearing in mind that the latter forms almost part of the court's daily routine (at least in major first instance courts of the country), priority should have been given to an implementing act providing guidance on this issue, in stead of opting to elaborate on a matter with seemingly minimal

practical implications.

Last but not least, it should be reminded that a relevant study has been released last year, commissioned by the Policy Department for Citizens' Rights and Constitutional Affairs at the request of the JURI Committee of the European Parliament, which may be retrieved here.

The application of the 1996 Hague Child Protection Convention to unaccompanied and separated migrant children

The Permanent Bureau of the Hague Conference on Private International Law has recently issued a document illustrating the application of the 1996 Hague Child Protection Convention to unaccompanied and separated children.

The document, drafted in preparation of the upcoming meeting of the Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, concludes that dialogue and collaboration "should be facilitated between authorities responsible for international co-operation in child protection matters – at both the domestic and international levels – with those responsible for immigration and asylum matters, with regard to the operation of the 1996 Convention in order to better assist unaccompanied and separated children across borders".

The hope is also expressed, among other things, that "UNICEF and UNHCR officials will meet with government officials from some Central Authorities designated under the 1996 Convention to discuss and examine the application of the 1996 Convention to unaccompanied and separated children" and that "the global implementation of the 1996 Convention will assist with the on-going elaboration and future realisation of the United Nations Global Compact on

Refugees and Global Compact for Migration", referred to in the New York Declaration for Refugees and Migrants adopted by the General Assembly of the United Nations on 19 September 2016.

New Editors for Conflict of Laws.net: Welcome on board!

The editors of CoL decided to enlarge their team in order to increase the coverage of certain jurisdictions and regions. All (existing and new) editors are of course free and encouraged to report on interesting issues beyond their home jurisdictions.

Today we very warmly welcome on board (in alphabetical order):

Mukarrum Ahmed (UK)

Asma Alouane (France)

Apostolos Antimos (Greece)

Pamela Bookman (USA)

Mayela Celis (Hague Conference)

Adeline Chong (Singapore)

Rui Dias (Portugal)

Maria Hook (New Zealand)

Antonio Leandro (Italy)

Brooke Adele Marshall (Australia)

Ralf Michaels (USA)

Rahim Moloo (USA)

Marie Nioche (France)

Hakeem Olaniyan (Africa)

Richard Oppong (Africa)

Ekaterina Pannebakker (Russia)

Sophia Tang (China/UK)

Zeynep Derya Tarman (Turkey)

Guangjian Tu (China)

Please feel invited to click on the profiles of the new editors and learn more about them (if you do not know them already anyway). The existing editors are looking forward to working with their new colleagues on CoL and to seeing more of the intriguing field of the conflict of laws worldwide.

Giesela and Matthias

Opinion of Advocate General Bobek on jurisdiction in cases concerning violations of personality rights on the internet (Bolagsupplysningen, C-194/16)

We have already alerted our readers to the preliminary reference triggered by the Estonian Supreme Court concerning violations of personality rights of legal persons committed via the internet (Bolagsupplysningen OÜ, Ingrid Ilsjan v.

Svensk Handel AB; see our previous post here). Recently, AG Bobek has presented his conclusions in this case (see here). **Anna Bizer**, doctoral candidate at the University of Freiburg, has kindly provided us with her thoughts on this topic:

After the case *eDate* (C-509/09 and C-161/10), the CJEU will have to rule on the question of how Art. 7 (2) Brussels Ibis is to be interpreted when personality rights are violated on the internet for the second time. This case provides not only the first opportunity to confirm or correct the Court's ruling on *eDate*, but also poses further questions:

- 1) Which courts have jurisdiction when the claimant seeks removal of the publication in question?
- 2) Should legal persons be treated the same way as natural persons under Art. 7(2) Brussels *Ibis* concerning personality rights?
- 3) If question 2) is to be answered in the affirmative, where is the centre of interest of a legal person?

AG Bobek holds the following opinion:

- •In cases concerning personality rights violations on the internet, the place where the damage occurs is the place where the claimant has his centre of interest – regardless of whether the claimant is a natural or legal person. The same applies to claims of removal.
- •The place where a legal person conducts its main professional activities is its centre of interest.
- It is possible that a person has more than one centre of interest.
- •The mosaic approach as developed in case *Shevill* should not be applied to personality infringements on the internet at all.

The facts

The claimant is an Estonian company operating mostly in Sweden whose management, economic activity, accounting, business development and personnel department are located in Estonia. The company claims to have no foreign representative or branch in Sweden. A Swedish employers' federation blacklisted the Estonian company for "deals in lies and deceit" on its website, what led to an enormous amount of comments capable of deepening the harm to the company's reputation. All information and comments were published in Swedish and caused

a rapid decrease in turnover, which was listed in Swedish kroner.

The Estonian company brought an action before Estonian courts asking for rectification of the published information and removal of the comments from the website as well as damages for pecuniary loss. The referring court doubted its jurisdiction based on the Brussels Ibis Regulation.

The Law

The basic principle in jurisdiction is that claims have to be brought before the courts where the defendant is domiciled (Art. 4 Brussels Ibis). According to Art. 7 Brussel Ibis, the claimant can also choose to sue before the courts of a member state that have special jurisdiction, i.e. in tort cases, the place where the harmful event originated as well as the place where the harm was suffered. In Shevill (C-68/93), the CJEU ruled that the courts of those member states have jurisdiction where the establishment of the publisher is located as well as the courts of the state in which the newspaper was published and where the claimant asserts to have suffered harm to his reputation. The latter jurisdiction is limited to the harm suffered in this member state. Concerning the violation of personality rights and reputation on the internet (eDate), the CJEU transferred the Shevill-ruling to online publications and added a third possibility: the courts of the member state where the victim has his centre of interest.

Reasoning of AG Bobek

AG Bobek answers the questions in three parts: First, he explains why the jurisdiction of the courts in the member state where the centre of interest is located should be open to legal persons as well (A). In a second step, he proposes a more strict interpretation of Art. 7 (2) Brussels Ibis compared to the case eDate and gives reasons why the mosaic approach should not be applied to personality infringements on the internet at all (B). In the last part, he aims at giving an alternative solution for claims for an injunction ordering the rectification and removal if the CJEU decides to continue with the mosaic approach (C).

(A) AG Bobek sees the main reason for creating the new head of jurisdiction in *eDate* in the protection of fundamental rights. Examining the case law of the CJEU and the ECtHR, he records that the personality and the reputation of legal persons are protected but restrictions are easier to justify that restrictions to rights of natural persons. In his opinion, fundamental rights should not be valued

differently. Hence, the protection of fundamental rights of natural persons as intended by eDate should be at the same level as the protection of the fundamental rights of legal persons.

He recommends, however, that the CJEU puts aside the issue of fundamental rights since the Brussels Ibis regulation must be applied to determine jurisdiction as long as a legal person can sue the alleged violator of its personality rights or reputation according to the Member States' law. Therefore, the CJEU has to answer the Estonian court's questions regarding its jurisdiction irrespective of the level of protection.

As Art. 7 (2) Brussels *Ibis* is applicable to claims concerning the violation of personality rights of a legal person, a distinction between legal and natural persons within this regulation might only be justified if natural persons were typically the "weaker party". AG Bobek objects to this general assumption mentioning the diversity of legal persons, on the one hand, and the growth of power that natural persons experience thanks to the medium internet on the other hand. He also points out that special jurisdiction does not aim to protect a weaker party but to "facilitate the sound administration of justice" (Recital 16 Brussels *Ibis*). Therefore, natural and legal persons should not be treated differently under Art. 7 (2) Brussels *Ibis*.

(B) According to AG Bobek, the mosaic approach is not adequate for cases concerning the violation of personality rights on the internet. As online publications can be accessed worldwide, lawsuits might be brought in all 28 member states. The mosaic approach is based on the idea that the harm in one member state can be measured. But unlike newspapers online publications do not have a number of copies that can be counted. Especially due to the easy access to machine translation it is impossible to measure the harm suffered in one member state. The opportunity to sue in 28 different states leads to the possibility of abuse and is also not compatible with the aim of predictability of jurisdiction. The mosaic approach also provokes difficulties to coordinate the different proceedings, especially concerning *lis pendens* and *res judicata*.

Therefore, AG Bobek proposes the following: The place where the event giving rise to harm took place should be the location of the person(s) controlling the information typically being identical with the domicile of the publisher. The place where the harm occurred should be "where the protected reputation was most strongly hit", i.e. the person's centre of interest.

According to AG Bobek, the centre of interest depends on "the factual and social

situation of the claimant viewed in the context of the nature of the particular statement". For natural persons, the habitual residence should be the basic element. Concerning legal persons, the centre of interest is in the member state where it "carries out its main professional activities provided that the allegedly harmful information is capable of affecting its professional situation". That is supposed to be where the legal person records the highest turnover or, in the case of non-profit organisations, where most of the clients can be located.

AG Bobek argues that in respect of a specific claim, a (natural or legal) person can have more than one centre of interest. Consequently, a claimant with more than one centre of interest can choose between several member states. Each jurisdiction identified that way comprises the entire harm suffered.

(C) Concerning the rectification and removal of a publication, AG Bobek states that those claims are indivisible by nature because of the unitary nature of the source. AG Bobek argues that an alternative solution is actually impossible even if the CJEU prefers to continue with the mosaic approach.

The overall result remains that the mosaic approach is not an adequate solution for personality infringement on the internet.

Assessment of the AG's opinion

AG Bobek raises some important issues concerning the infringement of personality rights on the internet. Following the AG's opinion, the result will typically be that Art. 7 (2) Brussels Ibis allows the claimant to sue before the courts of the member state where he has his domicile. Thus, it creates a forum actoris that is the complete opposite of the basic rule of jurisdiction according to which the claimant has to sue at the domicile of the defendant (Art. 4 Brussels Ibis). Exceptions to a basic rule should be applied restrictively and only where the law explicitly allows doing so or where the aim of the law requires an exception.

Concerning the place where the event giving rise to harm took place, I can agree with AG Bobek. In internet cases, the crucial place of acting is normally the place where the allegedly infringing publication was uploaded. The disadvantage of this approach is that this place can be random and may lack the specific connection to the place. This applies especially when a natural person uploads the publication while travelling. Thus, the approach of the AG proposing the place where the person normally has control over the publication avoids jurisdiction based on a merely fugitive connection to a member state.

AG Bobek quite rightly points out that the mosaic approach is not adequate for the medium internet due to the worldwide accessibility. And since the European conflict-of-law system excludes personality rights and reputation (Art. 1(2)(g) Rome II), the mosaic approach applied to online cases can provoke forum shopping – especially if applied to claims for an injunction for rectification or removal.

The CJEU maybe should consider determining the centre of interest by other criteria that take more into account the specific circumstances of the case. Applying the definition of AG Bobek, the place where the harm occurs will almost always be where the claimant has his main administration (or his habitual residence in case of a natural person) irrespective to how strong the connection to another state may be. In the case at hand, the pecuniary damage and the economic consequence are probably in Estonia but the appearance of the company is mainly affected in Sweden. For example, the comments (mainly in Swedish and uploaded from Sweden) can not only be personality violations themselves but also show that the originally published information affected the reputation of the company in Sweden.

Furthermore, it is doubtful whether a person can have various centres of interest. It shifts the balance of interests that was tried to reach in *eDate* to the advantage of the claimant: the claimant may ask for the entire damages in another state than the state of the defendant's domicile (advantage to the claimant) but he cannot choose between different states— and thus between different choice-of-law rules—as it would be possible under the mosaic approach (advantage for the defendant). Of course, there might be cases where the centre of interest is difficult to identify. The approach of the AG, however, implies that in those difficult cases the claimant might just choose. I am not sure if this really fosters predictability. Besides, it is somehow contradictory because the concept of the centre of interest is that even if the person-ality is affected in another state to a considerable extent, the courts in that state should not have jurisdiction.

I cannot agree with the AG concerning the relevance of fundamental rights. Of course, the level of protection is not relevant to the question whether the Brussels Ibis Regulation is applicable or not – including special jurisdiction. Nevertheless, the fundamental rights can influence how jurisdictional rules have to be interpreted. AG Bobek himself states that *eDate* can be understood as the protection of fundamental rights. Thus, the CJEU should consider whether the

decision on *eDate* offering a claimant-friendly approach is owed to the fact that it is necessary to protect fundamental rights of the affected natural persons. If that is the case, the reasoning cannot simply be transferred to legal persons. It is rather necessary to check if the personality rights and the reputation of a legal person can justify the restrictions to the rights of the defendant, e.g. freedom of speech.