Text of the Commission's Proposal on Succession and Wills Finally Available

Following our previous post on the **presentation by the Commission of the Proposal for a regulation on succession and wills** (COM(2009) 154 fin. of 14 October 2009), the text of the Proposal has been made available on the PreLex website, where the codecision procedure has been filed under no. 2009/0157/COD. Only the English, French and German versions are currently accessible.

The proposal is accompanied by two Commission Staff working documents (in English):

- doc. n. SEC(2009)410 of 14 October 2009, Impact Assessment;
- doc. n. SEC(2009)411 of 14 October 2009, Summary of the Impact Assessment.

Direct linking to these supplements does not currently work: to download them, use the search form at the bottom of this page.

European Commission Presents Proposal on Succession and Wills

According to a press release by the DG Freedom, Security and Justice (IP/09/1508), **the long-awaited Proposal for a Regulation on succession and wills**, whose presentation, initially expected in last March, had been significantly delayed, **was finally released on 14 October 2009 by the European Commission**.

The official reference *should* be the following: Proposal for a Regulation of the

European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, COM(2009)154 fin. of 14 October 2009.

The text of the proposed regulation, along with the Commission's explanatory memorandum, is not yet available on the institutional websites. Interested readers may have a look at the press release and at a basic set of Q&A (MEMO/09/447) prepared by the Commission. References to the preparatory studies, the 2005 Green Paper and the subsequent public consultation can be found in our previous post here.

Moving to France to Bypass German Insolvency (and Tax) Law

On 16 September 2008, the Court of Appeal of Colmar (Alsace) ruled that a German debtor could not benefit from French insolvency law, as he had apparently moved to France for that sole reason. Had he followed the advice of http://www.insolvenz-frankreich.de ?

I understand that under German law, insolvency proceedings do not have the effect of immediately cancelling debts. By contrast, under French law, insolvency proceedings result in the immediate cancellation of all debts, irrespective of whether the liquidation of the assets was sufficient to pay creditors. The Colmar court specifically insisted that the goal of the German debtor was to benefit from this rule of French law.

The German debtor had allegedly moved to France in 2005. He waited for two years before filing for insolvency in Strasbourg in November 2007. He then claimed that he lived in France and worked there part-time for a French company. He also claimed that he had become insolvent as he owed €56,000 to a German company. At a later stage, he added that he also owed €155,000 to German tax authorities. He alleged he had no assets.

Now, this did not really convince the court, for a variety of reasons:

1. The French company was not paying him much (€600), and he was not really able to explain in court what his job there actually was.

2. German tax authorities were seeking payment of taxes for years 2005, but also 2006 and 2007, which was hard to reconcile with the claim that he had not worked in Germany during that time. Indeed, he admitted that he was still registered as an auditor there.

3. The German company to which he owed €56,000 had its seat at his address in Germany, in Wissembourg.

4. A garage from Haguenau had notified him with an injunction of payment, which was hard to reconcile with the claim that he had no assets, and in particular no car.

5. Finally, he had allegedly moved to France at the very moment when he had received a notification of debt from the German tax authorities. Strange coincidence, really. Did he make up the other € 56,000 debt to conceal that the point was to avoid paying the tax debt?

Until recently, French law did not provide for insolvency for individuals. This was different in Alsace – Lorraine, which always kept that possibility even after it became French again after the war. There is thus a special provision in the French commercial code which provides that all individuals domiciled in Moselle, Haut-Rhin and Bas-Rhin can enjoy the benefit of insolvency, but only if they are in "good faith" and "notoriously insolvent" (Com. code, art. L. 670-1). The Court found that he was not in good faith, and thus that the requirements under French insolvency law were not met. This means that, thanks to this substantive provision of French insolvency law, the Court did not have to discuss whether there had been any *fraude à la loi*, the traditional concept used by French conflict scholars to tackle strategic behavior of this kind.

Finally, the application of the European Insolvency Regulation was not discussed.

Conferences on International Family Law at the French Cour de cassation

In November, two conferences will be held on family law at the French Supreme Court for private and criminal matters (*Cour de cassation*). Access is free, although participants should register in advance. Speeches will be delivered in French.

The first conference will be held on November 9, from 9:30 am until 5:30 pm. The general theme will be the importance of nationality in Franco-Moroccan relations (*Les enjeux de la nationalité dans les relations franco-marocaines*). Conflict issues will be mostly addressed in the afternoon. Speakers will be judges from France and Morocco. The program can be found here.

The second conference will be held on November 20, from from 9:30 am until 6 pm. It will evaluate 20 years of application of the U.N. Convention on the rights of the child. Speakers will have various backgrounds, but will essentially include judges and practioners. The program can be found here.

Croatian Conference on Brussels I

Institute of European and Comparative Law of the University of Rijeka Faculty of Law and the Croatian Comparative Law Association are organising the international conference titled ***The Brussels I Regulation: Challenges for Croatian Judiciary***. The conference program covers the topics concerned with general issues and special heads of jurisdiction under the Brussels I Regulation, with particular emphasis on the new developments and relationships with third countries. The aim of the conference is to offer guidance to Croatian lawyers on how to implement the Regulation provisions as a part of the capacity building for the accession to the EU. Besides, it is intended to provide the lawyers interested

in the topic with an insight into some of the recent issues.

The conference is dedicated to one of the most prominent Croatian private international lawyers and scholars Professor Petar Sarcevic to whom the University of Rijeka Faculty of Law is highly indebted for his scientific and teaching contributions throughout his academic career. This conference is intended to be the first in the series of the conferences devoted to specific topics of private international law organised by the Institute.

The conference is to be held on **13 and 14 November 2009** at the Hotel Milenij Grand in Opatija, Croatia.

The Mess of Manifest Disregard

What is the impact of the much commented decision of the U.S. Supreme Court *Hall Street Associates v. Mattel Inc.* on the doctrine of manifest disregard of the law? This judicially crafted ground for vacatur of arbitral awards empowers American courts to review awards on the merits, which is an old difference between the common law and the civil law worlds.

Hall Street was not about whether manifest disregard was good law. It was about whether parties could change the grounds for vacatur of awards. As the Court held that the American *Federal Arbitration Act* (FAA) should be strictly applied and thus that the parties did not have such power, *Hall Street* immediately raised the issue of whether it impacted the power of courts to continue to use judicially crafted exceptions to the FAA such as manifest disregard.

A recent article by Hiro Aragaki (*The Mess of Manifest Disregard*, 119 Yale L.J. Online 1 (2009)) summarizes how U.S. Courts have reacted, and shows that there is a split in the making among circuits in the U.S. For some, *Hall Street* has indeed spelled the end of manifest disregard, while for others, manifest disregard remains, but must now be founded in one of the statutory grounds of the FAA. Aragaki offers a third interpretation.

The article, which has the great advantage of being unusually short (14 pages) by American standards, can be downloaded here.

ECJ: First Ruling on the Rome Convention

On March 2008, the Hoge Raad der Nederlanden (Netherlands) made reference for a preliminary ruling to the ECJ, regarding the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980 (see Giorgio Buono's post). The reference relates to Article 4 of the convention, which establishes the applicable law in the absence of a choice by the parties. AG Bot's opinion was delivered on 19 May 2009; the ECJ judgment (Grand Chamber) has been released today.

The dispute in the main proceedings concerned a contract entered into in August 1998 between Intercontainer Interfrigo SC (ICF) and Balkenende and MIC. That contract provided that ICF was to make train wagons available to MIC, and would ensure their transport via the rail network. Although the contract was not in written, ICF sent to MIC a written draft contract, which contained a clause stating that Belgian law had been chosen as the law applicable; that draft was never signed by any of the parties to the agreement. On November and December 1998, ICF sent invoices to MIC for the amounts of EUR 107 512.50 and EUR 67 100 respectively. Only the second of those amounts was paid by MIC. On December 2002, ICF brought an action against Balkenende and MIC before the Rechtbank te Haarlem (Local Court, Haarlem) (Netherlands) seeking an order for payment of the sum corresponding to the first invoice. Balkenende and MIC submitted that the claim at issue in the main proceedings was time-barred under the law applicable to the contract , in this case Netherlands law. By contrast, according to ICF, Belgian law was applicable to the contract, and the claim was not yet time-barred.

Both the Rechtbank te Haarlem and the Gerechtshof te Amsterdam (Netherlands)

(Regional Court of Appeal, Amsterdam) (Netherlands), applied Netherlands law and upheld the objection of limitation raised by Balkenende and MIC. The courts categorised the contract at issue as a contract for the carriage of goods, but they also said that if, as ICF maintained, the contract at issue in the main proceedings was not categorised as a contract of carriage, then Article 4(2) of the Convention was not applicable since it was apparent from the circumstances of the case that that contract was more closely connected with the Kingdom of the Netherlands, and thus the derogating provision in the second sentence of Article 4(5) of the Convention must be applied.

ICF appealled alleging an error of law in the categorisation of the contract as a contract of carriage, and also the possibility of the court's derogating from the general rule laid down in Article 4(2) of the Convention to apply Article 4(5) thereof. In view of those divergences on the interpretation of Article 4 of the Convention, the Hoge Raad der Nederlanden decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Must Article 4(4) of the … Convention … be construed as meaning that it relates only to voyage charter parties and that other forms of charter party fall outside the scope of that provision?

2. If [the first question] is answered in the affirmative, must Article 4(4) of the … Convention then be construed as meaning that, in so far as other forms of charter party also relate to the carriage of goods, the contract in question comes, so far as that carriage is concerned, within the scope of that provision and the applicable law is for the rest determined by Article 4(2) of the … Convention?

3. If [the second question] is answered in the affirmative, which of the two legal bases indicated should be used as the basis for examining a contention that the legal claims based on the contract are time-barred?

4. If the predominant aspect of the contract relates to the carriage of goods, should the division referred to in [the second question] not be taken into account and must then the law applicable to all constituent parts of the contract be determined pursuant to Article 4(4) of the … Convention?

5. Must the exception in the second clause of Article 4(5) of the … Convention be interpreted in such a way that the presumptions in Article 4(2) [to] (4) of the … Convention do not apply only if it is evident from the circumstances in their

totality that the connecting criteria indicated therein do not have any genuine connecting value, or indeed if it is clear therefrom that there is a stronger connection with some other country?"

Bringing together the first question and the first part of the second question, both relating to the application of Article 4(4) of the Convention to charter-parties, the ECJ has stated that the last sentence of Article 4(4) of the Convention "must be interpreted as meaning that the connecting criterion provided for in the second sentence of Article 4(4) applies to a charter-party, other than a single voyage charter-party, only when the main purpose of the contract is not merely to make available a means of transport, but the actual carriage of goods".

As for the second part of the second question and the third and fourth questions, relating to the possibility of the Court's dividing the contract into a number of parts for the purpose of determining the law applicable, the ECJ has answered that "the second sentence of Article 4(1) of the Convention must be interpreted as meaning that a part of a contract may be governed by a law other than that applied to the rest of the contract only where the object of that part is independent".

Through the fifth question the ECJ is asked whether the exception in the second clause of Article 4(5) of the Convention must be interpreted in such a way that the presumptions in Article 4(2) to (4) of the Convention do not apply only if it is evident from the circumstances in their totality that the connecting criteria indicated therein do not have any genuine connecting value, or whether the court must also refrain from applying them if it is clear from those circumstances that there is a stronger connection with some other country. In this regard, the ECJ has stated that "as is apparent from the wording and the objective of Article 4 of the Convention, the court must always determine the applicable law on the basis of those presumptions", but that "however, where it is clear from the circumstances as a whole that the contract is more closely connected with a country other than that identified on the basis of the presumptions set out in Article 4(2) to (4) of the Convention, it is for that court to refrain from applying Article 4(2) to (4)".

Enforcement in France of a U.S. Financial Penalty

Earlier this year, the French *Cour de cassation* (Supreme court for private and criminal matters) confirmed a declaration of enforceability of a U.S. financial penalty of 13 million dollars in a judgment of 28 January 2009.

The *Cour de cassation* characterized the foreign penalty as an *astreinte*. Its enforceability was challenged on the grounds that it was criminal in nature, as it sanctioned a contempt of court, and that it was not proportionate to the offence. By contrast, and although the introductory report prepared by one of the members of the court did discuss the issue, the judgment did not address whether *astreinte* was an exercise of state power which as such ought to remain strictly territorial.

The case was about another Ponzi scheme perpetrated in the U.S.. The accused was an American citizen, Richard Blech, who lived in France (he was eventually extradited to and jailed in New York and in California). He was the manager of an American corporation, Credit Bancorp, that he had used to commit the fraud. In January 2000, the District Court for the Southern District of New York appointed a receiver for Credit Bancorp, who was meant to trace the proceeds of the fraud committed by Blech. Some times later, the receiver sought an injunction from the US Court ordering Blech to cooperate with him. As he would not, he applied for a renewal of the injunction, together with a sanction of US$ 100 per day of non-compliance, which was to double each day. At that point in time, I understand that Blech was found to be in contempt of court for not complying with the injunction. Four months later, the same receiver applied for the penalty to be calcutated, which was done by the court in an order of 25 July 2000 which ordered Blech to pay a bit more than 13 million dollars.

The receiver then sought to enforce the order of July 25, 2000, in a ski resort in France, where Blech owned a property. In 2003, the competent first instance court of Thonon-les-Bains (French Alps) declared the American judgment

enforceable. The judgment was confirmed by the Chambery Court of Appeal in 2006. Blech appealed to the Cour de cassation.

Blech first challenged the lower courts' decisions on the ground that they had recognised a foreign criminal order. Here, much of the argument revolved around the fact that Blech was found to be in contempt of court. The reason why was that, in the *Stolzenberg* case, the *Cour de cassation* had said *obiter* that contempt of court was criminal in nature. Then, the point was to declare enforceable in France a *Mareva* injunction, and the court had ruled that a freezing order is civil in nature irrespective of the sanction of "contempt of court" (cited as such in the judgment) which backs it, and which is criminal. In *Blech*, the issue was not anymore to recognize the foreign injunction, but its sanction. A mechanical application of *Stolzenberg* would have led to rule that it was thus a US penal judgment which could not be enforced in France. But this is not what the *Cour de cassation* did. It held that the financial penalty which was the sanction for non complying with a foreign injunction was civil in nature, and could thus be declared enforceable.

As mentioned earlier, the judgment does not discuss whether, though not criminal, the foreign sanction could have been regarded as an exercise of American state authority, and should thus have produced effect on American soil only. The likely reason is that, as the foreign penalty had been calculated, it was perceived as not raising such an issue. French scholars all agree that as soon as a threat of financial sanction ceases to be a mere threat and is turned into an actual order to pay, the problem is not anymore one of exercising state authority. Support for this position is thought to be in article 49 of the Brussels I Regulation, although it obviously did not apply in this case.

Blech further challenged the recognition of the U.S. order on the ground that it was a disproportionate penalty: 13 million for not cooperating with the receiver. The Court aswered that trial judges could not be criticized for finding that it was a perfectly proportionate sanction given that the fraud was for US$ 200 million. Implicitely, however, the Court accepted that foreign civil penalties could only be recognized if proportionate. The Court referred to the proportionality principle which lies both in the French Constitution (1789 *Declaration des droits de l'homme et du citoyen*, article 8) and in European Human Rights Law (Article 1 of the First Protocol to the European Convention on Human Rights). In another context, this is what the European Court of Justice recently held in *Gambazzi*.

M. Blech has served his sentence in California and is now back to France.

Cuadernos de Derecho Transnacional, 2009-2

The second issue of the *Cuadernos de Derecho Transnacional*, the Spanish online journal created by Profs. Calvo Caravaca and Carrascosa Gonzalez (see presentation post), has been published last week. The magazine, wholly available under this net address, contains articles and notes written by from authors of different nationalities (Spanish, Italian and Portuguese). All of them are summarized in an English abstract.

Table of contents (Studies)

Hilda Aguilar Grieder, "Arbitraje comercial internacional y grupos de sociedades"
Abstract: Within the framework of the companies of the group, the parties that have not signed the international contract often take part in its negotiation, execution and termination. When the aforementioned contract includes an arbitration clause, the question arises as to whether the clause would affect these non-signatories; that is to say, whether these parties are allowed to undertake legal proceedings or can have claims filed against them in court. According to the "group of companies" doctrine which is, in specific circumstances, widely accepted in arbitral and state practice, the effects of the arbitration agreement would extend to the non-signatories of the companies of the group even though they have not signed the contract in which the arbitration clause is written.

C.M. Caamiña Domínguez, "Los contratos de seguro del art. 7 del Reglamento Roma I"
Abstract: This study analyses Article 7 of the Rome I Regulation. This Article establishes the law applicable to insurance contracts covering a large risk whether or not the risk covered is situated in a Member State, and to all other insurance contracts covering risks situated inside the territory of the Member

States. An insurance contract covering a large risk shall be governed by the law chosen by the parties. In the absence of choice, it shall be governed by the law of the country where the insurer has his habitual residence unless the contract is manifestly more closely connected with another country. When an insurance contract covers a non-large risk situated within the EU, party autonomy is limited. To the extent that the law applicable has not been chosen, such a contract shall be governed by the law of the Member State in which the risk is situated at the time of conclusion of the contract. In accordance with Article 7, additional rules shall apply to compulsory insurances.

A.L. Calvo Caravaca, "El Reglamento Roma I sobre la ley aplicable a las obligaciones contractuales: cuestiones escogidas"
Abstract: The Rome I Regulation has tried to improve the 1980 Rome Convention. The final result has been uneven. This study focuses on three matters. Firstly, it explains how to select the law applicable to the contract (Art. 3 Rome I Regulation). It will be a controversial regulation because of the connection between jurisdiction and applicable law as well as its opposition to the new Lex mercatoria. Secondly, consumer contracts are examined (Art. 6 Rome I Regulation). The concept of consumer contracts includes any contract concluded by a natural person with another person acting in the exercise of his trade or profession. However, it does not solve two matters: if overriding mandatory provisions are applicable to those contracts and how to protect active consumers. Lastly, although Article 9 is inspired by Article 7 of the Rome Convention, it adds two innovations: a controversial Community definition of overriding mandatory provisions, and when to give effect to overriding mandatory provisions of a different law from the one of the forum.

E. Castellanos Ruiz, "Las normas de Derecho Internacional Privado sobre consumidores en la Ley 34/2002 de servicios de la sociedad de la información y de comercio electrónico"
Abstract: The rules of private law on consumers in Directive 2000/31 of 8 June 2000 on certain legal aspects of the information society, in particular electronic commerce in the Internal Market (Directive on e-commerce) and the Act transposing the Directive on the legal Spanish Law 34/2002 of July 11, services of information society and electronic commerce are very rare, and most have a "character clarification". These rules of private international law clarificatory highlighted in the arts. 26 and 29 of the LSSI concerning the law applicable to

electronic contracts and determining the place of conclusion of contracts online, respectively.

C. Llorente Gómez de Segura, "La ley aplicable al contrato de transporte internacional según el Reglamento Roma I"
Abstract: Contracts of carriage have received a specific legal treatment under the Rome I Regulation following a trend initiated by the Rome Convention. However, Rome I has not merely introduced cosmetic changes with respect to the Rome Convention but has produced new rules particularly, although not exclusively, regarding carriage of passengers. In addition, this article aims to be a reference guide for the analysis of the Rome I general rules in order to facilitate its application to contracts of carriage.

D. Moura Vicente, "Liberdades comunitárias e Direito Internacional Privado"
Abstract: The «unity in diversity» demanded by European integration requires a system of coordination of the laws of the Member-States which is compatible with the free movement of persons, goods, services and capitals within the European Community. In recent legislative acts of the Community, as well as in the case-law of the European Court of Justice, a trend can be noticed towards the adoption of rules concerning the law applicable to private international relationships exclusively connected with the European internal market or calling for a principle of mutual recognition in the regulation of those relationships. This papers aims at determining whether and in what measure this «Private International Law of the internal market», which seems to be on the rise, involves a change of paradigm, from the standpoint of the methods and solutions that it enshrines, when compared with the common conflict of laws rules.

G. Pizzolante, "I contratti con i consumatori e la nuova disciplina comunitaria in materia di legge aplicabile alle obbligazioni contrattuali"
Abstract: The «Rome I» Regulation has converted the 1980 Rome Convention into a Community instrument. In relation to consumer contracts, the Regulation has expanded the scope of material application of Article 6. Under the new text, with certain exceptions, the special provision dealing with consumer contracts appliesto any contract entered into between a professional and a consumer, regardless of its object. This paper analyses in particular two aspects (a) the reasons that justified the modifications (b) its scope (subjective and objective) of application. It also shows the development of European consumer contract law within the whole area of European contract law and analyses the inclusion into

EC directives on consumer protection of specific provisions as to their international scope in order to ensure their effective and uniform application to international consumer transactions. In fact, certain number of directives contain a provision that, although not being a conflict of laws' rule, have an impact on the applicable law to a contract. If the contract has a direct link to the territory of one or more Member States, these provisions provide for the application of Community law even if the parties chose the law of a third country.

F. Seatzu, "La Convenzione europea dei diritti dell'uomo e le libertà di iniciativa imprenditoriale e professionale"
Abstract: This article looks at different aspects of the concept of "economic initiative" and delineate its indicia for the purpose of human rights discourse. It discusses the meaning of the notion of economic initiative as a human rights within the context of European Convention on Human Rights. The author argues that a theoretical framework is required in order to clarify how far the Convention allows public authorities to interfere with economic rights. The article addresses a number of issues, including the following questions: what is economic initiative? Is economic initiative a human rights? How are economic rights limited? How far can public authorities legitimately interfere with human rights? In order to do this, the author examines case law of the Convention organs and reflects on the result of cases in the light of the theoretical framework that has been established.

P. Zapatero Miguel, "Diplomacia y cultura legal en el sistema GATT/OMC"
Abstract: The GATT/WTO system has evolved from a diplomacy-based system to a rule-oriented system. This cultural process in which lawyers finally triumphed over diplomats as key professionals running the regime was the direct result of an internal battle over technical qualifications inside the GATT that lasted several decades. Legal techniques have significantly reinforced the multilateral trading system
in comparative institutional terms. However, incremental legalization and judicialization has inevitably broadened the scope of trade justiciability, reaching a critical point that generates some criticism and concern. From the point of view of institutional design, this flexible and adaptative regime is among the most powerful and advanced multilateral artifacts in international legal arquitecture.

*A **Varia** section follows, also enclosing English abstracts.*

Conference Announcement: The Role of Ethics in International Law

The Role of Ethics in International Law

Event Information
Friday, November 13, 2009 / 8:30 AM
Tillar House/Cosmos Club
Washington, D.C.

Each year, the International Legal Theory Interest Group of the American Society of International Law convenes a special conference to consider an important theoretical issue in international law. This year, the conference will focus on the Role of Ethics in International Law. Special attention will be paid both to the role of ethics in public and private international law, as well as to normative and theoretical perspectives. The panels will feature the following distinguished scholars.

The Role of Ethics in Public International Law
Oona A. Hathaway, Yale Law School
Mary Ellen O'Connell, Notre Dame Law School
Edward T. Swain, George Washington University Law School

The Role of Ethics in Private International Law
Lea Brilmayer, Yale Law School
Perry Dane, Rutgers School of Law
Dean Symeon C. Symeonides, Willamette University College of Law

Normative and Theoretical Perspectives
Mashood A. Baderin, School of Law, SOAS, University of London
Samantha Besson, University of Fribourg/Duke University School of Law
H. Patrick Glenn, McGill University

Lunch will be served as part of this free conference for ASIL members ($15.00 for

non-ASIL members). For further information, see here.