Exxon, Punitive Damages and the Conflict of Laws

Yesterday, the U.S. Supreme Court delivered its decision in Exxon v. Baker. The central issue of the case was whether an award of punitive damages of US$ 2.5 billion (as reduced by the lower courts from an initial award of US$ 5 billion) was excessive as a matter of maritime common law. The Court held 5 to 3 (with Alito recused) that such awards should be limited by using a ratio of punitive to compensatory damages. The court held that, in maritime cases, a ratio of 1:1 is a fair upper limit. Thus, as the lower court had assessed the compensatory damages to US$ 507 million in that case, the Supreme Court held that punitive damages should be reduced to that amount as well.

This case comes after several decisions where the Supreme court has interpreted the Due Process Clause as setting limits to punitive damages awards. In those cases, it was held that a ratio superior to one digit (i.e. superior to 9:1) would rarely satisfy Due Process, and that when the award of compensatory damages was already substantial, it might be that only a ratio of 1:1 would satisfy the constitutional requirement.

There is therefore a clear trend in American law towards more reasonableness and predictability in the award of punitive damages.

To bolster its holding limiting punitive damages, the Court noted that the practice of other common law jurisdictions was different, but also that awards of punitive damages were often denied recognition abroad:

> *For further contrast with American practice, Canada and Australia allow exemplary damages for outrageous conduct, but awards are considered extraordinary and rarely issue. See … Noncompensatory damages are not part of the civil-code tradition and thus unavailable in such countries as France, Germany, Austria, and Switzerland. See … And some legal systems not only*

decline to recognize punitive damages themselves but refuse to enforce foreign punitive judgments as contrary to public policy. See, e.g., Gotanda, Charting Developments Concerning Punitive Damages: Is the Tide Changing? 45 Colum. J. Transnat'l L. 507, 514,518, 528 (2007) (noting refusals to enforce judgments by Japanese, Italian, and German courts, positing that such refusals may be on the decline, but concluding, "American parties should not anticipate smooth sailing when seeking to have a domestic punitive damages award recognizedand enforced in other countries").

From a conflict perspective, the interesting question is whether such an evolution of American law would change anything. Would Japanese, Italian or German courts recognize lower awards? Is size the issue? Or is it just the punitive nature of such judgments, which makes them, for conflict purposes, criminal in nature?

Comments from all jurisdictions welcome!

First Issue of 2008's Revue Critique de Droit International Privé

The first issue of 2008's *Revue Critique de Droit International Privé* has just been released. It contains three articles, but only one dealing with a conflict issue per se, the public law exception within the Brussels I Regulation after the *Lechouritou* case ("*Les actes* jure imperii *et le Règlement Bruxelles I – A propos de l'affaire* Lechouritou"). The two other articles discuss immigration law issues.

The article is authored by French scholars Horatia Muir Watt, who teaches at Paris I University (and who was our Guest Editor of last month), and Etienne Pataut, who teaches at Cergy University.

The authors have kindly provided the following abstract:

Inasmuch as private international law in continental legal systems is entirely structured by the distinction between private cross-border relationships subjected to the conflict of laws, and the public sphere, correlatively excluded, it is now undergoing profound transformations due to to the changing nature and function of substantive « private » law. The traditional opposition between public and private law is if not discredited, at least in search of re-definition. It is not surprising, therefore, that the "public law exception" which first appeared in the Brussels Convention in 1968 and continues to figure unaltered in the new Community private international law instruments, raises considerable difficulties in the case-law of the Court of justice, and gives rise to varying constructions in the courts of the various Member States. The 2007 Lechouritou case (C-292/05) is emblematic of these difficulties, insofar as it reveals a lack of coherence between the scope of sovereign immunity and the public law exception within the Brussels I Regulation. This article uses the Lechouritou case to revisit the distinction between public and « civil and commercial matters » and suggests a new reading of the Regulation in this context.

Conference: The Rome I Regulation – New Choice of Law Rules in Contract

We are pleased to announce the:

Journal of Private International Law Conference
The Rome I Regulation: New Choice of Law Rules in Contract
Friday 19th September 2008
Herbert Smith, Exchange House, London

The full programme, also set out below, can be found on our **dedicated conference page**. The speakers are all internationally recognised experts in the

fields of private international law, insurance e-commerce and IP, and financial services. The keynote speech is to be delivered by The Honourable Mr Justice Richard Plender, Royal Courts of Justice.

Details on fees and booking can be found here – if you wish to attend, I suggest booking with all due speed as places *are* limited.

The conference is kindly sponsored by Herbert Smith, the University of Birmingham, the University of Aberdeen and the University of Southampton.

Programme

9.30am – 10.00am **Registration and Coffee/Tea**

10.00am – 10.15am **Opening and Keynote Address**

The Honourable Mr Justice Richard Plender, Royal Courts of Justice, '*Towards a European Private International Law of Obligations*'

10.15am – 11.30am **The General Framework**

(Chair: Professor Paul Beaumont, University of Aberdeen)

Raquel Correia, Legal Adviser and JHA Counsellor, Portuguese Permanent Representation to the European Union

Andrew Dickinson, Clifford Chance LLP, London; Visiting Fellow in Private International Law, British Institute of International and Comparative Law

Dr Michael Hellner, University of Uppsala

Oliver Parker, Legal Adviser, Ministry of Justice

11.30am – 12.00pm **Coffee/Tea Break**

12.00pm–1.00pm **Insurance**

(Chair: Adam Johnson, Partner, Herbert Smith LLP)

Richard Lord QC, Brick Court Chambers

Professor Robert Merkin, University of Southampton

Louise Merrett, Trinity College, University of Cambridge; Fountain Court Chambers

1.00pm – 2.15pm **Lunch**

2.15pm – 3.15pm **E-Commerce and IP**

(Chair: Professor Gerrit Betlem, University of Southampton)

Richard Fentiman, Queens' College, University of Cambridge

Dr Julia Hörnle, Queen Mary, University of London

Professor Paul Torremans, University of Nottingham

3.15pm – 4.30pm **Financial Services**

(Chair: Professor Jonathan Harris, University of Birmingham; Brick Court Chambers)

Professor Michael Bridge, London School of Economics, University of London

Professor Francisco Garcimartin Alférez, University of Madrid Rey Juan Carlos

Dr Joanna Perkins, Secretary of the Financial Markets Law Committee

Charles Proctor, Partner, Bird & Bird; Honorary Professor, University of Birmingham

4.30pm – 5.00pm **Coffee/Tea Break**

5.00pm – 5.30pm **Panel Discussion**

(Chair: Murray Rosen QC, Partner, Herbert Smith LLP)

5.30pm **Drinks Reception**

Booking and Fees

New Reference on Brussels II bis

Another reference for a preliminary ruling on the **Brussels II *bis* Regulation** has been referred to the ECJ, this time by the Republic of Lithuania.

The Lithuanian court (*Lietuvos Aukš?iausiasis Teismas*) has referred the following questions to the ECJ:

> *Can an interested party within the meaning of Article 21 of Council Regulation (EC) No 2201/2003 apply for non-recognition of a judicial decision if no application has been submitted for recognition of that decision?*
>
> *If the answer to Question 1 is in the affirmative: how is a national court, when examining an application for non-recognition of a decision brought by a person against whom that decision is to be enforced, to apply Article 31(1) of Regulation No 2201/2003, which states that '… Neither the person against whom enforcement is sought, nor the child shall, at this stage of the proceedings, be entitled to make any submissions on the application'?*
>
> *Is the national court which has received an application by the holder of parental responsibility for non-recognition of that part of the decision of the court of the Member State of origin requiring that that holder return to the State of origin the child staying with that holder, and in respect of which the certificate provided for in Article 42 of Regulation No 2201/2003 has been issued, required to examine that application on the basis of the provisions contained in Sections 1 and 2 of Chapter III of Regulation No 2201/2003, as provided for in Article 40(2) of that regulation?*
>
> *What meaning is to be attached to the condition laid down in Article 21(3) of Regulation No 2201/2003 ('Without prejudice to Section 4 of this Chapter')?*
>
> *Do the adoption of a decision that the child be returned and the issue of a certificate under Article 42 of Regulation No 2201/2003 in the court of the Member State of origin, after a court of the Member State in which the child is being unlawfully kept has taken a decision that the child be returned to his or*

her State of origin, comply with the objectives of and procedures under Regulation No 2201/2003?

Does the prohibition in Article 24 of Regulation No 2201/2003 of review of the jurisdiction of the court of the Member State of origin mean that, if it has received an application for recognition or non-recognition of a decision of a foreign court and is unable to establish the jurisdiction of the court of the Member State of origin and unable to identify any other grounds set out in Article 23 of Regulation No 2201/2003 as a basis for non-recognition of decisions, the national court is obliged to recognise the decision of the court of the Member State of origin ordering the child's return in the case where the court of the Member State of origin failed to observe the procedures laid down in the regulation when deciding on the issue of the child's return?

The case is pending as C-195/08 (*Inga Rinau*)

(Many thanks again to Jens Karsten (Brussels) for information on this case.)

Update: it seems that *Rinau* is the first reference to the ECJ to use the "urgent preliminary reference procedure" – more information can be found on the excellent EU Law Blog (which is where we spotted it). The effect of that is that the hearing is due before the Third Chamber on 26th June 2008, *less than two months* after it was first lodged.

See for more information on the urgent preliminary reference procedure the following press release of the Commission which can be found here.

Ph.D. Grants of the International Max Planck Research School for

Maritime Affairs

The International Max Planck Research School for Maritime Affairs at the University of Hamburg will award for the period commencing 1 October 2008 six Ph.D. grants for a term of two years. The particular area of emphasis to be supported by this round of grants is the **Implications of Climatic Changes in the Arctic**.

Deadline for applications is 31 July 2008.

More information on the International Max Planck Research School for Maritime Affairs, application requirements as well as the application procedure can be found here.

The Standard of Proof of Facts going to Jurisdiction

The recent case of *Purple Echo Productions, Inc. v. KCTS Television*, 2008 BCCA 85 (available here) addresses, at some length, the standard of proof required of jurisdictional facts.

I have recently co-written an article on a related topic – the standard of proof for jurisdiction clauses – in the Canadian Business Law Journal. See SGA Pitel & J de Vries, "The Standard of Proof for Jurisdiction Clauses" (2008) 46 C.B.L.J. 66.

In the main, the British Columbia Court of Appeal uses the language of the orthodox cases – facts need not be proven on the balance of probabilities, but rather only need to be proven to the "good arguable case" standard. And to some degree the decision may turn on the specifics of the province's regulatory provisions, which allow the defendant to keep jurisdiction a live issue up to and including trial (see paras. 38 and 39 of the decision). But overall I am troubled by the court's analysis.

In the article, we draw the distinction between the sort of facts that can found jurisdiction under the heads of service out, like the breach of a contract committed in Ontario, and other sorts of facts. For the former, the good arguable case standard seems right. The plaintiff does not have to show, at the jurisdiction stage, that there has, on balance of probabilities, been such a breach. That is for trial. For the latter, in which we include the existence of a jurisdiction clause, there is much less reason for the lower standard of proof. Indeed, in many jurisdictions the determination of the issue will be final in both law and fact. In a footnote at the end of the article we make the following argument:

"This article has focused on jurisdiction clauses because of the highly important role they play—greater than any other factor—in both the jurisdiction and stay of proceedings analyses. While it is beyond the scope of this article, there may be other factual disputes on jurisdictional motions that should also use the higher balance of probabilities standard of proof rather than the traditional lower standard. It is possible, for example, that in light of the importance of whether the defendant is present in the jurisdiction, the higher standard of care should be used for a dispute over that issue. More problematic could be disputes over facts that are deemed or presumed to conclusively found jurisdiction. See for example *The Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28, s. 10."

Purple Echo, it seems to me, is a case that fits into this area. The facts in issue were as to whether the defendant had a place of business in British Columbia. Why should the standard of proof for this, a "pure" jurisdictional issue (it goes to nothing else), not be the balance of probabilities? Why delay the resolution of this issue until some later stage of the litigation?

Stephen

New References for Preliminary

Rulings

New references for preliminary rulings on the interpretation of the Brussels I Regulation, the Brussels II *bis* Regulation and the Insolvency Regulation have been referred to the ECJ:

1. Reference on Brussels I Regulation

The Swedish *Högsta Domstolen* has referred the following question to the ECJ:

> *Is the exception in the Brussels I Regulation regarding insolvency, compositions and analogous proceedings to be interpreted as meaning that it covers a decision given by a court in one Member State (A) regarding registration of ownership of shares in a company having its registered office in Member State A, which ownership is transferred by the liquidator to a company in another Member State (B), where the court based its decision on the fact that Member State A, in the absence of an agreement between the States regarding mutual recognition of insolvency proceedings, does not recognise the liquidator's powers of disposal over property in Member State A?*

The case is pending as *SCT Industri Aktiebolag i likvidation v. Alpenblume Aktiebolag* (C-111/08).

2. Reference on Insolvency Regulation

The Spanish *Juzgado de lo Mercantil No 1* has referred the following questions to the ECJ:

> *1. For the purposes of Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty of European Union and the Treaty establishing the European Community, should Denmark be considered to be a Member State within the meaning of Article 16 of Regulation (EC) No 1346/2000 on insolvency proceedings?*
>
> *2. Does the fact that that Regulation is subject to that Protocol mean that that Regulation does not form part of the body of Community law in that country?*
>
> *3. Does the fact that Regulation No 1346/2000 is not binding on and is not*

applicable in Denmark mean that other Member States are not to apply that Regulation in respect of the recognition and enforcement of judicial declarations of insolvency handed down in that country, or, on the other hand, that other Member States are obliged, unless they have made derogations, to apply that Regulation when the judicial declaration of insolvency is handed down in Denmark and is presented for recognition and enforcement in other Member States, in particular, in Spain?

The case is pending as *Finn Mejnertsen v Betina Mandal Barsoe* (C-148/08).

3. Reference on Brussels II *bis* Regulation

The French *Cour de Cassation* has referred the following questions to the ECJ:

Is Article 3(1)(b) [of Regulation No 2201/2003] to be interpreted as meaning that, in a situation where the spouses hold both the nationality of the State of the court seised and the nationality of another Member State of the European Union, the nationality of the State of the court seised must prevail?

If the answer to Question 1 is in the negative, is that provision to be interpreted as referring, in a situation where the spouses each hold dual nationality of the same two Member States, to the more dominant of the two nationalities?

If the answer to Question 2 is in the negative, should it therefore be considered that that provision offers the spouses an additional option, allowing those spouses the choice of seising the courts of either of the two States of which they both hold the nationality?

The case is pending as *Iaszlo Hadadi (Hadady) v Csilla Marta Mesko, married name Hadadi (Hadady)* (C-168/08).

(Many thanks to Jens Karsten (Brussels) for the tip-off.)

Book: Conflits de Lois et Régulation Economique

This interesting book on *Conflict of Laws and Economic Regulation* gathers the contributions of the speakers to a conference held in Paris a year ago. It is edited by three French scholars, Mathias Audit, Horatia Muir Watt (who was our Guest Editor last month) and Etienne Pataut, who all teach in Paris.

Here is how the conference was presented:

> *Within the specific instance of the internal market, the installation and the operation of mechanisms of economic regulation raise a well identified difficulty. Building legal instruments suitable to ensure this regulation supposes indeed to resort to community instruments, which have by nature vocation to transcend national legal orders. However, it is the object of private international law to implement the management tools of this normative diversity. Consequently, this raises the question which will be at the center of this conference: the relationship between the internal market's tools of regulation (set up by the European Union) and private international law.*

The first part of the book discusses the influence of economic regulation on choice of law in fields which are regulated, such as companies, products, services, banks or securities. The second part wonders whether other areas such as culture, environment, employment, health and judicial services, could be subjected to economic regulation, and how this would influence choice of law.

Contributors include the three editors, but also T. Azzi, M. Behar-Touchais, O. Boscovic, E. Bouretz, F. Fages, S. Francq, M.-A. Frison-Roche, F. Garcimartin-Alferez, L. Idot, M.-N. Jobard-Bachellier, P. Mavridis, A. Perrot.

Article on the Eurofood Case

Matteo M. Winkler, an Italian scholar and practising lawyer in Milan, has recently published an article on the *Eurofood* case in the Berkeley Journal of International Law: *From Whipped Cream to Multibillion Euro Financial Collapse: The European Regulation on Transnational Insolvency in Action*.

The author has kindly provided the following abstract:

Determining the most competent court for the adjudication of a transnational insolvency case is an old problem and different theories – i.e., universalism, territorialism, modified universalism and cooperative territorialism – have been applied by courts and scholars in the past in order to adjudicate and solve the disputes concerning the insolvency of debtors having their assets in more than one country. Although different in some sense, all four theories aim to balance the same interests: domestic adjudication of foreign assets, efficiency of the bankruptcy proceedings, and protection of local investors and markets.

Significantly, the difficulties arising from the application of these theories are rooted in the current international trade system. First, states differ as to their bankruptcy procedures, especially with regard to the nature of the bankruptcy itself, the remedies available to debtors and creditors, and the priorities of creditors over the debtor's assets. Second, the differences among the various legal regimes generate competition between courts, which makes the prospect of an international treaty very difficult.

In analysing the outcomes of Eurofood, I argue that, in determining the centre of the debtor's main interests (COMI) pursuant to article 3 of the EC Regulation No. 1346/2000 on transnational insolvency, the European Court of Justice actually maintained an hyperflexible definition of COMI, which favours the creditors or the debtors' race to national courts in order to find the best conditions in filing for bankruptcy. The race to national courts is well-illustrated by the European courts practice, which, instead of enforcing the spirit of cooperation and reciprocal reliance which underlies in the EC Regulation, actually backs national interests. From this standpoint, European institutions are convinced that the issue has been settled, while in reality, much work has yet to be done.

Matteo Winkler has also published two other articles on this topic in Italian, which can be found respectively in *Int'l Lis*, 2007, at 15, and in 21 *Diritto del commercio internazionale*, 2007, pp. 527-536.

A Round-Up of Articles Recently Published

Conflicts scholars have been busy since my last round-up of published articles in February, so the time seems ripe for another list of potential material to add to your reading pile. The usual caveats apply: the list is limited to articles published in *English*, and even then is almost certainly not comprehensive. If you know of any articles, reviews or casenotes published in 2008 not included in either this list or the previous one, then **let me know**.

- M. Danov, **'Awarding exemplary (or punitive) antitrust damages in EC competition cases with an international element – the Rome II Regulation and the Commission's White Paper on Damages**' (2008) 29 *European Competition Law Review* 430 – 436.

Discusses the importance of choosing the most appropriate EU jurisdiction to bring private proceedings to enforce competition law and to claim punitive or exemplary damages in jurisdictions where those remedies are available. Considers the absence of proposals for procedural harmonisation in the Commission White Paper on Damages actions for breach of the EC antitrust rules. Examines whether Regulation 864/2007 (Rome II) will require national courts which ordinarily do not award exemplary damages for breach of competition law to change their practice when it comes into force.

- C. Joerges, **'Integration through de-legalisation?**' (2008) 33 *European Law Review* 291 – 312. Abstract:

Discusses theories of governance and law with reference to changes in the forms of European governance, including the European committee system, the

principle of mutual recognition, and the open method of coordination. Asks whether the rule of law is challenged by the change of governance proclaimed by the Commission's White Paper on European Governance in 2001. Suggests a shift towards a ***conflict*** *of* ***laws*** *approach in the conceptualisation of European law and governance.*

- A. Scott, **'Reunion Revised?'** (2008) *Lloyd's Maritime and Commercial Law Quarterly* 113 – 118. Abstract:

Discusses the European Court of Justice ruling in Freeport Plc v Arnoldsson (C-98/06) on the national court's jurisdiction to hear connected claims against foreign domiciliaries together with the main action against a domiciled defendant under Regulation 44/2001 (Judgments Regulation) art.6(1). Considers whether claims against a parent company and its subsidiary were connected even if the two claims had different legal bases. Examines whether the legal basis of each claim was relevant to jurisdiction under the ruling in Reunion Europeenne SA v Spliethoff's Bevrachtingskantoor BV (C-51/97). Looks at the possibility of abusive claims brought solely to found jurisdiction for connected claims.

- A. Rushworth, '**Assertion of ownership by a foreign state over cultural objects removed from its jurisdiction**' (2008) *Lloyd's Maritime and Commercial Law Quarterly* 123 – 129.

Discusses the Queen's Bench Division judgment in Iran v Barakat Galleries Ltd on preliminary issues in an action to recover antiquities taken without permission from Iran, examining whether the court had jurisdiction to enforce foreign law by returning property to a foreign sovereign.

- A. Briggs, **'Review: Brussels I Regulation (2007), edited by Ulrich Magnus and Peter Mankowski'** (2008) *Lloyd's Maritime and Commercial Law Quarterly* 244 – 246.
- J. Davies, '**Breach of intellectual property warranties and jurisdiction**' (2008) 19 *Entertainment Law Review* 111 – 113. Abstract:

Comments on the Chancery Division judgment in Crucial Music Corp (Formerly Onemusic Corp) v Klondyke Management AG (Formerly Point Classics AG) on

whether to set aside service out of the jurisdiction in a dispute about warranties in a copyright licensing agreement for music. Considers the place of performance and the place where damage was sustained within the meaning of the Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1988 art.5.

- A. Staudinger, **'From international conventions to the Treaty of Amsterdam and beyond: what has changed in judicial cooperation in civil matters?**' (2007) *European Legal Forum* 257 – 265. Abstract:

Discusses the shift from treaties and directives towards secondary EC law in the fields of European civil procedure law and conflict of law rules. Considers the scope of the allocation of competence under the EC Treaty arts 61(c) and 65, the absence of unified conflict of law rules within the inner market and the decreasing national competence and external competence of the EU Member States. Examines advantages and disadvantages of the shift from treaties and directives towards regulations, including in relation to legal consistency in the inner market, reducing sources of law, review and modernisation of regulations, the extent of conformity to a coherent system, and proceedings for a preliminary ruling.

- P. Hay, '**The development of the public policy barrier to judgment recognition within the European Community**' (2007) *European Legal Forum* 289 – 294. Abstract:

Discusses the extent to which national public policy concerns present an obstacle to the harmonisation of areas of substantive law, focusing on the role of public policy in trans-border litigation, in particular in relation to judgment recognition in the EU. Reviews traditional defences to judgment recognition, the defences in Regulation 44/2001 art.34 relating to violation of procedural due process or national public policy, and English judgments awarding or recognising punitive damages or contingent fees. Comments on calls for the public policy exception to be abandoned.

- S. Calabresi-Scholz, '**Brussels I Regulation Article 5(2): the concept of "matters relating to maintenance**' – autonomous interpretation'

(2007) *European Legal Forum* 294 – 295. Abstract:

Comments on the German Federal Supreme Court ruling in Bundesgerichtshof (XII ZR 146/05) on whether the German courts had jurisdiction to hear a claim by a German domiciled divorced spouse for compensation from her former husband, who had transferred his domicile from Germany to France, for the disadvantages she suffered as a result of the limited real income splitting under German tax law. Considers whether the action was a matter relating to maintenance within the meaning of Regulation 44/2001 art.5(2).

- T. Simons, '**Lugano Convention Article 21: lis alibi pendens – priority**' (2007) *European Legal Forum* 296 – 297. Abstract:

Comments on the Swiss Federal Supreme Court judgment in Bundesgericht (4A 143/2007) on whether an application to stay Swiss proceedings, under the Lugano Convention art.21, on the basis that the defendants had lodged a negative declaratory action in the Italian courts prior to the commencement of the Swiss proceedings, should be refused on the basis that the defendants' comportment had been fraudulent.

- L. Osona, **'Brussels I Regulation Article 33(2), Article 1(2)(d): contract for the supply of services – arbitration clause'** (2007) *European Legal Forum* 297 – 298. Abstract:

Reviews the Dusseldorf Court of Appeal ruling in Oberlandesgericht (Dusseldorf) (I 3 W 13/07) on whether an order of a Spanish court denying jurisdiction over a dispute on the basis that the agreement between the parties contained an arbitration clause in favour of an arbitration court in Barcelona should be recognised by the German courts.

- S. Magniez, **'Brussels II Regulation Article 2(1)(a), (2) and (6): jurisdiction over matrimonial matters – last habitual residence of the spouses'** *European Legal Forum* 301 – 302. Abstract:

Comments on a Luxembourg Court of Appeal ruling dated June 6, 2007 on whether the Luxembourg courts had jurisdiction under Regulation 1347/2000 to hear divorce proceedings brought by the ambassador of Luxembourg to Greece

where the spouses had been resident in Greece and where the husband had returned to Luxembourg and the wife had moved to Germany. Considers whether the husband had established a habitual residence in Greece.

- C. Wadlow, **'Bugs, spies and paparazzi: jurisdiction over actions for breach of confidence in private international law'** (2008) 30 *European Intellectual Property Review* 269 – 279. Abstract:

This, the first of two connected articles, discusses the allocation of jurisdiction for breach of confidence actions, focusing on trade secrets. Reviews cases under common law, the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1968 and Regulation 44/2001.

- G. Ward, **'Protection of the right to a fair trial and civil jurisdiction: the institutional legitimacy in permitting delay'** (2008) *Juridical Review* 15 – 31. Abstract:

Examines the operation of the right for proceedings to be heard within reasonable time, provided by the European Convention on Human Rights 1950 art.6, in the context of civil jurisdiction, with reference to case law on the compatibility of the reasonable time requirement with: (1) the lis pendens system of the Brussels civil jurisdiction regime; and (2) the forum non conveniens doctrine.

- S. Kingston & C. Burrows, **'Europe and beyond'** (2008) 76 *Family Law Journal* 5 – 7. Abstract:

This, the second of a two-part article on the approach in different countries towards jurisdiction in family proceedings, considers the application of Regulation 1347/2000 (Brussels II) through case law of the European Court of Justice and domestic courts of Member States. Discusses the jurisdictional rules followed by non-EU countries, giving information on the jurisdiction, domicile, residence and matrimonial property provisions in Australia, Switzerland, Denmark, California, and New York.

- Y. Amin & A. Rook, **'Capacity to marry and marriages abroad'** (2008) 152 *Solicitors Journal* 8 – 10. Abstract:

Examines the Court of Appeal ruling in Westminster City Council v IC on whether: (1) the marriage of a British man with severe learning disabilities conducted over the telephone to a woman in Bangladesh, which was valid according to Sharia law was recognised as a valid marriage according to English law, where it was accepted by the parties that the man lacked the capacity to marry in accordance with English law; (2) the court's inherent jurisdiction was usurped by the Mental Capacity Act 2005; and (3) the court could prevent the man leaving the jurisdiction to travel to Bangladesh.

- W. Shi, **'Review: Private International Law and the Internet (2007) by Dan Jerker B. Svantesson'** (2008) 13 *Communications Law* 64 – 65.
- C. Knight, **'Of coups and compensation claims: Mbasogo reassessed'** (2008) 19 King's Law Journal 176 – 182. Abstract:

Comments on Adrian Briggs's analysis of the Court of Appeal decision in Mbasogo v Logo Ltd (No.1), on the justiciability of Equatorial Guinea's claim for compensation against the participants of an attempted coup, which appeared in the Law Quarterly Review (2007, 123(Apr), 182-186). Evaluates Briggs's assessment of the Court's application of the rule that the English courts lack jurisdiction to hear an action for the enforcement of a public law brought by a foreign state. Considers how this rule was applied in the Court of Appeal decision in Iran v Barakat Galleries Ltd where the state party attempted to enforce Iranian law.

- C. Bjerre & S. Rocks, **'A transactional approach to the Hague Securities Convention'** (2008) 3 *Capital Markets Law Journal* 109 – 125. Abstract:

Examines the scope and effect of the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary (the Hague Securities Convention). Reviews the background to the Convention, its core agreement based mechanism, including the substantive issues for which the Convention prescribes applicable law, key definitions, the Convention's scope, the main ways that parties can draft agreements to achieve the Convention's effect and the "Qualifying Office" requirement, and the Convention's impact on agreements which do not fully use the Convention's core agreement based mechanism, including the fall back rules and pre-Convention agreements.

- B. Ubertazzi, **'The law applicable in Italy to the capacity of natural persons in relation to trusts'** (2008) 14 *Trusts & Trustees* 111 – 119. Abstract:

Examines Italian law on the capacity of natural persons in relation to trusts. Reviews the substantive law categories of capacity under Italian private international law and the four rules on the law applicable to capacity related to international trade of natural persons. Discusses Italian law applicable to the capacity of the settlor, trustee, protector and beneficiary and to the capacity to choose the governing law of the trust.

- I. Thoma, **'Applicable law to indirectly held securities: a non-"trivial pursuit"'** (2008) 23 *Butterworths Journal of International Banking & Financial Law* 190 – 192. Abstract:

Discusses conflict of laws issues arising in connection with indirectly held securities. Considers difficulties in the application of the lex cartae sitae rule. Examines the respective approaches to conflict of laws of the EC law of the place of the relevant intermediary (PRIMA), the free choice of applicable law under the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary and the draft UNIDROIT Convention on Intermediated Securities.

- D. Rosettenstein, **'Choice of law in international child support obligations: Hague or vague, and does it matter? – an American perspective'** (2008) 22 *International Journal of Law, Policy and the Family* 122 – 134. Abstract:

Discusses, from a US perspective, the choice of law rules under the draft Convention on the International Recovery of Child Support and other Forms of Family Maintenance. Considers the significance and value of these rules, and compares them to the regime applicable in US child support proceedings.

- S. James, **'Rome I: Shall we Dance?'** (2008) 2 *Law & Financial Markets Review* 113 – 122. Abstract:

Discusses whether the UK should opt into the Draft Regulation on the law

applicable to contractual obligations (Rome I), comparing Rome I with the Convention on the Law Applicable to Contractual Obligations 1980 (Rome Convention), including the provisions on: (1) party autonomy; (2) applicable law in the absence of express choice; (3) overriding laws; (4) insurance contracts; (5) consumer contracts; (6) contracts of carriage; and (7) assignment. Illustrates the operation of the Rome I Regulation with flowcharts, and presents text from the Regulation in boxes. Notes how its applicable law clauses differ from those of Regulation 864/2007 (Rome II Regulation).

- L. Enneking, **'The common denominator of the Trafigura case, foreign direct liability cases and the Rome II Regulation: an essay on the consequences of private international law for the feasibility of regulating multinational corporations through tort law.'** (2008) 16 *European Review of Private Law* 283 – 312. Abstract:

Identifies a trend towards claims that parent companies should be liable in their home country for damage caused by their subsidiaries abroad. Cites the claim issued in 2006 in the UK against Trafigura Beheer BV for environmental damage caused in the Ivory Coast as an example of this type of claim. Appraises the adequacy of regulation of international corporate activities and considers whether tort law could fill gaps in the regulatory framework. Examines the background to and provisions of Regulation 864/2007 (Rome II) and the impact it could have on tortious liability in this field.

- A. Mills, **'Arbitral jurisdiction and the mischievous presumption of identity of foreign law'** (2008) 67 *Cambridge Law Journal* 25 – 27. Abstract:

Examines the Commercial Court judgment in Tamil Nadu Electricity Board v ST-CMS Electric Co Private Ltd on whether a dispute over the pricing arrangements under an electricity supply contract between two Indian parties, which involved elements to be determined by Indian regulatory authorities, fell outside the scope of an arbitration agreement governed by English law. Considers the extent and validity of the supposed presumption of English law that, if the content of foreign law is not proved satisfactorily, the equivalent English law rule will apply.

- R. Bailey-Harris, **'Jurisdiction: Brussels II revised'** (2008) 38 *Family Law* 312 – 314. Abstract:

Reports on the European Court of Justice decision in Sundelind Lopez v Lopez Lizazo on whether the Swedish or French court had jurisdiction in a divorce petition where the respondent was a Swedish national but was habitually resident in France. Comments on Regulation 2201/2003 arts 3, 6 and 7 and whether a court of a member State has exclusive jurisdiction where the respondent is neither habitually resident in, nor a national of, a Member State.

- D. Eames, **'The new Hague Maintenance Convention'** (2008) 38 *Family Law* 347 – 350. Abstract:

Discusses the Convention on the International Recovery of Child Support and other Forms of Family Maintenance 2007. Considers: (1) the scope of the Convention and provisions therein in relation to recognition and enforcement of judgments, including the grounds upon which recognition can be refused, and the definition of a maintenance arrangement; (2) the Protocol on applicable law; and (3) the EU draft Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

- M. Matousekova, **'Private international law answers to the insolvency of cross border groups: comparative analysis of French and English case law'** (2008) *International Business Law Journal* 141 – 163. Abstract:

Compares the approaches of French and UK courts to the conflict of laws issues arising from the insolvency of cross border groups of companies, particularly whether to adopt different strategies towards each entity in a group. Reviews the relevant provisions of French domestic law, the UK statutory regime before and after 2006, and case law on the policy of each jurisdiction towards application of the conflict of laws rules in Regulation 1346/2000. Considers the extent to which French courts have applied the principle of automatic recognition to the UK's centralisation of group interests.

- Y. Farah, **'Allocation of jurisdiction and the internet in EU law'**

(2008) 33 *European Law Review* 257 – 270. Abstract:

Assesses the scope and interpretation of Regulation 44/2001 Art.15(1)(c) in its application to electronic consumer contracts. Outlines policy considerations and whether they are achieved by Regulation 44/2001. Questions whether traditional rules determining jurisdiction are adequate or whether internet-specific rules are required. Discusses the concept of a consumer contract, the jurisdictional risks for website operators, the meaning of the words "directs such activities" in Art.15(1)(c), the principle of good faith, and fairness. Compares the EU and the US approach.

- S. Voigt, **'Are international merchants stupid? Their choice of law sheds doubt on the legal origin theory'** (2008) 5 *Journal of Empirical Legal Studies* 1 – 20. Abstract:

Evaluates the legal origin hypothesis, the commonly held view in economic literature that common law systems are superior to civil law systems, by examining the choice of law of international trade transactions in cases referred to the International Court of Arbitration. Presents data in tables comparing the expected proportion of contracts choosing the law of a common law jurisdiction with the actual findings. Considers the effects and implications of the legal origin hypothesis.

- I. Fletcher, **'Alfa Telecom Turkey Ltd v Cukurova Finance International Ltd'** (2008) 21 *Insolvency Intelligence* 61 – 64. Abstract:

Comments on the British Virgin Islands High Court decision in Alfa Telecom Turkey Ltd v Cukurova Finance International Ltd on the role of expert evidence in the proof of foreign law, and the meaning of the words "to appropriate the collateral" in the Financial Collateral Arrangements (No.2) Regulations 2003 reg.17, implementing Directive 2002/47. Notes the novelty of a Commonwealth court having to interpret an English statutory provision not previously considered by the English courts, and the reference made by the court to the Directive as an aid to interpretation.

- P. Shine, **'Establishing jurisdiction in commercial disputes: arbitral autonomy and the principle of kompetenz-kompetenz'** (2008)

Journal of Business Law 202 – 225. Abstract:

Examines the balance of power between the courts and arbitral tribunals on questions of jurisdiction. Analyses the judgments in Fiona Trust & Holding Corp v Privalov and Albon (t/a N A Carriage Co) v Naza Motor Trading SDN BHD on the extent to which a challenge to the validity of an agreement containing an arbitration clause affects the validity of the clause itself. Considers the application of the principles set out in those cases in other cases. Notes the approach of other countries which have also adopted the UNCITRAL Model Law for International Commercial Arbitration 1985 as the basis for their arbitration legislation.