Guest Editorial: Harris on "Reflections on the Proposed EU Regulation on Succession and Wills"

The second instalment of our 2008 series of Guest Editorials is by Professor Jonathan Harris: **Reflections on the Proposed EU Regulation on Succession and Wills.**

Prof. Jonathan Harris is Professor of International Commercial Law and Deputy Head of the Law School at the University of Birmingham, UK. He also practises as a barrister at Brick Court Chambers, London. He is an editor of Dicey, Morris and Collins, *The Conflict of Laws* (14th ed 2006; First Supplement 2007) and co-editor of the *Journal of Private International Law*. He is author of *The Hague Trusts Convention* (Hart Publishing, 2002) and co-author of *International Sale of Goods in the Conflict of Laws* (OUP, 2005). He has numerous articles and book chapters in the field of private international law. He is also a contributor to Underhill and Hayton, *Law of Trusts and Trustees* (16th and 17th editions, Butterworths). Professor Harris has recently been advising the UK Ministry of Justice on the proposed EU Regulation on Wills and Succession and gave oral evidence to the House of Lords Select Committee on European Union Law in October 2007. The transcript of this evidence is available here.

Reflections on the Proposed EU Regulation on Succession and Wills.

In March 2005, the European Commission issued its Green Paper on Succession and Wills (COM(2005) 65 final). It is now starting work on a draft Regulation. The United Kingdom will, of course, have to decide in due course whether to participate in this venture.

Those not directly concerned with matters of succession law may be excused for taking only a passing interest in the subject. Others may be sceptical about the internal market justification for this initiative. Closer inspection, however, shows that this is a potentially extraordinarily wide ranging and ambitious initiative, which demands attention. The Regulation may, for instance: alter the procedures

adopted in Member States for the administration of estate; affect lifetime dispositions made by gift or on trust prior to the testator's death; and even require Member States to recognise property rights that are unknown in their own domestic legal systems.

The Regulation is intended to cover jurisdiction, recognition of foreign judgments and choice of law. Perhaps the most familiar issue for most people is the choice of law rule for succession to movable and immovable property. For the former, English courts have adopted the common law test of domicile at the time of death. We can confidently expect that this connecting factor will be replaced by habitual residence. If the United Kingdom participates in the Regulation, then, depending upon how the habitual residence test is defined, this might cause some significant change in respect of, for example, a person who dies whilst they are employed overseas for a number of years in State X, whilst intending to return to their state of origin, State Y, in due course.

Much more difficult, however, is the choice of law rule for immovables. It is clear that the European powers that be favour a unitarian system, applying the law of the deceased's last habitual residence to the devolution of the entire estate. Some onlookers will see this as a positive development; not least because it allows a local lawyer to provide advice as to the devolution of a client's estate across Europe, with apparent consequential improvement for the legal position of citizens. Others, however, will wonder about the desirability and feasibility of applying foreign law in relation to land located within the jurisdiction. It is true that, for Contracting States to the Hague Trusts Convention, the possibility of creating a valid trust governed by a foreign law over land located in the jurisdiction already exists. But it seems inconceivable that a court could apply a foreign governing law to, for example, the process by which a right in land is transferred on death; or to the question of whether that right should appear on the land register. Appropriate derogations to the law of the situs will need to be carved out.

A more fundamental matter, however, is the scope of the Regulation and the subject matter that it will encompass. In particular, the Regulation is likely to cover a far wider canvass than what would, in English law, be regarded as matters of succession. For instance, in English law, there is a clear delineation between succession rights and the prior process by which a deceased person's estate is administered. In England, property is first vested in an executor (if

named in the will) or an administrator (if not) appointed by the court, who will deal with outstanding liabilities before distributing the estate. English law also does not automatically recognise the status and competence of an administrator appointed overseas. It may very well be, however, that the Regulation will apply the lex successionis to the administration of estates; even if, for instance, that law vests the property directly in the beneficiaries and requires them to deal with administrative matters. This will, of course, constitute a fundamental change to national procedural processes for dealing with the estates of deceased persons.

But perhaps the most extraordinary aspect of the Regulation is that it seems distinctly possible that it will attempt to address the panoply of property rights that might be created upon death. A testator might, for instance, leave his property on testamentary trust; or subject to a usufruct or a tontine. There was a marked uncertainty in the Green Paper as to the relationship between trusts and the law of succession. The question of whether X has left his property to Y to be held on trust is a succession law issue; but the question of whether the trust itself is valid, the terms of the trust and the rights and obligations of the trustee are trusts specific issues (which, in the United Kingdom, are covered by the Hague Trusts Convention) and emphatically are not succession issues. This distinction between succession law and trusts has properly been drawn in the context of the Hague Succession Convention (Article 14) and the Hague Trusts Convention (Article 15). Indeed, the Hague Trusts Convention is applicable to the operation of the trust itself but not to the preliminary acts by which the property is vested in trustees (Article 4).

If the Regulation were to lay down choice of law rules and recognition rules which extend to all rights arising upon death, then doubtless, the United Kingdom would gain considerably if its testamentary trusts were routinely recognised across Europe. But this does not seem a terribly realistic aspiration. Most Member States of the European Union have shunned the Hague Trusts Convention, pursuant to which they would be required to recognise trusts qua trusts. It is difficult to believe that they will now relish having to recognise such trusts in their legal systems. Moreover, this would lead to the rather bizarre result that Member States would recognise testamentary trusts; but not be required to recognise inter vivos trusts. Yet once the trust is up and running, its genesis is arguably irrelevant to the legal regime that should govern it. Since the Regulation will also extend to matters of jurisdiction, the possibility exists that the courts of a

civilian Member State would be required, for example, to consider the operation of a discretionary trust contained in a will which gives the trustee the discretion to distribute the trust property amongst a group of person specified by the testator, but compels him to exercise the discretion; and to have to determine such questions as whether the trustee has exercised his discretion properly.

Conversely, English courts might be asked to recognise foreign property rights unknown in its legal system such as, for example, a usufruct or a tontine, that might arise according to the lex successionis. Yet it is difficult to see how a Regulation on succession law can seek to regulate all the property rights that exist in the Member States (and, if the Regulation has universal scope, all the property rights that exist in non-Member States as well), or require overseas courts to assert jurisdiction in proceedings relating to such rights. Still less can those States automatically recognise such foreign interests, register them and give effective to them within the context of their own legal systems. Such a Regulation would, in reality, not be a pure succession law Regulation at all; and its potential impact would be enormous.

An equally difficult problem in formulating a suitable Regulation is the issue of clawback. Many legal systems have wide ranging rules on the inclusion in the deceased's estate of assets which he disposed of prior to his death. English law has only a very circumscribed right for relatives of the deceased to make an application to the court for a discretionary award under the Inheritance (Provision for Family and Dependants) Act 1975 where the deceased died domiciled in England and Wales. Otherwise, it places great weight on the sanctity and validity of inter vivos dispositions. Other Member States prefer more extensive protection against testators dissipating assets to prevent their nearest and dearest from getting at them; and in some cases, will include dispositions made many years prior to death. From an English perspective, this has the potential to undermine trusts that were validly created by their governing law, or at least threatens that these assets will be taken into account in assessing a person's entitlement under the will. This, in turn, might also drive investors to offshore trusts jurisdictions, which have legislation that can offer much greater protection against the application of foreign rules of clawback. It remains to be seen if an exclusion from the along the lines of Article 1(2)(d) of the Hague Succession Convention might be feasible. This excludes "Property rights, interests or assets created or transferred otherwise than by succession, such as in joint ownership with right of survival,

pension plans insurance contracts or other arrangements of a similar nature". Article 7(2)(c) muddies the waters somewhat, however, in stating that the lex successionis applies to " any obligation to restore or account for gifts, advancements or legacies when determining the shares of heirs, devisees or legatees". In any event, it is likely that many Member States will wish the question of clawback, and of what assets are included in the deceased's estate, simply to be left to the lex successionis.

The question of testator freedom to choose the governing law will also be an important issue. The ability to choose, for instance, the law of one's habitual residence at the time of making a will would increase the testator's confidence as to the devolution of his estate. For cross-border workers, there may also be benefit in allowing a choice between connecting factors, so as to allow e.g. a person domiciled in England but currently resident in France whilst working there for a fixed term of five years to choose the law of his domicile rather than that of his habitual residence. But too wide a choice might simply allow a testator to evade the policies and protection of his "home" law, as where he chooses English law so as to avoid rules of compulsory heirship of another legal system which require him to leave a fixed percentage of his estate to his family members.

The Regulation will also need to formulate suitable rules of jurisdiction. Given the very wide range of issues that could arise under the Regulation, this will be no easy matter. It is likely, however, that the default rule will be to confer jurisdiction on the courts of the deceased's habitual residence at death. Equally difficult will be rules on the mutual recognition of foreign judgments. A Regulation of wide scope, which includes within its ambit judgments on the administration of the estate, the validity of property rights unknown in the state where recognition is sought, or provides for clawback of assets disposed of by inter vivos trust, may create acute issues of public policy for the state which is asked to recognise the judgment. There is also the question of how the United Kingdom would accommodate the acts of notaries, since it does not have a notarial tradition.

The Green Paper also reveals plans for a standard European Certificate of Inheritance, which would be issued by courts in Member States and contain a statement as to the assets of the estate and the entitlement of beneficiaries. But even if the courts of every Member State were willing and able to adapt their domestic procedures so as to issue such a document, difficulties would remain. In

view of the problems considered above in deciding what assets should be included in the testator's estate, it may be difficult for a court to accept a conclusive statement from another Member State's courts as to the assets of the estate. It remains to be seen whether a less ambitious approach, which recognises the certificate as having only evidential value, might be acceptable.

Finally, the Green Paper makes reference to a system of registration of wills. Such a development may be desirable, at least on an optional basis. It would, however, cause certain problems if an obligation to register a will were imposed. It is not clear how that system would be policed, or what would happen to a will that had not been registered. Nor is it clear what the register would contain, who could access it and when. Some testators may not wish the existence of their will to be disclosed prior to death.

The proposed Regulation is, in summary, a very complex initiative, not least because of the considerable disparity in the ways in which the domestic legal systems of Member States deal with the devolution of a person's estate upon death. Moreover, the true scope and potential effects of the Regulation are extremely significant. It remains to be seen whether that ambition will be realised; and whether, in attempting to achieve so much, the European institutions will be able to produce a Regulation that meets with general approval and which enables the United Kingdom, in particular, to participate in the initiative.

The March Guest Editorial will be by Professor Paul Beaumont; details to follow).

New Reference for a Preliminary Ruling on Brussels II bis

Following the cases of *Applicant C* and *Sundelind Lopez*, a third reference for a preliminary ruling on Brussels II *bis* has been referred to the ECJ – again (as *Applicant C*) by the Finnish *Korkein Hallinto-oikeus* (Case C-523/07, *Applicant A*).

The present case concerns children who have their habitual residence in Sweden, live transitionally in Finland and became Swedish citizens during the proceedings. Since the Finnish court had doubts whether it can exercise international jurisdiction under the Brussels II *bis* Regulation to take measures in connection with child protection due to the childrens' alleged permanent residence in Sweden, the court has referred the following questions to the ECJ for a preliminary ruling:

> *1(a) Does Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, (the Brussels IIa Regulation) apply to the enforcement, such as in the present case, of a public-law decision made in connection with child protection, as a single decision, concerning the immediate taking into care of a child and his or her placement outside the home, in its entirety,*
>
> *(b) or, having regard to the provision in Article 1(2)(d) of the regulation, only to the part of the decision relating to the placement outside the home?*
>
> *2 How is the concept of habitual residence in Article 8(1) of the regulation, like the associated Article 13(1), to be interpreted in Community law, bearing in mind in particular the situation in which a child has a permanent residence in one Member State but is staying in another Member State, carrying on a peripatetic life there?*
>
> *3(a) If it is considered that the child's habitual residence is not in the latter Member State, on what conditions may an urgent measure (taking into care) nevertheless be taken in that Member State on the basis of Article 20(1) of the regulation?*
>
> *(b) Is a protective measure within the meaning of Article 20(1) of the regulation solely a measure which can be taken under national law, and are the provisions of national law concerning that measure binding when the article is applied?*
>
> *(c) Must the case, after the taking of the protective measure, be transferred of the court's own motion to the court of the Member State with jurisdiction?*
>
> *4 If the court of a Member State has no jurisdiction at all, must it dismiss the case as inadmissible or transfer it to the court of the other Member State?*

In the meantime, after this new reference has been lodged on 23 November 2007, the Court already had to deal with the issue raised in the first question of the present reference in the context of case C-435/06, *Applicant C*. In its judgment of 27 November 2007 the Court held in this regard that:

> *Article 1(1) of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, as amended by Council Regulation (EC) No 2116/2004 of 2 December 2004, is to be interpreted to the effect that a single decision ordering a child to be taken into care and placed outside his original home in a foster family is covered by the term 'civil matters' for the purposes of that provision, where that decision was adopted in the context of public law rules relating to child protection.*

The Finnish court has decided to refer the question to the ECJ again being aware of the first reference which had still been pending at the time the second reference was made. This might be explained by the fact that the Finnish court saw a need for clarification by the ECJ also with regard to the other questions and therefore decided not to wait for the ECJ's decision on the first reference in case *Applicant C*.

See with regard to case C-435/06, Applicant C, also our previous posts on the judgment as well as the Advocate General's opinion.

(Many thanks to Dr. Helena Raulus, Erasmus University Rotterdam for valuable information on the Finnish referring decision.)

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 Riyad 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.

Northern Cyprus and the Acquis Communautaire

The **Court of Appea**l (Civil Division) has referred an interesting reference for a preliminary ruling to the ECJ on the application of the Brussels I Regulation with regard to judgments relating to land in the Turkish Republic of Northern Cyprus (*Meletis Apostolides v David Charles Orams, Linda Elizabeth Orams*, C-420/07):

> *1. In this question,*
>
> *the term "the Government-controlled area" refers to the area of the Republic of Cyprus over which the Government of the Republic of Cyprus exercises effective control; and*
>
> *the term "the northern area" refers to the area of the Republic of Cyprus over which the Government of the Republic of Cyprus does not exercise effective control.*
>
> *Does the suspension of the application of the acquis communautaire in the northern area [by Article 1(1) of Protocol No 10 of the Act of Accession 2003 of Cyprus to the EU preclude a Member State Court from recognising and enforcing a judgment given by a Court of the Republic of Cyprus sitting in the Government-controlled area relating to land in the northern area, when such recognition and enforcement is sought under Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*[1] *("Regulation 44/2001"), which is part of the acquis communautaire'?*
>
> *Does Article 35(1) of Regulation 44/2001 entitle or bind a Member State court to refuse recognition and enforcement of a judgment given by the Courts of another Member State concerning land in an area of the latter Member State over which the Government of that Member State does not exercise effective control? In particular, does such a judgment conflict with Article 22 of Regulation 44/2001?*
>
> *3. Can a judgment of a Member State court, sitting in an area of that State over which the Government of that State does exercise effective control, in respect*

of land in that State in an area over which the Government of that State does not exercise effective control, be denied recognition or enforcement under Article 34(1) of Regulation 44/2001 on the grounds that as a practical matter the judgment cannot be enforced where the land is situated, although the judgment is enforceable in the Government-controlled area of the Member State?

4. Where –

a default judgment has been entered against a defendant;

the defendant then commenced proceedings in the Court of origin to challenge the default judgment; but

his application was unsuccessful following a full and fair hearing on the ground that he had failed to show any arguable defence (which is necessary under national law before such a judgment can be set aside),

can that defendant resist enforcement of the original default judgment or the judgment on the application to set aside under Article 34(2) of Regulation 44/2001, on the ground that he was not served with the document which instituted the proceedings in sufficient time and in such a way as to enable him to arrange for his defence prior to the entry of the original default judgment? Does it make a difference if the hearing entailed only consideration of the defendant's defence to the claim.

5. In applying the test in Article 34(2) of Regulation 44/2001 of whether the defendant was "served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence" what factors are relevant to the assessment? In particular:

Where service in fact brought the document to the attention of the defendant, is it relevant to consider the actions (or inactions) of the defendant or his lawyers after service took place?

What if any relevance would particular conduct of, or difficulties experienced by, the defendant or his lawyers have?

(c) Is it relevant that the defendant's lawyer could have entered an appearance

before judgment in default was entered?

The **background of the case** was as follows: Mr. Apostolides, a Greek Cypriot, owned land in an area which is now under the control of the Turkish Republic of Northern Cyprus, which is not recognised by any country save Turkey, but has nonetheless *de facto* control over the area. When in 1974 the Turkish army invaded the north of the island, Mr. Apostolides had to flee. In 2002, Mr. and Mrs. Orams (British citizens) purchased part of the land which had come into the ownership of Mr. Apostolides. In 2003, Mr. Apostolides was – due to the easing of travel restrictions – able to travel to the Turkish Republic of Northern Cyprus and saw the property. In 2004 he issued a writ naming Mr. and Mrs. Orams as defendants claiming to demolish the villa, the swimming pool and the fence they had built, to deliver Mr. Apostolides free occupation of the land and damages for trespass. Since the time limit for entering an appearance elapsed, a judgment in default of appearance was entered on 9 November 2004. Subsequently, a certificate was obtained in the form prescribed by Annex V to the Brussels I Regulation. Against the judgment of 9 November 2004, an application was issued on behalf of Mr. and Mrs. Orams that the judgment be set aside. This application to set aside the judgment, however, was dismissed by the District Court at Nicosia on the grounds that Mr. Apostolides had not lost his right to the land and that neither local custom nor the good faith of Mr. and Mrs. Orams constituted a defence.

On the application of Mr. Apostolides to the English High Court, the master ordered in October 2005 that those judgments should be registered in and declared enforceable by the High Court pursuant to the Brussels I Regulation. However, Mr. and Mrs. Orams appealed in order to set the aside the registration, *inter alia* on the ground that the Brussels I Regulation was not applicable to the area controlled by the Turkish Republic of Northern Cyprus due to Art. 1 of Protocol 10 to the Treaty of Accession of the Republic of Cyprus to the European Union.

This article reads as follows:

> *1. The application of the acquis shall be suspended in those areas of the Republic of Cyprus in which the government of the Republic of Cyprus does not exercise effective control. […]*

Jack J (Queen´s Bench Division) allowed the appeal on 6 September 2006 by holding *inter alia*

> *that the effect of the Protocol [10 of the Treaty of Accession of the Republic of Cyprus] is that the acquis, and therefore Regulation No 44/2001, are of no effect in relation to matters which relate to the area controlled by the TRNC [i.e. the Turkish Republic of Northern Cyprus], and that this prevents Mr Apostolides relying on it to seek to enforce the judgments which he has obtained. (para. 30)*

Subsequently, Mr. Apostolides lodged an appeal against the judgment of the Queen's Bench Division at the Court of Appeal. The Court of Appeal decided to refer the above cited questions to the ECJ for a preliminary ruling according to Art. 234 EC-Treaty.

The outcome of the case is both of general significance since it concerns the ambit of the application of the acquis communautaire and of particular relevance for comparable cases since – depending on the Court's ruling – it may have consequences for other Greek Cypriots who have lost their property in Northern Cyprus.

The decision of the Queen's Bench Division of 6 September 2006 can be accessed via Westlaw, [2006] EWHC 2226 (QB).

Comity at the Court: Three Recent Orders Seeking the View of the Solicitor General

If the Justices are considering whether to grant a petition for certiorari, and they think the case raises issues on which the views of the federal government might be relevant—but the government is not a party—they will order a CVSG brief.

"CVSG" means "Call for the Views of the Solicitor General." This "invitation" is naturally treated as a command by the Solicitor General, and signals that the Court is at least considering granting the Petition. In its most recent private conference, the Court ordered CVSG briefs in two new cases concerning the role of international judicial comity in private litigation. Together with another CVSG ordered in November on Executive assertions of foreign policy interests affected by private litigation, and a fourth likely grant being considered in private conference next month, the 2008 Term may already be taking an interesting shape for this site's readership. Here's a preview of the cases.

In *PT Pertamina v. Karaha Bodas Company, LLC*, No. 07-619, the Second Circuit granted an anti-suit injunction against litigation in the Cayman Islands after it had finally decided the merits of a claim. The Petition to the Court presents an array of circuit conflicts and questions for review, all centered around the basic question of when a district court can issue an anti-suit injunction and in what circumstances. (The long-standing divergence over this important question was previously discussed here on this site.) The Petition specifically asks "whether an injunction barring foreign litigation presents a grave intrusion upon principles of international comity that is justified only when necessary to protect the jurisdiction of the U.S. federal court or to further an important public policy." The decision of the Second Circuit in *Pertamina* is in direct conflict with the decision of the Eighth Circuit in *Goss International Corp. v. Tokyo Kikai Seisakusho, Ltd*., No. 07-618, which is also pending before the Court and the subject of a contemporaneous CVSG. The Eighth Circuit refused to enjoin Japanese litigation. The conflict between the Second and Eighth Circuits stems around the doctrine of "ancillary jurisdiction," specifically whether a federal court loses the power to bar foreign litigation once it decides the merits of a claim and the resulting judgment is satisfied. But the Petition in Goss also raises the comity issue, questioning whether the court "erred in giving dispositive weight to concerns about international comity at the expense of the court's traditional duty to enforce U.S. law on U.S. soil and protect final judgments from relitigation."

Judicial comity is not the only current point of interest; more traditional notions of comity among nations is at issue in *Exxon Mobil Corp. v. Doe I*, No. 07-81, in which the Court ordered a CVSG brief last November. *Doe* involves a case under the federal Alien Tort Statute, regarding various human rights abuses by members of the Indonesian military hired to perform security services for Exxon

Mobil. Both the U.S. State Department, and the Indonesian Ambassador to the United States, have urged the court that continuation of the suit would detrimentally affect foreign policy interests. The district court declined to dismiss the suit under the political question doctrine, and the D.C. Circuit dismissed the interlocutory appeal for lack of jurisdiction. The Petition In Doe asks whether the collateral order doctrine permits the immediate appeal of a denial of a motion to dismiss, when continuation of the suit threatens "potentially serious adverse impact on significant foreign policy interests." In post-Petition wrangling, counsel for the Exxon companies sought a stay of the discovery process in the District Court, ostensibly because that process was interfering with U.S.-Indonesian relations. The Chief Justice refused to block the scheduled discovery, stating that the denial took into account a limit on the "current phase of discovery," but left open the possibility that Exxon could ask again for relief at a later time.

Finally, still pending is the Petition in *American Isuzu Motors Inc. v. Ntsebeza*, No. 07-919, previewed here on this site last November. It involves tort claims against 50 multinational corporations by a class of persons alive in South Africa between 1948 and 1993 who were affected by the apartheid regime. Again, the U.S. State Department opposes the lawsuit because of its effect on foreign relations, and the Petition to the Court asks, inter alia, whether the case should be dismissed "[in] deference to the political branches, political question or international comity." Interestingly, as noted in the prior post, the Petition also asks whether international treaties—specifically the Rome Statute of the International Criminal Court—can provide the legal standard to define a cause for "aiding and abetting" a violation of international law under the Alien Tort Statute. The Solicitor General has already filed a brief supporting review.

The best source for further discussion on these cases, and links to more documents and the decisions below, is the SCOTUSBlog. It seems that an interest in comity at the Court is clearly on the rise (not to be confused with "comedy" at the Court, which seems to be on the rise as well. On this latter point, see the interesting study by Professor Wexler from Boston University.)

Swiss Institute of Comparative Law: Conference on Rome I Regulation

On Friday, 14th March, the **20th Journée de droit international privé**, organised by the **Swiss Institute of Comparative Law** (ISDC) and the **University of Lausanne** (Center of Comparative Law, European Law and Foreign Legislations), will analyse the new Rome I Regulation, whose final adoption is expected in one of the first Council's sessions in early 2008 (see our previous post here).

Here's a short presentation of the programme (*our translation from French*):

20e Journée de droit international privé

"The new Rome I regulation on the law applicable to contractual obligations" *(Le nouveau règlement européen 'Rome I' relatif à la loi applicable aux obligations contractuelles)*

Introductory remarks: *Walter Stoffel* (University of Fribourg) – The 20th anniversary of the "Journées de droit international privé" and award of the "Prix Alfred E. von Overbeck" of the ISDC.

First Session: General Aspects (*Généralités*)

Chair: Andrea Bonomi (University of Lausanne)

- *Michael Wilderspin* (European Commission): The new "Rome I" regulation: the European Commission's point of view (*Le nouveau règlement "Rome I": point de vue de la Commission européenne*);
- *Eva Lein* (ISDC): The new synergy Rome I/Rome II/Brussels I (*La nouvelle synergie Rome I/Rome II/Bruxelles I*);
- *Caroline Nicholas* (UNCITRAL, Wien): Relationships with international conventions: UNCITRAL/The Hague/Unidroit (*Les relations avec le droit conventionnel: CNUDCI/La Haye/Unidroit*).

Second Session: Basic Principles (*Principes de base*)

Chair: *Peter Mankowski* (University of Hamburg)

- *Stefan Leible* (University of Bayreuth): Choice of applicable law (*Le choix de la loi applicable*);
- *Bertrand Ancel* (University of Paris I): Law applicable in the absence of choice (*La loi applicable à défaut de choix*).

Third Session: Some Special Contracts (*Quelques contrats particuliers*)

Chair: *Bertrand Ancel* (University of Paris I)

- *Helmut Heiss* (University of Zurich): Insurance contracts (*Les contrats d'assurance*);
- *Peter Mankowski* (University of Hamburg): Consumer contracts (*Les contrats conclus par les consommateurs*);
- *Francisco J. Garcimartin Alférez* (University of Madrid 'Rey Juan Carlos'): Contracts on financial instruments (*Les contrats portant sur des instruments financiers*).

Fourth Session: Specific mechanisms (*Mécanismes spécifiques*)

Chair: *Stefan Leible* (University of Bayreuth)

- *Eleanor Cashin Ritaine* (Director, ISDC): Assignment, subrogation and set-off (*La cession de créance, la subrogation et la compensation*)
- *Andrea Bonomi* (University of Lausanne): *Lois de police* and public policy (*Les lois de police et l'ordre public*)

Concluding remarks: *Tito Ballarino* (University of Padova) – Emerging of new values and filling loopholes (*Emergence de nouvelles valeurs et comblement des lacunes*).

The conference will be held in French, German and English (no translation is provided).

For the detailed programme and further information (including fees), see the ISDC website and the downloadable leaflet. An online registration form is available.

(Many thanks to Prof. Giulia Rossolillo – University of Pavia – for the tip-off, and to Béatrice Angehrn – ISDC – for providing additional information on the conference)

Article on the Economic Analysis of Choice of Law Clauses

Stefan Voigt (Marburg) has written an interesting article titled **"Are International Merchants Stupid? Their Choice of Law Sheds Doubt on the Legal Origin Theory"** which has been published originally in the *Journal of Empirical Legal Studies, March 2008, Vol. 5, Issue 1* and has been posted on SSRN.

The abstract reads as follows:

> *In economics, there is currently an important discussion on the role of legal origins or legal families. Some economists claim that legal origins play a crucial role even today. Usually, they distinguish between Common Law, French, Scandinavian and German legal origin. When these legal origins are compared, countries belonging to the Common Law tradition regularly come out best (with regard to many different dimensions) and countries belonging to the French legal origin worst.*
>
> *In international transactions, contracting parties can choose the substantive law according to which they want to structure their transactions. In this paper, this choice is interpreted as revealed preference for a specific legal regime. It is argued that the superiority-of-common-law view can be translated into the hypothesis that sophisticated and utility-maximizing actors would rationally choose a substantive law based on the Common Law tradition such as English or US American law. Although exact statistics are not readily available, the evidence from cases that end up with international arbitration courts (such as the International Court of Arbitration run by the International Chamber of Commerce in Paris) demonstrates that this is not the case. This evidence sheds, hence, some doubt on the superiority-of-the-common-law view.*

The article can be downloaded from SSRN as well as from Blackwell Synergy (with subscription).

(Many thanks to Prof. Dr. Jan von Hein (Trier) for the tip-off!)

Replies to Green Papers regarding Matrimonial Property and the Attachment of Bank Accounts

As stated on the website of the European Judicial Network, the replies received with regard to the **Green Paper** on conflict of laws in matters concerning **matrimonial property regimes**, including the question of jurisdiction and mutual recognition (COM(2006) 400 final) are now available at the EJN's website.

See with regard to the Green Paper on matrimonial property also our previous posts which can be found here, here and here.

Further, also the replies which have been received with regard to the **Green Paper** improving the efficiency of the enforcement of judgments in the European Union: The **attachment of bank accounts** (COM(2006) 618 final) are available at the EJN's website as well.

You can find further information on the Green Paper on the attachment of bank accounts on our related site.

French Muslims Getting Divorced Back Home

In 2007, the French supreme court for private matters (*Cour de cassation*) ruled five times on the recognition in France of Islamic divorces obtained in Algeria (judgments of 10 July 2007, 19 September 2007, 17 October 2007, 31 October 2007) or in Morocco (judgment of 22 May 2007). Even by the standard of a civil law supreme court which delivers thousands of judgments each year, this is a high number.

The facts of the cases are almost invariably the same. The couple was of Algerian (or Moroccan) origin. They were sometimes born there, or even had got married there. They then emigrated to France, where they have been living ever since. They sometimes acquired French citizenship.

It seems that it is normally the wife who wants the divorce. She therefore decides to sue, in France. But the husband then travels to Algeria or Morocco and gets an islamic divorce (*Talaq*) there. He subsequently attempts to rely on the res judicata effect of the Moroccan judgment to stop the French proceedings. This is where the French court has to decide whether the foreign judgment can be recognised in France and thus have a res judicata effect.

The reasons why the wife chooses France, and the husband their country of origin, are quite simple. The wife seeks an allowance for her and the children. A French court would give her much more than an Algerian court. And in any case, under Islamic law, at least as a matter of principle (there are some variations among sunni schools), women may not ask for divorce. This is a right which belongs to men only.

The practice could appear as shocking for a variety of reasons. First, it seems that husbands seek divorce in Algeria or Morocco to avoid French courts and the French law of divorce. Second, it appears that, typically, women will not even be called in the foreign proceedings, which is contrary to the basic understanding of due process. At the same time, this is not completely illogical, since they have no say in the proceedings anyway (although it seems that they sometimes have a say

in respect of the financial consequences of the divorce). Third, Islamic law of divorce is essentially unequal.

For long, the *Cour de cassation* was unwilling to rule that islamic divorces ought to be denied recognition because they are the product of a law which does not consider men and women equal. The court would still deny recognition to most Islamic divorces, but on the ground that the wife had not been called to the foreign proceedings. Alternatively, the court would sometimes rule that the husband had committed a *fraude à la loi*, i.e. had initiated proceedings in Algeria for the sole purpose of avoiding French proceedings. However, such intent was often difficult to prove. After all, he was Algerian, and initiating proceedings where he was from was not unreasonable. However, this method led the court to recognize some of these divorces. For instance, in 2001, it accepted to recognize an Algerian divorce decision where the wife had participated to the foreign proceedings and had been awarded a (tiny) allowance.

In 2004, the *Cour de cassation* changed its doctrine and ruled that Islamic divorces are contrary to French public policy on the more general and abstract ground that divorce in Algerian or Moroccan law is in the hands of the sole husband, which infringes the principle of equality between spouses in the dissolution of marriage. The Islamic law of divorce has been rejected abstractly ever since. Formally, the court has ruled that the principle of equality between spouses flows from the European Convention of Human Rights (Article 5, Protocol VII).

The five 2007 judgments all deny recognition to the Algerian or Moroccan divorces on that ground. The law now seems settled. It is thus quite surprising that the court still has to rule so often on the issue. France has certainly a large Algerian and Moroccan population (and generally has the biggest Muslim population in Europe), which explains why so many disputes arise. One wonders, however, why the costs of litigation up to the supreme court do not discourage husbands. My guess is that, for some reason, they do not bear them.

Party Autonomy and Beyond: An International Perspective of Contractual Choice of Law

Mo Zhang (Temple University) has posted "**Party Autonomy and Beyond: An International Perspective of Contractual Choice of Law**" on SSRN; it originally appeared in the *Emory International Law Review, Vol. 20, No. 511, 2006*. The abstract reads:

> *As a popular choice of law doctrine, party autonomy allows the parties in international contracts (or foreign contracts) to choose governing law of particular jurisdiction they prefer. Premised on freedom of contract, this doctrine has evolved in many ways since it was introduced in the 1600's and has become an internationally accepted principle governing choice of law in contracts. In international community, the doctrine of party autonomy has been adopted and applied through the rule-based framework or mechanism. But the acceptance of party autonomy in the United States is intertwined with interest or policy analysis so closely that it is often quite difficult for the parties to predict the ultimate outcome of the choice of law they have made. In addition, the interest and policy analysis based American choice of law approaches and the choice of law rules so developed in the US hardly have any general application internationally. Also, the connection requirement has rendered the US contractual choice of law in discordance with international common practice. In fact, both interest analysis and connection requirement are not necessarily needed with regard to the choice of law by the parties. Choice of law should be ruled based and the rules should be intended to maximize the individual or private welfare rather than the state interest.*

Download the article.