First Issue of 2007's LMCLQ and Private International Law

There is a veritable feast of articles, casenotes and book reviews in the latest issue of the *Lloyd's Maritime & Commercial Law Quarterly*. They are:

"Piercing the corporate veil: searching for appropriate choice of law rules" by Chee Ho Tham (*L.M.C.L.Q. 2007, 1(Feb), 22-43*)

> *Analyses case law on whether the English courts will exceptionally disregard the separate legal personality of foreign incorporated entities in litigation, applying English or foreign company law. Discusses the jurisdiction to order remedies against shareholders on the ground that incorporation was a sham. Considers the nature of limited liability under English law.*

"Substance and procedure and choice of law in torts" by Andrew Scott (L.M.C.L.Q. 2007, 1(Feb), 44-62)

> *Discusses the House of Lords judgment in Harding v Wealands on the choice of law in actions for tort under the Private International Law (Miscellaneous Provisions) Act 1995 s.14. Interprets the scope of procedural matters to be determined in accordance with the laws of the forum. Reviews UK and Commonwealth cases. Considers potential problems if substantive and procedural issues must be determined according to different national laws.*

"EU Private International Law: Harmonization of Laws, 2006, Peter Stone" Reviewed by Adrian Briggs (*L.M.C.L.Q. 2007, 1(Feb), 123-126*) (see our items on this publication here).

"Concise Introduction to EU Private International Law, 2006, Michael Bogdan" Reviewed by Adrian Briggs (L.M.C.L.Q. 2007, 1(Feb), 123-126)

"EU Private International Law: An EC Court Casebook, 2006, Edited by Michael Bogdan and Ulf Maunsbach" Reviewed by Adrian Briggs *(L.M.C.L.Q. 2007, 1(Feb), 123-126)*

The LMCLQ isn't available online – paper subscription only.

Insolvency and the Conflict of Laws: A Review of English Cases in 2006

Andrew McKnight (Salans) has written written his annual review in the *Journal of International Banking Law and Regulation* on **legal developments during 2006 of interest to practitioners in the insolvency and conflict of laws fields** (*J.I.B.L.R. 2007, 22(4)*). Here's the abstract:

> *This, the second part of a two part article, examines legal developments during 2006 of interest to practitioners in the insolvency and conflict of laws fields. Reviews the UK adoption of the Model Law on Cross Border Insolvency 1997, the range of issues examined by the Court of Appeal in Manning v AIG Europe UK Ltd and other case law on topics including common law assistance in foreign insolvency proceedings, cross border insolvencies, transactions at an undervalue, administration expenses, court powers to determine a state's entitlement in a bank account, jurisdiction agreements, sovereign immunity, conflict of laws rules concerning tortious issues and international arbitration.*

Cases referred to: *Cambridge Gas Transport Corp v Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2006] UKPC 26; [2006] 3 W.L.R. 689 (PC (IoM)); *HIH Casualty & General Insurance Ltd v Axa Corporate Solutions (formerly Axa Reassurance SA)* [2002] EWCA Civ 1253; [2002] 2 All E.R. (Comm) 1053 (CA (Civ Div)); *Manning v AIG Europe UK Ltd* [2006] EWCA Civ 7; [2006] Ch. 610 (CA (Civ Div)); *AY Bank Ltd (In Liquidation), Re* [2006] EWHC 830; [2006] 2 All E.R. (Comm) 463 (Ch D (Companies Ct)); *Svenska Petroleum Exploration AB v Lithuania (No.2)* [2005] EWHC 2437; [2006] 1 All E.R. (Comm) 731 (QBD (Comm)); *Trafigura Beheer BV v Kookmin Bank Co* (Preliminary Issue) [2006] EWHC 1450; [2006] 2 All E.R. (Comm) 1008 (QBD (Comm)); *Harding v*

Wealands [2006] UKHL 32; [2006] 3 W.L.R. 83 (HL).

Rome II – All Change?

There is a short note in the new issue of the New Law Journal by Stephen Turner (*Beachcroft LLP*) entitled "**Rome II – all change?**" The abstract reads:

> *Considers the UK law as it applies to torts committed overseas, with reference to the House of Lords ruling in Harding v Wealands, where a road traffic accident had occurred in Australia. Examines the provisions of the Private International Law (Miscellaneous Provisions) Act 1995 on how to deal with international disputes and how the provisions of the Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (Rome II) will change how the appropriate jurisdiction is determined, considering if any exception should be made for product liability claims.*

Ref: *New Law Journal N.L.J. (2006) Vol.156 No.7247 Pages 1666-1667.* Available on Lawtel.

Seminar: The Future of Private International Law in England and Wales

The Future of Private International Law in England and Wales – Seminar at the British Institute of International & Comparative Law

Tuesday 24 October 2006 17:00 to 19:00
Location: Charles Clore House, 17 Russell Square, London WC1B 5JP

Participants

- **Lord Mance**
- **Professor Jonathan Harris, Birmingham University and Brick Court Chambers**
- **Adeline Chong, Nottingham University**
- **Adam Johnson, Herbert Smith**

This seminar is part of the British Institute's Evening Seminar Series on Private International Law which will run throughout the Autumn of 2006 and well into 2007 titled **'Private International Law in the UK: Current Topics and Changing Landscapes'**.

The series explores issues which are of topical importance for current legal practice and study in the field of Private International Law. Led by leading experts in the field, they will evaluate, in particular, the growing impact of the establishment of a European Civil Justice Area on the future of Private International Law in the UK.

Other Featured Events:

2006

1. 21 November: Substance and Procedure in the Law Applicable to Torts: Harding v Wealands
2. 18 December: Civil Remedies for Torture in the UK Courts: Jones v Saudi Arabia

2007

1. January: Non-justiciability: Reappraisal of Buttes Gas in the light of recent Decisions
2. 22 January: Intellectual Property Problems: Jurisdiction in IP Disputes
3. 22 January: The Future of International Patent Litigation in Europe
4. February: Resolving Family Conflicts in the EU: The Changing Landscape
5. March: The Road to Rome: An Update on the Law Applicable to Contractual Obligations

The British Institute's Series on Private International Law is kindly sponsored by Herbert Smith.

For more information, please log on to the BIICL website.

Form over Substance

There is a short note by Wendy Hopkins and Stephen Turner (Beachcroft LLP) in the new issue of the Solicitors Journal on the recent House of Lords ruling in *Harding v Wealands* (2006) UKHL 32; (2006) 3 WLR 83 (HL) [see this post for the judgment].

The article focuses on whether the relevant provisions of the New South Wales Motor Accidents Compensation Act 1999 were procedural and should be excluded when determining the quantification of damages for personal injury.

Ref: *Solicitors Journal S.J. (2006) Vol.150 No.32 Page 1071*.

Maher v Groupama Grand Est: Law Applicable to Direct Action Against Insurer

This post was written by Mrs Jenny Papettas, a PhD Candidate and Postgraduate Teaching Assistant at the University of Birmingham.

The Court of Appeal delivered its judgment in the case of *Maher v. Groupama Grand Est*. on 12 November 2009, upholding both the decision and reasoning of Blair J. in the Queen's Bench Division. The case, concerning issues of applicable

law in a direct action against an insurer, is noteworthy because it is illustrative of the type of case that will fall to be decided under Article 18 Rome II and serves as a reminder that individual Member State reasoning on these issues is obsolete under that Regulation.

The Claimants, an English couple, Mr. and Mrs. Maher, were involved in a collision in France with a van being driven negligently by French resident M Marc Krass. M Krass was sadly killed in the collision. The claim was brought directly against M Krass' third party liability insurer. Liability and the application of French law to the substantive issues in the case were not at issue. The outstanding issues to be determined by the court were; (1) Whether damages should be assessed in accordance with French law or English law, (2) Whether pre-judgment interest on damages should be determined in accordance with French law or English law.

The Assessment of Damages

Under English law the assessment of damages in tort claims falls to be decided as a procedural issue *(Harding v. Wealands* [2007] 2 AC 1). The issue in *Maher* was whether in a direct action against the tortfeasor's insurer the issue was to be characterised as tortious, with damages being dealt with as a procedural issue under the *lex fori* or as a claim founded in contract, where assessment of damages is dealt with as a substantive issue by the applicable (French) law as stipulated in both the Rome Convention (implemented in English law by Contracts (Applicable Law) Act 1990, s.2 and Sch.1, Art.10(1)(c)) and the Rome I Regulation. Despite the Defendant's arguments that the claim only arose because it was contractually obliged to indemnify the insured and that therefore the claim was contractual in nature, the Court, citing *Macmillan Inc v. Bishopgate Investment Trust plc (No. 3) [1996]1 WLR 387,* held that it was not the claim that fell to be characterised but each individual issue. Further citing Law Com Report No. 193 (Private international Law: Choice of Law in Tort and Delict (1990)) where it was stated that direct actions against liability insurers are better seen as an extension of a tortious action (para 3.51) the Court held that since liability was admitted and the insurer therefore had to meet the tortfeasor's liability the claim was tortious with the consequence that assessment of damages was procedural and a matter for the *lex fori*.

Pre-judgment Interest

With regard to pre-judgment interest the Court found that the issue was split. The existence of a right to such interest was held to be a substantive issue whilst the calculation of any interest, being partially discretionary in nature under s 35A Supreme Court Act 1981, was procedural. However, although the quantification of interest would as a result be determined with reference to English law, s35A is flexible enough to allow the Court to apply French rates if it is necessary to achieve justice in the circumstances.

Anticipating Rome II

Article 15 of Rome II provides a lengthy list of issues which will be determined by the applicable law, largely disposing of any possibility of subjecting different issues to different laws. This extends to the assessment of damages thereby expanding the scope of Rome II into areas previously classified as procedural under the traditional English substance /procedure dichotomy. Indeed, it was acknowledged during *Maher* that the application of Rome II would have produced a different result in this regard.

However an intriguing question remains as to whether Article 18, which provides for direct actions against insurers, will be interpreted so that the injured party's choice of either the applicable law or the law of the insurance contract will govern the whole claim or simply the question of whether a direct action can be permitted. Furthermore it will be interesting to see how the issue of characterisation plays out. For example, will the insurer be able to rely on the contractual limits of the policy where the applicable law to a direct action is determined by the law applicable under the Regulation. The only certainty is that such questions will have to be answered with reference to the autonomous definitions which are yet to develop and the methods currently employed by Member State courts will be obsolete for dealing with issues which fall within the remit of Rome II.

McNeilly v Imbree [2007] NSWCA 156

The decision of the New South Wales Court of Appeal in *McNeilly v Imbree* [2007] NSWCA 156 may be of interest to those in the United Kingdom (and elsewhere) because it raises the private international law dimensions of the same New South Wales statute as was considered by the House of Lords in *Harding v Wealands* [2006] UKHL 32; [2006] 4 All ER 1; [2006] 3 WLR 83, namely the New South Wales *Motor Accidents Compensation Act 1999* (the ***MACA***).

McNeilly concerned a plaintiff who was seriously injured in a car accident that occurred in the Northern Territory. The plaintiff took action in New South Wales against the driver of the car for negligence. One issue in the case was whether the assessment of damages was governed by the MACA or the equivalent Northern Territory statute, the MACA providing a lower discount rate for damages for future economic loss. The Court of Appeal concluded that the Northern Territory statute applied on the basis that the assessment of damages was a question of substance governed by the law of the Northern Territory as the place of the tort, pursuant to the Australian common law choice of law rule for torts (the *lex loci delicti* rule). It was not argued that the *lex loci delicti* rule was excluded by s 123 of the MACA as a mandatory law of the forum, which provides: "A Court cannot award damages to a person in respect of a motor accident contrary to this Chapter."

McNeilly may be contrasted with *Harding*, which concerned a claim before the English courts arising out of a car accident in New South Wales. The House of Lords characterised the question of damages as a question of procedure and therefore applied English law as the law of the forum, rather than the MACA. Section 123 of the MACA could not affect this conclusion: even if it had the effect of a mandatory law of the forum in a case before the New South Wales courts, it could not have that effect in a case before the English courts.