


ICLQ Articles on *Harding v Wealands* and the Law of Domicile

There are two short articles in the private international law current developments section of the new issue of the *International & Comparative Law Quarterly* (2007, Volume 56, Number 2). 

Charles Dougherty and Lucy Wyles (2 Temple Gardens) have written a casenote on the decision of the House of Lords in ***Harding v Wealands*** [2006] UKHL 32 (see all of our relevant posts here.) Here's the introduction:

In Harding v Wealands¹ the House of Lords had to consider the vexed question of where the dividing line between substance and procedure should lie in private international law. The specific issue before their Lordships was whether matters relating to the assessment of damages in tort should be treated as matters of substance, and thus be for the applicable law, or whether they should be treated as matters of procedure, and therefore be left for the law of the forum. The decision of the House of Lords has resolved this difficult question in favour of a procedural characterization. The result of the House of Lords decision is that in all such cases, regardless of the foreign law element, the assessment of damages will be conducted in accordance with English (Northern Irish or Scottish) law, as the law of the forum. Nonetheless, some reservations do exist as to the justification for the decision and as to how likely it is to remain the last word on the subject.

In addition, the decision of the Court of Appeal remains of some importance in relation to the determination of the law applicable to a foreign tort. In the light of their decision on the difference between substance and procedure, the House of Lords found it unnecessary to interfere with the decision of the Court of Appeal in this regard.

There is also a piece on **Regression and Reform in the Law of Domicile** by Peter McEleavy. Here's a taster:

In the United Kingdom the law pertaining to domicile has the rather dubious distinction that, although subjected to concerted criticism from commentators

and law reformers alike for over half a century, it has largely remained unchanged. Common law jurisdictions around the world have succeeded in passing legislation which, to varying degrees, has modernized the concept, yet in Britain a series of initiatives have either failed to complete the legislative process or not even made it to Parliament.³ The reason in each instance was less the substance of the proposals, but rather political expediency in the face of pressure from the overseas business community resident in the United Kingdom, who feared extended fiscal liability if the connecting factors were attributed with a less legalistic interpretation.

The consequence is that 19th and early 20th century values continue to apply, but they do so in a world where, inter alia, individual mobility is taken for granted, migration has reached unprecedented levels⁶ and there is a greater awareness of and respect for other legal traditions. Trends in case law appear to suggest new approaches have emerged but have failed to take hold. To a certain degree this is not surprising as domicile, like habitual residence, applies in a variety of distinctive areas and is therefore prey to contrasting policy considerations,¹⁰ with result selection long regarded as playing an implicit role in many cases.¹¹ However, in contrast to habitual residence domicile faces the added burden, at least formally, of remaining a unitary concept with a single meaning whatever the area of law in which it might apply.

Links to both pieces, and the rest of the issue, can be found on the ICLQ homepage (for those with online access.)

Harding v Wealands - the Final Word on Assessment of Damages under English Law?

Yet another casenote on *Harding v Wealands* (2006) has been published, this time in the new issue of the *Civil Justice Quarterly*, written by Hakeem Seriki

(C.J.Q. 2007, 26(Jan), 28-36). Here's the abstract:

Examines English and Australian case law on the classification of issues as either substantive or procedural in the context of a conflict of laws. Comments on the first instance, Court of Appeal, and House of Lords decisions in Harding v Wealands on whether the assessment of damages in respect of a car accident in Australia was a "question of procedure" within the meaning of the Private International Law (Miscellaneous Provisions) Act 1995 s.14(3)(b) so that the law of the forum, rather than the law of New South Wales, applied.

The *Civil Justice Quarterly*, to my knowledge, isn't accessible online, so you'll have to get your hands on a copy of the Journal itself to read the article.

Casenote on Harding v Wealands and the Quantification of Damages

Pippa Rogerson (Cambridge University) has written a short casenote in the latest issue of the *Cambridge Law Journal* on the judgment of the House of Lords in *Harding v Wealands* [2006] UKHL 32. Here's the first paragraph:

THERE is a contradiction at the heart of this casenote. On the one hand, the House of Lords was completely right in its decision in Harding v. Wealands [2006] UKHL 32, [2006] 3 W.L.R. 83 overturning the Court of Appeal's judgment (noted [2005] C.L.J. 305) and reinstating that of Elias J. On the other, it was utterly wrong.

Those with online access to the Cambridge Law Journal can download the article from [here](#).

Seminar: Substance and Procedure in the Law Applicable to Torts - *Harding v Wealands* & the Rome II Regulation

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

Seminar at the British Institute of International & Comparative Law

Tuesday 21 November 2006 17:00 to 19:00

Location: Charles Clore House, 17 Russell Square, London WC1B 5JP

Participants:

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

This seminar is part of the British Institute's seminar series on private international law which will run throughout the Autumn of 2006 and well into 2007 entitled Private International Law in the UK: Current Topics and Changing Landscapes, sponsored by Herbert Smith.

For more information, see the BIICL website.

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

Harding v Wealands

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

The issue is whether damages for personal injury caused by negligent driving in New South Wales should be calculated according to the applicable law selected in accordance with Part III of the Private International Law (Miscellaneous Provisions) Act 1995 (hereafter "Part III") or whether it is a question of procedure which falls to be determined in accordance with English law. The Court of Appeal, by a majority (Arden LJ and Sir William Aldous, Waller LJ dissenting) held that it should be determined in accordance with the applicable law, which they decided was the law of New South Wales. In my opinion the dissenting opinion of Waller LJ was correct and the question is one of procedure governed by the law of the forum (para. 13 per Lord Hoffman).

The full judgment of the House of Lords can be downloaded from [here](#). Comments on the decision are welcome.

English High Court Rules on Art. 4 Rome II Regulation

The English High Court has recently rendered an insightful and thought provoking decision on the application of Art. 4 II and III of the Rome II Regulation (*Winrow v. Hemphill*, [2014] EWHC 3164). The case revolved around a road traffic accident that had taken place in Germany in late 2009. The (first) defendant, a UK national, had driven the car, while the claimant, likewise a UK national, had been sitting in the rear. As a result of the accident, caused by the (first) defendant's negligence, the claimant suffered injury and initiated proceedings for damages in England.

The court had to determine the applicable law in accordance with Art. 4 of the Rome II Regulation. What made the choice of law analysis complicated were the following – undisputed – facts (quote from the judgment):

- At the time of the accident, 16 November 2009, the Claimant was living in Germany, having moved there in January 2001 with her husband who was a member of HM Armed Services. Germany was not the preferred posting of the Claimant's husband. It was his second choice. He had four separate three year postings in Germany.
- Since the Claimant's husband was due to leave the army in February 2014 after twenty-two years' service he would have returned to England one and a half to two years before that date to undertake re-settlement training. It was always their intention to return to live in England.
- Whilst in Germany, the Claimant and her family lived on a British Army base where schools provided an English education. The Claimant's eldest son remained in England at boarding school when the Claimant's husband was posted to Germany. Their three other children were at school in Germany.
- The Claimant was employed while in Germany on a full-time basis as an Early Years Practitioner by Service Children's Education. This is a UK Government Agency.
- The Claimant and her husband returned to live in England in June 2011, earlier than planned. Her husband left the Army in August 2013.
- The First Defendant is a UK national. She was also an army wife. Her husband served with the Army in Germany. She had been in Germany for between eighteen months and two years before the accident. She returned to England soon afterwards.

Against this backdrop, the court had to decide whether to apply German law as law of the place of the tort (Art. 4 I Rome II) or English law as law of the common habitual residence of the parties (Art. 4 II Rome II) or as law of the manifestly more closer connection (Art. 4 III Rome II). After a detailed discussion of the matter Justice Slade DBE held that that German law applied because England was not the common habitual residence of the parties at the time of the accident. Nor was the case manifestly more closely connected with England than with Germany:

"41. The Claimant had been living and working in Germany for eight and a half years by the time of the accident. She was living there with her husband. Three of

their children were at school in Germany. The family remained living in Germany for a further eighteen months after the accident. There was no evidence that during this time the family had a house in England. The residence of the Claimant in Germany was established for a considerable period of time. The fact that the Claimant and her family were living in Germany because the Army had posted her husband there and that it was not his first choice does not render her presence there involuntary. He and his family were living in Germany because of his job. The situation of the Claimant in Germany was similar to that of the spouses of other workers posted abroad. This is not an unusual situation. Having regard to the length of stay in the country, its purpose and the establishing of a life there – three children were in an army run school in Germany and the Claimant worked at an army base school – in my judgment the habitual residence of the Claimant at the time of her accident was Germany. When the Claimant came to live in England in 2011 her status changed and she became habitually resident here. However, the family's intention to return to live in England after the Claimant's husband's posting in Germany came to an end did not affect her status in November 2009. The Claimant has not established that the law of the tort indicated by Article 4(1), German law, has been displaced by Article 4(2).

42. The burden is on the Claimant to establish that the effect of Article 4(1) is displaced by Article 4(3). The standard required to satisfy Article 4(3) is high. The party seeking to disapply Article 4(1) or 4(2) has to show that the tort is manifestly more closely connected with a country other than that indicated by Article 4(1) or 4(2).

43. The circumstances to be taken into account are not specified in Article 4(3). As does Miss Kinsler, I respectfully take issue with the exclusion by Mr Dickinson from the circumstances to be taken into account under Article 4(3) of the country in which the accident and damage occurred or the common habitual residence at the time of the accident of the Claimant and the person claimed to be liable. That these are determinative factors for the purposes of Articles 4(1) and 4(2) does not exclude them from consideration under 4(3). All the circumstances of the case are to be taken into account under Article 4(3). If the only relevant circumstance were the country where the damage occurred or the common habitual residence of the Claimant and the tortfeasor the issue of the proper law of the tort would be determined by Article 4(1) or 4(2). However, these factors are not excluded as being amongst others to be considered under Article 4(3). Further, under Article

4(2), habitual residence is to be considered at the time when the damage occurs. Preamble (17) to Rome II makes clear that the country in which damage occurs, which is the subject of Article 4(1), is the country where the injury was sustained. However, under Article 4(3), the habitual residence of the Claimant at the time when consequential loss is suffered may also be relevant.

44. Mr Chapman rightly acknowledged that one system of law governs the entire tortious claim. Different systems do not govern liability and quantum. In Harding v Wealands [2005] 1 WLR 1539, the issue was whether damages for personal injury caused by negligent driving in New South Wales Australia should be calculated according to the law applicable in accordance with the Private International Law (Miscellaneous Provisions) Act 1995 ('the 1995 Act') or whether it is a question of procedure which fell to be determined in accordance with the *lex fori*, English law. Considering factors which connect the tort with respective countries, in section 12(1)(b) of the 1995 Act, a provision similar to Article 4(3), Waller LJ in observed at paragraph 12:

"...the identification is of factors that connect the *tort* with the respective countries, not the *issue or issues* with the respective countries."

The majority judgment of the Court of Appeal, Waller LJ dissenting, was overruled in the House of Lords. The *obiter* observations of Waller LJ on the factors which connect the *tort* rather than separate *issues* with a particular country were undisturbed on appeal.

45. I do not accept the contention by Mr Chapman that the circumstances to be taken into account in considering Article 4(3) will vary depending upon the issues to be determined and, as I understood his argument, the stage reached in the proceedings. Nor do I accept the submission that "the centre of gravity" of the tort when liability was conceded and only damages were to be considered depended upon circumstances relevant to or more weighted towards that issue. As was held by Owen J at paragraph 46 of Jacobs:

"...the question under Art 4(3) is not whether the right to compensation is manifestly more connected to England and Wales, but whether the tort/delict has such a connection."

The "centre of gravity" referred to in the Commission Proposal for Rome II and by Flaux J in Fortress Value in considering Article 4(3) is the centre of gravity of

the *tort* not of the *damage and consequential loss* caused by the tort.

46. Whilst I do not accept the argument advanced by Mr Chapman that different weight is to be attributed to relevant factors depending on the stage reached in the litigation, since there is no temporal limitation on these factors, a court will make an assessment on the relevant facts as they stand at the date of their decision. The balance of factors pointing to country A rather than country B may change depending upon the time but not the stage in the proceedings at which the court makes its assessment. At the time of the accident both the claimant and the defendants may be habitually resident in country A and by the time of the court's decision, in country B. At the time of the accident it may have been anticipated that all loss would be suffered in country A but by the date of the assessment it is known that current and future loss will be suffered in country B.

47. There is some difference of opinion as to whether the circumstances to be taken into account in considering Article 4(3) are limited to those connected with the tort and do not include those connected with the consequences of the tort. It may also be said that the tort and the consequences of the tort are treated as distinct in Article 4. Article 4(1) refers separately to the tort, to damage and to the indirect consequences of the "event". Article 4(2) refers to "damage". Accordingly it could be said that the reference in Article 4(3) to *tort* but not also to *damage* or *indirect consequences* indicates that it is only factors showing a manifestly closer connection of the tort, but not the damage direct or indirect, caused by or consequential on it, which are relevant.

48. Section 12 of the 1995 Act considered in Harding, whilst differing from Article 4(3) by including reference to the law applicable to *issues* in the case was otherwise to similar effect in material respects to Article 4(3). Section 12(2) provides:

"The factors that may be taken into account as connecting a tort or delict with a country for the purposes of this section include, in particular, factors relating to the parties, to any of the events which constitute the tort or delict in question, or to any of the circumstances or consequences of those events."

Applying section 12, Elias J, as he then was, in deciding whether the law of the place of the motor vehicle accident should be displaced, took into account "the fact that the consequences of the accident will be felt in England" [34]. This

approach was not doubted on appeal CA [17]. In Stylianou, Sir Robert Nelson adopted a similar approach when considering Article 4(3) which does not expressly include the consequences of the tortious events as a relevant factor in determining whether the general rules as to the applicable law of the tort are displaced. The Judge observed that there are powerful reasons for saying that the Claimant's condition in England is a strong connecting factor with this country. [83].

49. Including the consequences of a tort as a factor to be taken into account in considering Article 4(3) has received endorsement from writers on the subject. Mr Dickinson writes in *The Rome II Regulation* at paragraph 4.86:

“The reference in Article 4(3) to ‘the tort/delict’ (in the French text, ‘*fait dommageable*’) should be taken to refer in combination to the event giving rise to the damage and all of the consequences of that event, including indirect consequences.”

Further the authors of *Dicey* write at paragraph 35-032:

“Thus it would seem that the event or events which give rise to damage, whether direct or indirect, could be circumstances relevantly considered under Art 4(3), as could factors relating to the parties, and possibly also factors relating to the consequences of the event or events.”

50. Whilst the answer to the question is by no means clear, I will adopt the approach suggested as possible in *Dicey*, as correct by Mr Dickinson and adopted by Sir Robert Nelson. Accordingly the link of the consequences of the tort to a particular country will be considered as a relevant factor for the purposes of Article 4(3).

51. Unlike Articles 4(1) and 4(2), Article 4(3) contains no temporal limitation on the factors to be taken into account. If, as in this case, the claimant and the defendant were habitually resident in country A at the time of the accident but in country B at the time the issue of whether the exception provided by Article 4(3) applied, in my judgment both circumstances may be taken into account. Similarly, if at the time of the accident it was anticipated that the Claimant would remain in country A and all her consequential loss would be incurred there, but by the time the issue of whether the exception provided by Article 4(3) applied, she had

moved to country B and was incurring loss there, in my judgment both circumstances may be taken into account in deciding whether in all the circumstances the tort is manifestly more closely connected with country B than with country A.

52. The European Commission recognised in their proposal for Rome II that the “escape clause” now in Article 4(3) would generate a degree of unforeseeability as to the applicable law. In my judgment that unforeseeability includes not only the factors taken into account but also that the nature and importance of those factors may depend upon the time at which a court makes an assessment under Article 4(3) in deciding whether there is a “manifestly closer connection” of the tort with country B rather than country A. The court making a decision under Article 4(3) undertakes a balancing exercise, weighing factors to determine whether there is a manifestly closer connection between the tort and country B rather than country A whose law would otherwise apply by reason of Article 4(1) or 4(2).

53. Whilst Mr Chapman relied principally on the country where consequential loss is being suffered and the current habitual residence of the Claimant and the First Defendant, I also consider other factors raised by counsel in determining whether, in all the circumstances of the case, the tort is manifestly more closely connected with England than with Germany.

54. In my judgment the common United Kingdom nationality of the Claimant and the First Defendant is a relevant consideration. Waller LJ at paragraph 18 of Harding considered the nationality of the Defendant to a road traffic accident claim to be relevant to determining the applicable law of the tort under the similar provisions of section 12 of the 1995 Act.

55. Although there is no United Kingdom law or English nationality in my judgment that does not, as was contended by Miss Kinsler, prevent the United Kingdom nationality of those involved in the tort being relevant to whether English law applies. For example the Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003 implementing Directive 2000/26/EC of 16 May 2000, the Fourth Motor Insurance Directive, referred in Regulation 13(1)(i) to the United Kingdom as “an EEA state”. Regulation 12(4) specified the law applicable to loss and damage as that “under the law applying in that part of the United Kingdom in which the

injured party resided at the date of the accident". Article 25 of Rome II provides that:

"Where a State comprises several territorial units, each of which has its own rules of law in respect of non-contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Regulation."

I take into account the United Kingdom nationality of the Claimant and the First Defendant at the time of the accident and now, when the issue is being determined, as a factor indicating a connection of the tort with English law.

56. That the Claimant and the First Defendant are now habitually resident in England is, in my judgment in the circumstances of this case, relevant to determining the system of law to which the tort has a greater connection. However, I view the weight to be given to this factor in the light of the Claimant's habitual residence in Germany for about eight and a half years by the time of the accident. The Claimant was not a short-term visitor to Germany. She had established a life there with her husband for the time being.

57. I take account of the fact that the Claimant remained in Germany for a further eighteen months after the accident during which time she received a significant amount of medical treatment for her injuries including, in June 2010, an operation to remove a prolapsed disc. The Claimant states that between 15 and 25 March 2011 she spent just under two weeks in a German hospital for pain management. In April and May 2011 she had further treatment in Germany for the pain. Some of the injuries she suffered after the accident, neck and shoulder pains and pain in her stomach, resolved whilst she was in Germany.

58. Article 15 of Rome II makes it clear that the applicable law determined by its provisions applies not only to liability but also to:

"15(c) the existence, the nature and the assessment of damage or the remedy claimed."

Whilst recital (33) states that when quantifying damages for personal injury in road traffic accident cases all the relevant actual circumstances of the Claimant including actual losses and costs of after-care should be taken into account by the

court determining the claim of a person who suffered the accident in a State other than that where they were habitually resident, as Sir Robert Nelson observed at paragraph 78 of Stylianou, the recital cannot override the terms of Article 4.

59. In my judgment “all the circumstances” of the case relevant to determining whether a tort is manifestly more closely connected with country B than country A can include where the greater part of loss and damage is suffered. Where, as in this case, causation and quantum of loss are in issue, at this stage the location of the preponderance of loss may be difficult to ascertain. However, weight is to be given to the assertion by the Claimant that she continued to suffer pain after she and her husband returned to England in June 2011. She attended a pain clinic in Oxford and received treatment. She states that as a result of her pain and the effects of the accident she had become depressed. The continuing pain and suffering and medical treatment is a factor connecting the tort with England. So is the contention that loss of earnings has been and will be suffered in England.

60. The vehicle driven by the First Defendant was insured and registered in England. Whilst a factor to be taken into account, as was observed in Harding at paragraph 18, where the motor vehicle involved in the accident was insured is not a strong connecting factor. Nor is where the vehicle was registered.

61. In Stylianou, Sir Robert Nelson considered that the continued and active pursuit of proceedings in Western Australia was an important factor to take into consideration under Article 4(3). The pursuit of proceedings by the Claimant in the English courts is taken into account in this case, however it is not a strong connecting factor. The choice of forum does not determine the law of the tort.

62. Factors weighing against displacement of German law as the applicable law of the tort by reason of Article 4(1) are that the road traffic accident caused by the negligence of the First Defendant took place in Germany. The Claimant sustained her injury in Germany. At the time of the accident both the Claimant and the First Defendant were habitually resident there. The Claimant had lived in Germany for about eight and a half years and remained living there for eighteen months after the accident.

63. Under Article 4(3) the court must be satisfied that the tort is manifestly more closely connected with English law than German law. Article 4(3) places a high hurdle in the path of a party seeking to displace the law indicated by Article 4(1)

or 4(2). Taking into account all the circumstances, the relevant factors do not indicate a manifestly closer connection of the tort with England than with Germany. The law indicated by Article 4(1) is not displaced by Article 4(3). The law applicable to the claim in tort is therefore German law.”

A discussion of the case can be found [here](#).

Rome-ing Instinct?

In February this year, the English courts appeared finally to have woken up to the arrival of the Rome II Regulation, with the first published decision addressing its provisions.



In *Jacobs v Motor Insurers Bureau* [2010] EWHC 231 (QB), Mr Justice Owen applied Rome II’s provisions to reach the conclusion that the compensation to be paid by the MIB (acting as the UK’s compensation body under the Fourth Motor Insurance Directive) to the claimant as a result of an accident in a Spanish shopping centre car park in December 2007 in which the other driver was German (and uninsured) should be assessed in accordance with Spanish law, as the law of the place where the damage occurred. In the course of his judgment, the judge rejected the claimant’s arguments that (1) the matter was not one involving a “conflict of laws” within Art. 1(1) of the Regulation, (2) damage was suffered in England for the purposes of Art. 4(1) by reason of the MIB’s failure to compensate the claimant there, (3) the reference to the “person claimed to be liable” in the common habitual residence rule in Art. 4(2) was a reference to the named defendant (here, the MIB) not the primary tortfeasor (i.e. the uninsured driver), and (4) that the “escape clause” in Art. 4(3) should be invoked by reason of the MIB’s involvement, on the basis that its compensation obligation was manifestly more closely connected to England. Owen J concluded that, insofar as the UK statutory instrument which obliged the MIB to compensate the claimant appeared to require that the compensation be assessed in accordance with

English (or British) law (as to which, see below), it must be considered to have been overridden by Rome II's provisions.

That decision has now been reversed by the Court of Appeal ([2010] EWCA Civ 1208), which treated Rome II as having no material impact on the issues to be determined in the case before it and did not consider it necessary to address any of the (interesting and important) issues concerning the proper application of Art. 4. In the Court's view (para. 38 of its judgment), the relevant provision within the UK Regulations invoked before it (reg 13 of the Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations (SI 2003/37) (the "Compensation Body Regulations")) defined the MIB's compensation obligation in such a way as to require the application of English law principles to the assessment of compensation and did not constitute a rule of applicable law which was incompatible with, and could be trumped by, the Rome II Regulation. The Court considered that its conclusion was entirely consistent with the scheme and provisions of the Fourth Motor Insurance Directive (Directive (EC) No 2000/26), which the Compensation Body Regulations were designed to implement.

Assuming that there is no further appeal, the claimant Mr Jacobs will receive compensation according to English law principles of assessment, with the result that his award will likely be higher than if the MIB had prevailed in his argument that Spanish law should be applied. That consequence, no doubt, will be of great comfort to him and may appear to many (given that the economic burden will be spread widely among those holding motor insurance policies) as a "fair result". Nevertheless, certain aspects of the decision remain troubling.

First, the Court did not consider whether and, if so, how the MIB's obligation to pay compensation fitted within the framework of the Rome II Regulation. Here, a number of very interesting questions arise (apart from those identified above concerning the proper interpretation of Art. 4):

- Did Mr Jacobs' claim against the MIB constitute a "civil and commercial" matter within Art. 1(1) of the Rome II Regulation? At first instance, Mr Jacobs' counsel had conceded that it did (and Owen J agreed with that concession - see para. 19 of his judgment), but it is not entirely clear that the concession was correct, given that the MIB was acting as the UK's

compensation body under the Fourth Motor Insurance Directive and its (putative) obligation was subject to a special regime established pursuant to the Directive and the Compensation Body Regulations.

- Did any obligation owed by the MIB constitute a “non-contractual” obligation falling within the scope of the Rome Regulation? If so, did it constitute a “non-contractual obligation arising out of a tort/delict” within Art. 4? Owen J found that it did (see para. 30 of his judgment), but it may be doubted whether a scheme of this kind for compensating victims of anti-social conduct from public funds was intended to fall within the ambit of the Regulation.
- If the Rome II Regulation does apply, what is its effect in terms of defining the applicable law and its relationship with the Compensation Body Regulations? In principle, the Rome II Regulation applies to determine the law applicable to a non-contractual obligation in its entirety and not only to a specific issue, for example the assessment of damages. If the MIB’s (putative) obligation fell, therefore, within the scope of the Rome II Regulation then the starting point would be that not only the amount of compensation payable but also the basis and extent of the MIB’s liability would fall to be determined in accordance with the law applicable in accordance with its provisions. This leads to the following conundrum: if Art. 4 points in this case to Spanish law (as Owen J concluded), how can the MIB be under any obligation at all as no provision of Spanish law will impose any compensation obligation on the MIB (as opposed to its Spanish counterpart)? The answer, it is submitted, may be found in Art. 16 (overriding mandatory provisions) whereby provisions of the law of the forum may be given overriding effect in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation. The Compensation Body Regulations, being intended to fulfil the United Kingdom’s obligations under the Fourth Motor Insurance Directive, may well be of this character, although the Court of Appeal did not explicitly seek to explain their application in these terms.

Against this background, it is disappointing that the Court of Appeal did not consider it necessary to address any of these issues in concluding (para. 38) that:

Rome II has no application to the assessment of the compensation payable by

the MIB under regulation 13 [of the Compensation Body Regulations] and it is therefore unnecessary to consider the issues relating to the construction of Article 4 that would arise if it did so.

(Earlier in his judgment, although not necessary for the decision in Jacobs as liability was not in issue, Moore-Bick LJ did appear to accept that the law applicable under Rome II should govern the question whether the driver of the uninsured/untraced vehicle was “liable” to the claimant, being (as the Court held – para. 32) an implicit pre-condition to a compensation claim under regulation 13. If correct, this would involve a partial, statutory incorporation of the Regulation’s rules with respect to the driver’s non-contractual obligation, without applying them in their full vigour to the MIB’s compensation obligation. It may, however, be questioned whether this approach can be supported, given that its effect is to distort the Regulation’s scheme by applying its rules only to the question of liability and not questions concerning the assessment of damages.)

Secondly, the Court of Appeal’s explanation of the legal effect of the relevant provision in the UK Regulations appears incomplete. Regulation 13(2) of the Compensation Body Regulations provides as follows:

(2) Where this regulation applies—

(a) the injured party may make a claim for compensation from the compensation body, and

(b) the compensation body shall compensate the injured party in accordance with the provisions of Article 1 of the [Second Motor Insurance Directive] as if it were the body authorised under paragraph 4 of that Article and the accident had occurred in Great Britain.

The Court of Appeal accepted (para 34) a submission on the part of the MIB that the intention underlying the closing words in sub-para. (b) (“as if it were the body authorised [under Art. 1(4) of the Second Motor Insurance Directive] and the accident had occurred in Great Britain”) was to require the MIB to respond to Mr Jacobs claim on the basis of a legal fiction that the accident had occurred in Great Britain. In such cases, it must be noted, the MIB is also the body responsible for providing compensation to the victim of an accident involving an uninsured or

untraced driver under the extra-statutory scheme established by the Uninsured and Untraced Drivers Agreements between the MIB and the UK Secretary of State for Transport. These Agreements, in their current form, seek to implement the UK's obligations to establish a compensation mechanism under the Second Motor Insurance Directive.

Taking this submission to its logical conclusion (although it does not appear that the MIB sought to press it this far), it would follow that the content of the MIB's statutory obligation under regulation 13 ought to have been determined by reference to the terms of either the Uninsured or the Untraced Drivers Agreement (as applicable), on the premise that the accident had occurred in Great Britain and not abroad. The Court, however, proceeded to the conclusion that the MIB was under an obligation to compensate Mr Jacobs in accordance with English law principles, without any further analysis of the Agreements to determine (for example) (a) which of the Agreements applied to the facts of the case, (b) whether any pre-conditions for obtaining compensation under the applicable Agreement (for example, in the case of the Uninsured Drivers Agreement, the obtaining of an unsatisfied judgment) had been or were capable of being met, or (c) whether the applicable Agreement provided any guidance for the assessment of compensation by the MIB.

Instead of undertaking this exercise, and without citing any supporting authority, the Court concluded (para. 35) that:

The mechanism by which the MIB's obligation to compensate persons injured in accidents occurring abroad involving uninsured or unidentified drivers is established is to treat the accident as having occurred in Great Britain, but in the absence of any provision limiting its scope it is difficult to see why it should not also affect the principles governing the assessment of damages, particularly in the absence at the time of complete harmonisation throughout the EEA of the conflicts of laws rules governing that issue. Nonetheless, the matter is not free from difficulty. As I have already observed, at the time the Regulations were made damages recoverable as a result of an accident occurring in Great Britain would normally have been assessed by reference to the lex fori, yet regulation 13(2)(b) does not make any provision for the application of English or Scots law as such, presumably leaving it to the court seised of any claim to apply its own law.

This reasoning is unconvincing. In short, it does not appear to be tied to the wording of regulation 13 or to be consistent with the Court's explanation of why it was so worded. A further examination of the Agreements may have found them to be impossible or excessively difficult to apply to foreign accident cases such as Jacobs or of being incompatible with the Fourth Motor Insurance Directive and this analysis, in turn, might have led the Court to doubt its approach to statutory construction. The short-cut taken by the Court, however, appears to leave a sizeable gap in its reasoning.

Third, the Court comforted itself (para 37) with the fact that (on the interpretation that it favoured) regulation 13 of the Compensation Body Regulations (dealing with untraced or uninsured drivers) would produce the same outcome for a claimant in Mr Jacobs' position as for a claimant relying on the apparently clear wording of regulation 12 (dealing with the situation where an insurer's representative has not responded within the prescribed time, in which case the Regulations refer to "the amount of loss and damage ... properly recoverable ... under the laws applying in that part of the United Kingdom in which the injured party resided at the date of the accident"). In each case, English law principles would normally be applied to the assessment of compensation (a result which would also accord with English private international law at the time that the Compensation Body Regulations were adopted: *Harding v Wealands* [2006] UKHL 32). As the Court also recognised, however, this understanding of the Compensation Body Regulations produces two apparent anomalies (see paras. 29 and 30):

- *In many cases, the claimant will receive more compensation from the MIB in cases of "insurance delinquency" than if it had sued the driver or made a direct claim against its insurer, being claims to which the rules of applicable law in the Rome II Regulation would undoubtedly apply.*
- *The MIB, having paid that compensation, will be unable to pass the full burden to the compensation body in the Member State where the vehicle is based or the accident occurred, pursuant to the provisions of the Fourth Motor Insurance Directive. Under the 2002 Agreement between the Member States' compensation bodies, the MIB's recovery will be limited to the amount payable under the law of the country in which the accident occurred. Nor will the MIB have any express right of*

subrogation under the Directive for the balance against the driver or its insurer, such right being limited to the reimbursing compensation body.

Powerless as the Court of Appeal may have been to address these anomalies, they deserve the attention of the UK legislator (and – dare I say it – the European legislator) at the earliest opportunity. In the meantime, it remains to be seen whether there will be a further appeal to the Supreme Court in Jacobs.

Tick, Tock: Temporal Application of the Rome II Regulation Referred to the CJEU

Two recent decisions of the English High Court consider the temporal effect of the Rome II Regulation, with the first of these making a reference to the CJEU as to the combined effect of Articles 31-32 of the Regulation (to my knowledge, the first reference with respect to this Regulation).

Each of the cases (*Homawoo v GMF Assurance SA* [2010] EWHC 1941 (QB) and *Bacon v Nacional Suiza* [2010] EWHC 1941 (QB)) concerned proceedings with respect to injuries suffered by the claimant in a road traffic accident occurring (a) in a Member State (France in *Homawoo* and Spain in *Bacon*) and (b) in 2007 (but in each case after 20 August, the first critical date in terms of defining the temporal effect of the Regulation). In each case, proceedings were issued in England before 9 January 2009 (the second critical date). In *Bacon*, the sole defendant was the insurer of the only car involved in the accident (Mr Bacon was a pedestrian). In *Homawoo*, although the driver and owner of the car causing injury were also joined, proceedings were only pursued against the insurer. Liability was disputed (successfully) in *Bacon*, but accepted in *Homawoo*.

The question for decision by each of Sharp J (*Homawoo*) and Tomlinson J (*Bacon*) was whether the Rome II Regulation applied, with the result that damages would

fall to be assessed by reference to the law applicable under the Regulation (French or Spanish law) and not the law of the forum (cf. *Harding v Wealands* [2007] 1 AC 1, under the pre-existing English rules of applicable law).

Under Article 31 of the Rome II Regulation, the Regulation “shall apply to events giving rise to damage which occur after its entry into force”. Under Article 32, the Regulation (with the sole exception of Article 29) “shall apply from 11 January 2009”. This combination clearly suggests, as both judges accepted, a distinction between the date of entry into force of the Regulation and its date of application, with only the latter being specifically designated in Article 32 (9 January 2009). If that view, supported by records of the discussions in the Council’s Rome II working group, is accepted as representing the legislative intention of the EU, it would seem to follow that the date of entry into force must be fixed at 20 August 2007 in accordance with Article 254 of the EC Treaty (now TFEU, Article 297).

Nevertheless, an important conundrum remains to be resolved, in that the precise meaning of the words “shall apply” in Articles 31 and 32 must be explained: What is it to which the Regulation’s rules of applicable law “shall apply”?

Needless to say, given the unsatisfactory drafting, commentators differ in their approaches (for my own, see Dickinson, *The Rome II Regulation* (2008), paras 3.315-3.321), as did the two judges in these cases.

In *Homawoo*, Sharp J (at [43]-[49]) was unhappy with interpretations of Article 32 as referring to the date of commencement of legal proceedings or the date of determination of those proceedings. She suggested (at [50]) that a reading of Articles 31 and 32 as inter-linking and complete in themselves so that the Regulation would apply only to events giving rise to damage after 11 January 2009 “would give legal certainty”, but accepted that the “clear language of Article 31” made it impossible to reach this conclusion, at least without a preliminary reference to the CJEU. Accordingly (at [51]) she posed the following questions:

If the meaning and effect of Article 31 is that Rome II is to apply to events giving rise to damage which occur after the ‘entry into force’ of the Regulation on 20th August 2007, what is the meaning and effect of ‘shall apply from 11th January 2009’ in Article 32? Is it ‘apply to proceedings commenced’ or ‘apply to determination by a court’ after that date? What is the meaning and effect of Article 31? Should it be interpreted so that the Regulation shall apply to events

giving rise to damage which occur on or after 11th January 2009?

In *Bacon*, it was not necessary for Tomlinson finally to decide the temporal application point or to consider whether to make a reference, as he had held the claimant on the facts solely responsible for the accident and exonerated the defendant under Spanish law, which it was agreed applied to the question of liability in any event. Nevertheless, having heard arguments similar to those advanced before Sharp J, he concluded (at [61]) that the Regulation applied to the determination as from 11 January 2009 of the law applicable to a non-contractual obligation arising out of an event giving rise to damage on or after 20 August 2007.

Although Sharp J (at [46]) had observed that parties who are considering the possibility of settlement will wish to understand what law applies to the calculation of damages and they (like judges) need to know whether Rome II applies, Tomlinson J took the view (I would submit, correctly) that the Regulation is directed at the Member States and their courts (see [61]). This is not to deny that the Regulation's provisions are not relevant in calculating the parameters of settlement, but merely to accept that the parameters of settlement must themselves be calculated by reference to a hypothetical future determination by a court or tribunal having jurisdiction over the matter. Settlement discussions, as other commercial negotiations, are conducted by reference to the putatively applicable law, and in cross-border transactions it must be accepted that the rights and obligations of the parties may fall to be determined at different times and by different courts or tribunals according to different legal rules.

On the view taken by Tomlinson J (according with the wording and legislative history of Articles 31-32) the likely date of any future judicial determination was a factor which those negotiating settlements in the EU before 11 January 2009 would need to take into account, alongside such other factors as the identity and geographical location (within or outside a Member State) of the court(s) or tribunal(s) before which the matter could be brought if their negotiations were not to bear fruit. That is not illogical or unjust (see Tomlinson J, at [38]). Nor does it involve giving retroactive effect to the Regulation's provisions, which were published in the Official Journal on 31 July 2007. Nor, at the point of determination, does it result in any uncertainty as to the source of the rules of applicable law that the court must apply. Further, as Tomlinson J pointed out (at

[65]), the opportunity for taking any tactical advantage of the separation of entry into force and application of the Regulation ended (if this interpretation is accepted) on 11 January 2009, following which any determination by a Member State court of the law applicable to a non-contractual obligation must be carried out in accordance with the Regulation's rules. From that date, the Regulation (at least according to its major objective) promotes a different kind of certainty (decisional harmony), in ensuring that Member State courts apply the same law in the determination of non-contractual obligations, even if the event giving rise to damage occurred between 20 August 2007 and 11 January 2009. The harmonisation of approach in this area across the Member States is, of course, the primary objective of the Rome II Regulation (see Recitals (6) and (15)) and this interpretation appears, therefore, teleologically superior, even if it leads to a short term problem (now expired) in terms of the foreseeability of court decisions (see Recital (16)).

In any event, it may be questioned whether the form of "legal certainty" craved by Sharp J and other proponents of this solution is of any significant or lasting value. The very fact of a reference to the CJEU on this point (and the contrary view of Tomlinson J and many others) will leave those engaging in settlement discussions with respect to events occurring between 20 August 2007 and 11 January 2009 in doubt as to the source of the rules for determining the law applicable to the parties' non-contractual obligations for years to come. By the time that we have a firm answer, the large majority of cases (particularly those involving traffic accidents) will likely have settled notwithstanding that doubt (unpredictability of outcome may even be seen as a driver of settlement). If the CJEU follows the view of Tomlinson J, as I would submit that it should, all those whose claims remain (and those whose claims remain undiscovered) will know where they stand, even if the events on which the claim is based occurred in the interregnum. As decisional harmony will (or ought to) have been improved, even in the latter class of cases, so too the incentive for one party to upset settlement discussions by rushing off to bring proceedings in a Member State court that it considers will apply a favourable law will (or ought to) have been diminished. We will all, according to the tin, be better off.

It is suggested that, what at first sight may appear an awkward or "arbitrary" (Tomlinson J, at [38]) combination of provisions in Articles 31 and 32, is in fact a combination of puritanism and pragmatism. The authors of the Regulation, in

their unremitting quest to harmonise the rules of European private international law, were anxious that their new creation should be vivified at the earliest opportunity. That, however posed a problem in that the objectives of the Regulation might be put at risk if the creature's handlers (Member State judges) were not trained as to how to use it, with the result that a period of education was built in. The modified prospective effect of the Regulation can be seen, therefore, as an attempt to resolve the conflict between the ideals of a single area of justice and the reality of twenty six different ones.

The significance of questions of temporal effect will, of course, fade over time as claims are resolved and new ones arise. In a few years, we may all be better off and wonder what the excitement was about, although Mr Homawoo, Mr Bacon and others in their position may question exactly what they have found themselves in the middle of.

New Articles for Early 2008

It has been a little while since my last trawl through the law journals, and a few articles and casenotes have been published in the intervening period that private international law enthusiasts may wish to add to their reading list:

J.M. Carruthers, "**De Facto Cohabitation: the International Private Law Dimension**" (2008) 12 *Edinburgh Law Review* 51 – 76.

P. Beaumont & Z. Tang, "**Classification of Delictual Damages - Harding v Wealands and the Rome II Regulation**" (2008) 12 *Edinburgh Law Review* 131 – 136.

G. Ruhl, "**Extending Ingmar to Jurisdiction and Arbitration Clauses: The End of Party Autonomy in Contracts with Commercial Agents?**" (2007) 6 *European Review of Private Law* 891 – 903. An abstract:

In the judgment discussed below, the Appeals Court of Munich (OLG München) deals with the question whether jurisdiction and arbitration clauses have to be

set aside in the light of the Ingmar decision of the European Court of Justice where they cause a derogation from Articles 17 and 18 of the Commercial Agents Directive. The Court concludes that this question should be answered in the affirmative if it is 'likely' that the designated court or arbitral tribunal will neither apply Articles 17 and 18 nor compensate the commercial agent on different grounds. Thus, the Court advocates that Articles 17 and 18 be given extensive protection. This is, however, problematic because such extensive protection imposes serious restrictions on party autonomy, whereas these restrictions are not required by Community law in general or by the principle of effectiveness in particular. Therefore, it is very much open to doubt whether this decision is in the best interests of the Internal Market.

F. Bolton & R. Radia, "**Restrictive covenants: foreign jurisdiction clauses**" (2008) 87 *Employment Law Journal* 12 - 14. The abstract:

Reviews the Queen's Bench Division judgment in Duarte v Black and Decker Corp and the Court of Appeal decision in Samengo-Turner v J&H Marsh & McLennan (Services) Ltd on whether restrictive covenants were enforceable under foreign jurisdiction clauses contained in the long-term incentive plan agreements of UK domiciled employees of multinational companies. Examines the conflict of laws and whether English law applied under the Convention on the Law Applicable to Contractual Obligations 1980 Art.16 and under Regulation 44/2001 Arts.18 and 20.

W. Tetley, "**Canadian Maritime Law**" L.M.C.L.Q. 2007, 3(Aug) Supp (*International Maritime and Commercial Law Yearbook* 2007), 13-42. The blurb:

Reviews Canadian case law and legislative developments in shipping law in 2005 and 2006, including cases on: (1) carriage of goods by sea; (2) fishing regulations; (3) lease of port facilities; (4) sale of ships; (5) personal injury; (6) recognition and enforcement of foreign judgments; (7) shipping companies' insolvency; (8) collision; and (9) marine insurance.

S. James, "**Decision Time Approaches - Political agreement on Rome I: will the UK opt back in?**" (2008) 23 *Butterworths Journal of International Banking & Financial Law* 8. The abstract:

Assesses the extent to which European Commission proposed amendments to the Draft Regulation on the law applicable to contractual obligations (Rome I) meet the concerns of the UK financial services industry relating to the original proposal. Notes changes relating to discretion and governing law, assignment and consumer contracts.

A. Onetto, “**Enforcement of foreign judgments: a comparative analysis of common law and civil law**” (2008) 23 *Butterworths Journal of International Banking & Financial Law* 36 – 38. The abstract:

Provides an overview of the enforcement of foreign judgments in common law and civil law jurisdictions by reference to a scenario involving the enforcement of an English judgment in the US and Argentina. Reviews the principles and procedures applicable to the recognition and enforcement of foreign judgments in the US and Argentina respectively, including enforcement expenses and legal fees. Includes a table comparing the procedures for the recognition and enforcement of foreign judgments in California, Washington DC and New York.

J. Carp, “**I’m an Englishman working in New York**” (2008) 152 *Solicitors Journal* 16 – 17. The abstract:

Reviews case law on issues arising where a national of one country works in another country. Sets out a step by step approach to ascertaining: the law governing the employment contract; the applicability of mandatory labour laws, including cases on unfair dismissal, discrimination, working time, and the transfer of undertakings; which country has jurisdiction; and public policy. Offers practical suggestions for drafting multinational contracts.

J. Murphy – O’Connor, “**Anarchic and unfair? Common law enforcement of foreign judgments in Ireland**” 2007 2 *Bankers’ Law* 41 – 44. Abstract:

*Discusses the Irish High Court judgment in *Re Flightlease (Ireland) Ltd (In Voluntary Liquidation)* on whether, in the event that the Swiss courts ordered the return of certain monies paid by a Swiss airline, in liquidation, to an Irish company, also in liquidation, such order would be enforceable in Ireland. Considers whether: (1) the order would be excluded from enforcement under the common law on the basis that it arose from a proceeding in bankruptcy or*

insolvency; and (2) the order would be recognised on the basis of a “real and substantial connection” test, rather than traditional conflict of laws rules.

V. Van Den Eeckhout, **“Promoting human rights within the Union: the role of European private international law”** 2008 14 *European Law Journal* 105 – 127. The abstract:

This article aims to contribute both to the ‘Refgov’ project, which is focused on the ambition to find ways of promoting human rights within the EU, but also, more in general and apart from the project, to an improved understanding of the crucial place conflict of law rules occupy in the building of a common Europe—a highly political question behind apparently technical issues. In the study the author deals with the parameters, points of interest, etc in relation to private international law which should be heeded if European Member States ‘look at’ each other’s laws, and—in the context of the ‘Refgov’ project—if the idea is to exchange ‘best practices’ or harmonise substantive law, or to harmonise private international law, etc further through a type of open method of coordination. The contribution also shows that private international law issues are decisive in respect of every evaluation of the impact of European integration on human rights, both if this integration process takes place through ‘negative’ harmonisation (for example by falling back on the principle of mutual recognition) and through ‘positive’ harmonisation.

R. Swallow & R. Hornshaw, **“Jurisdiction clauses in loan agreements: practical considerations for lenders”** (2007) 1 *Bankers’ Law* 18 – 22. Abstract:

Assesses the implications for borrowers and lenders of the Commercial Court judgment in JP Morgan Europe Ltd v Primacom AG on whether proceedings brought in Germany challenging the validity a debt facility agreement were to be treated as the first seised under Regulation 44/2001 Art.27 (Brussels I Regulation), despite the fact that the agreement contained an exclusive jurisdiction clause in favour of the English courts. Advises lenders on the drafting of loan agreements to help mitigate the risk of a jurisdiction clause being frustrated. Considers the steps that might be taken by the lender once a dispute has arisen.

A. Dutton, **"Islamic finance and English law"** (2007) 1 *Bankers' Law* 22 – 25. Abstract:

Reviews cases relating to Islamic finance, including: (1) the Commercial Court decision in Islamic Investment Co of the Gulf (Bahamas) Ltd v Symphony Gems NV on whether the defendant was liable to make payments under a Sharia compliant contract governed by English law that would contravene Sharia law; (2) the Court of Appeal ruling in Shamil Bank of Bahrain EC v Beximco Pharmaceuticals Ltd (No.1) interpreting a choice of law clause expressed as English law "subject to the principles" of Sharia law; and (3) the Commercial Court judgment in Riyadh Bank v Ahli United Bank (UK) Plc on whether the defendant owed a duty of care to a Sharia compliant fund where it had contracted directly with its parent bank.

J. Burke & A. Ostrovskiy, **"The intermediated securities system: Brussels I breakdown"** (2007) 5 *European Legal Forum* 197 – 205. Abstract:

Presents a hypothetical case study of a dispute arising from a cross-border securities transaction involving parties from the UK, Sweden and Finland to examine the application of the private international law regime under Regulation 44/2001 Art.5(1) (Brussels I Regulation), the Convention on the Law Applicable to Contractual Obligations 1980 Art.4 (Rome Convention) and the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary. Considers the extent to which commercial developments in the securities industry have outstripped the current conflicts of law rules.

M. Requejo, **"Transnational human rights claims against a state in the European Area of Freedom, Justice and Security: a view on ECJ judgment, 15 February 2007 - C292/05 - Lechouritou, and some recent Regulations"** (2007) 5 *European Legal Forum* 206 – 210. Abstract:

Comments on the European Court of Justice ruling in Lechouritou v Germany (C-292/05) on whether a private action for compensation brought against Germany with respect to human rights abuses committed by its armed forces during its occupation of Greece in the Second World War fell within the scope of the Brussels Convention on Jurisdiction and Enforcement of Judgments in

Civil and Commercial Matters 1968 Art.1, thus preventing the defendant from claiming immunity for acts committed during armed conflict. Examines the EC and US jurisprudential context for such private damages claims.

L. Osana, "Brussels I Regulation Article 5(3): German Law Against Restrictions on Competition" (2007) 5 *European Legal Forum* 211 - 212. Abstract:

Summarises the Hamburg Court of Appeal decision in Oberlandesgericht (Hamburg) (1 Kart-U 5/06) on whether the German courts had jurisdiction under Regulation 44/2001 Art.5(3) (Brussels I Regulation) to order a German tour operator not to incite Spanish hotels to refuse to supply contingents to a competitor German tour operator, behaviour that had been found to be anti-competitive.

C. Tate, "**American Forum Non Conveniens in Light of the Hague Convention on Choice of Court Agreements**" (2007) 69 *University of Pittsburgh Law Review* 165 - 187.

E. Costa, "**European Union: litigation - applicable law**" (2008) 19 *International Company and Commercial Law Review* 7 - 10. Abstract:

Traces the history of how both the Convention on the Law Applicable to Contractual Obligations 1980 (Rome I) and Regulation 864/2007 (Rome II) became law. Explains how Rome II regulates disputes involving non-contractual obligations and determines the applicable law. Notes areas where Rome II does not apply, and looks at the specific example of how Rome II would regulate a dispute involving product liability, including the habitual residence test.

E.T. Lear, "**National Interests, Foreign Injuries, and Federal Forum Non Conveniens**" (2007) 41 *University of California Davis Law Review* 559 - 604 [**Full Text Here**]. Abstract:

This Article argues that the federal forum non conveniens doctrine subverts critical national interests in international torts cases. For over a quarter century, federal judges have assumed that foreign injury cases, particularly those filed by foreign plaintiffs, are best litigated abroad. This assumption is incorrect. Foreign injuries caused by multinational corporations who tap the

American market implicate significant national interests in compensation and/or deterrence. Federal judges approach the forum non conveniens decision as if it were a species of choice of law, as opposed to a choice of forum question. Analyzing the cases from an adjudicatory perspective reveals that in the case of an American resident plaintiff injured abroad, an adequate alternative forum seldom exists; each time a federal court dismisses such a claim, the American interest in compensation is irrevocably impaired. With respect to deterrence, an analysis focusing properly on adjudicatory factors demonstrates that excluding foreign injury claims, even those brought by foreign plaintiffs, seriously undermines our national interest in deterring corporate malfeasance.

I am sure that I have missed various articles or case comments published in the last couple of months. If you spot any that are not on this list (or, even better, if you have written one and it is not on this list), please let me know.

Choice of Law for Quantification of Damages: A Judgment of the House of Lords Makes a Bad Rule Worse

Russell J. Weintraub has written a fairly critical note on the House of Lords judgment in *Harding v Wealands* in the current issue (Spring 2007) of the *Texas International Law Journal*, entitled, **“Choice of Law for Quantification of Damages: A Judgment of the House of Lords Makes a Bad Rule Worse”** (42 Tex. Int’l L.J. 311). The (fairly long) introduction reads thus:

In discussing choice of law for determining damages for torts, it is necessary to distinguish between “heads” of damages and “quantification” of damages under

those heads. Heads of damages list the items for which a court or jury may award damages—medical expenses, lost wages, pain and suffering, punitive damages, and perhaps others. Quantification of damages measures the proper amount under each allowable head—how much for pain and suffering?

It is also necessary to focus on the meaning of “substantive” and “procedural” as those terms are used for choice of law. For “substantive” issues a court applies the forum’s choice-of-law rule to select the applicable law. “Procedural” in conflicts jargon is simply shorthand for saying that the forum’s rule applies.

“Procedural” is a term used in many contexts. It may refer to the rules that govern the workings of the forum’s courts—pleading, preserving objections for appeal, discovery. In the United States it may refer to a federal court’s freedom to apply a federal rule when the court has subject-matter jurisdiction because of the parties’ diversity of citizenship and is applying state, not federal, law to “substantive” issues. Or, as indicated above, a “procedural” issue might be one for which the forum court will not engage in its usual choice-of-law analysis, but will simply apply its own rule.

Justice Frankfurter said it as well as anyone: Matters of “substance” and matters of “procedure” are much talked about in the books as though they defined a great divide cutting across the whole domain of law. But, of course, “substance” and “procedure” are the same key-words to very different problems. Neither “substance” nor “procedure” represents the same invariants. Each implies different variables depending upon the particular problem for which it is used.

Therefore, in deciding when to apply the “procedural” label in the context of choice of law, the question is: what justifies a forum in insisting on applying its local rule when under the forum’s choice-of-law rule the law of another jurisdiction applies to all “substantive” issues? The proper standard is one that balances the difficulty of finding and applying the foreign rule against the likelihood that applying the forum’s rule will affect the result in a manner that will induce forum shopping. Pleading, serving process, preserving objections for appeal, and similar issues relating to the day-to-day operation of courts are properly labeled “procedural” for choice-of-law purposes. Flouting those rules will affect the outcome, but an attorney is not likely to choose one forum over another to take advantage of such housekeeping provisions. Discovery rules

require more balancing. A forum that permits massive pre-trial discovery is likely to attract plaintiffs. U.S.-style discovery is one of the reasons that American forums are magnets for the aggrieved and injured of the world. Nevertheless, it would be unthinkable to require U.S. judges and lawyers to learn and apply foreign discovery rules. Discovery is properly labeled “procedural” for choice-of-law purposes.

What about damages? Heads of damages, the items that a court or jury may include in computing the amount awarded to the plaintiff, are universally regarded as substantive. If the forum’s choice-of-law rule for torts points to a Mexican state, that Mexican state’s law determines the heads of damages. Quantification of damages under these heads, however, is regarded as “procedural” and forum standards apply.

*The standard rule treating quantification of damages as procedural makes no sense. Quantification is the bottom line—what all the huffing and puffing at trial is about. The American devotion to jury trials in civil cases and the tendency of American juries to award “fabulous damages” are the primary reasons that foreign plaintiffs attempt to litigate their cases in U.S. courts. I have opposed this silliness, but the windmills show little sign of weakening. The United States Supreme Court has indicated the direction to take. *Gasparini v. Center for Humanities, Inc.* held that federal courts exercising diversity jurisdiction must apply “the law that gives rise to the claim for relief” to determine whether a jury verdict awards excessive damages. Other U.S. courts have not taken this hint that quantification of damages is too important for a “procedural” label.*

*One bit of sanity that survives in this choice-of-law madness is that courts regard statutory limits on recovery as “substantive.” They apply these limits when their choice-of-law rules select the tort law of the jurisdiction where the statute is in force. In *Harding v. Wealands*, however, the House of Lords, construing the Private International Law (Miscellaneous Provisions) Act 1995, has rejected even this limit on the “procedural” label when quantifying damages.*

Available on Westlaw.