Publication: Liber Fausto Pocar – New Instruments of Private International Law

The Italian publishing house Giuffrè has recently published a very rich collection of essays in honor of Fausto Pocar, Professor at the University of Milan and judge and former President of the International Criminal Tribunal for the former Yugoslavia, one of Italian leading scholars in the field of public international law, EU law and private international law.

The collection, ***Liber Fausto Pocar***, edited by *Gabriella Venturini* and *Stefania Bariatti*, is divided in two volumes, devoted respectively to public international law (vol. I, Diritti individuali e giustizia internazionale – Individual Rights and International Justice) and private international law (vol. II, Nuovi strumenti del diritto internazionale privato – New instruments of Private International Law).

Here's the table of contents of the second volume:

- *Roberto Baratta*, Réflexions sur la coopération judiciaire civile suite au traité de Lisbonne;
- *Stefania Bariatti*, Filling in the Gaps of EC Conflicts of Laws Instruments: The Case of Jurisdiction over Actions Related to Insolvency Proceedings;
- *Maria Caterina Baruffi*, Il riconoscimento delle decisioni in materia di obbligazioni alimentari verso i minori: l'Unione europea e gli Stati Uniti a confronto;
- *Jürgen Basedow*, Lex mercatoria e diritto internazionale privato dei contratti: una prospettiva economica;
- *Paul R. Beaumont*, The Art. 8 Jurisprudence of the European Court of Human Rights on the Hague Convention on International Child Abduction in relation to Delays in Enforcing the Return of a Child;
- *Michael Bogdan*, Some Reflections Regarding Environmental Damage and the Rome II Regulation;
- *Andrea Bonomi*, Prime considerazioni sul regime delle norme di applicazione necessaria nel nuovo Regolamento Roma I sulla legge applicabile ai contratti;

- *Alegría Borrás*, Reservations, Declarations and Specifications: Their Function in the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance;
- *Nerina Boschiero*, Spunti critici sulla nuova disciplina comunitaria della legge applicabile ai contratti relativi alla proprietà intellettuale in mancanza di scelta ad opera delle parti;
- *Ronald A. Brand*, Evolving Competence for Private International Law in Europe: The External Effects of Internal Developments;
- *Andreas Bucher*, Réforme en matière d'enlèvement d'enfants: la loi suisse;
- *Sergio Maria Carbone*, Accordi interstatali e diritto marittimo uniforme;
- *Roberta Clerici*, Quale favor per il lavoratore nel Regolamento Roma I?;
- *Giuseppe Coscia*, La nuova azione collettiva risarcitoria italiana nel quadro delle discipline processuali di conflitto interne e comunitarie;
- *Saverio De Bellis*, La negotiorum gestio nel Regolamento (CE) n. 864/2007;
- *Patrizia De Cesari*, «Disposizioni alle quali non è permesso derogare convenzionalmente» e «norme di applicazione necessaria» nel Regolamento Roma I;
- *Harry Duintjer Tebbens*, Punitive Damages: Towards a Rule of Reason for U.S. Awards and Their Recognition Elsewhere;
- *William Duncan*, The Maintenance of a Hague Convention. Adapting to Change. A Discussion of Techniques to Ensure that a Convention Remains "Fit for Purpose";
- *Bernard Dutoit*, Le droit international privé des obligations non contractuelles à l'heure européenne: le Règlement Rome II;
- *Marc Fallon*, L'exception d'ordre public face à l'exception de reconnaissance mutuelle;
- *Paolo Fois*, La comunitarizzazione del diritto internazionale privato e processuale. Perplessità circa il carattere «definitivo» del trasferimento di competenze dagli Stati membri alla Comunità;
- *Marco Frigessi Di Rattalma*, La legge regolatrice della responsabilità da direzione e coordinamento nei gruppi multinazionali di società;
- *Manlio Frigo*, Ethical Rules and Codes of Honour Related to Museum Activities: A Complementary Support to the Private International Law Approach Concerning the Circulation of Cultural Property;
- *Luigi Fumagalli*, Il caso «Tedesco»: un rinvio pregiudiziale relativo al

Regolamento n. 1206/2001;

- *Giorgio Gaja*, Il regolamento di giurisdizione e il suo ambito di applicazione in materia internazionale;
- *Luciano Garofalo*, Diritto comunitario e conflitti di leggi. Spunti sulle nuove tendenze del diritto internazionale privato contemporaneo emergenti dal Regolamento Roma II;
- *Hélène Gaudemet Tallon*, Le destin mouvementé des articles 14 et 15 du Code civil français de 1804 au début du XXIème siècle;
- *Andrea Giardina*, Gli interessi: conflitti di leggi e diritto uniforme nella pratica giudiziaria e arbitrale internazionale;
- *Trevor C. Hartley*, The Integration Theory v Acquired Rights. The Way Forward for Matrimonial-Property Choice of Law in the EC;
- *Costanza Honorati*, La legge applicabile al nome tra diritto internazionale privato e diritto comunitario nelle conclusioni degli avvocati generali;
- *Monique Jametti Greiner*, La protection des enfants dans le cadre d'enlèvements internationaux d'enfants. Les solutions de La Haye
- *Hans Ulrich Jessurun D'Oliveira*, How do International Organisations Cope with the Personal Status of their Staff Members? Some Observations on the Recognition of (Same-Sex) Marriages in International Organizations;
- *Catherine Kessedjian*, Les actions collectives en dommages et intérêts pour infraction aux règles communautaires de la concurrence et le droit international privé;
- *Peter Kindler*, Libertà di stabilimento e diritto internazionale privato delle società;
- *Christian Kohler*, Trois défis : la Cour de justice des Communautés européennes et l'espace judiciaire européen en matière civile;
- *Paul Lagarde*, La culpa in contrahendo à la croisée des règlements communautaires;
- *Pierre Lalive*, L'ordre public transnational et l'arbitre international;
- *Riccardo Luzzatto*, Riflessioni sulla c.d. comunitarizzazione del diritto internazionale privato;
- *Maria Chiara Malaguti*, Brevi riflessioni sui moderni criteri di unificazione del diritto alla luce della disciplina sui titoli detenuti presso intermediari;
- *Alberto Malatesta*, Cultural Diversity and Private International Law;
- *Sergio Marchisio*, Les conventions de la Commission internationale de l'État civil;

- *Luigi Mari*, Equo processo e competenza in materia contrattuale. Note minime a proposito della giurisprudenza della Corte di giustizia;
- *Johan Meeusen*, Who is Afraid of European Private International Law?;
- *Paolo Mengozzi*, I conflitti di leggi, le norme di applicazione necessaria in materia di rapporti di lavoro e la libertà di circolazione dei servizi nella Comunità europea;
- *Robin Morse*, Industrial Action in the Conflict of Laws;
- *Franco Mosconi*, La Convenzione CIEC del 5 settembre 2007 sui partenariati registrati;
- *Francesco Munari*, L'entrata in vigore del Regolamento Roma II e i suoi effetti sul *private antitrust enforcement*;
- *Peter Arnt Nielsen*, European Contract Jurisdiction in Need of Reform?;
- *Tomasz Pajor*, The Impact of the United Nations Convention on Contracts for the International Sale of Goods on Polish Law;
- *Monika Pauknerová*, International Conventions and Community Law: Harmony and Conflicts;
- *Marta Pertegás*, The Interaction between EC Private International Law and Procedural Rules: The European Enforcement Order as Test-Case;
- *Paola Piroddi*, Between Scylla and Charybdis. Art. 4 of the Rome I Regulation Navigating along the Cliffs of Uncertainty and Inflexibility;
- *Ilaria Queirolo*, L'influenza del Regolamento comunitario sul difficile coordinamento tra legge fallimentare e legge di riforma del diritto internazionale privato;
- *Mariel Revillard*, Pratique de droit international privé de la famille en Italie et en France: perspectives de communautarisation;
- *Carola Ricci*, I fori «residuali» nelle cause matrimoniali dopo la sentenza *Lopez*;
- *Kurt Siehr*, The lex originis for Cultural Objects in European Private International Law;
- *Antoon V.M. (Teun) Struycken*, Bruxelles I et le monde extérieur;
- *Michele Tamburini*, La validità nel processo civile italiano della procura alle liti rilasciata all'estero;
- *Antonio Tizzano*, Qualche riflessione sul contributo della Corte di giustizia allo sviluppo del sistema comunitario;
- *Francesca Trombetta-Panigadi*, Osservazioni sulla futura disciplina comunitaria in materia di successioni per causa di morte;
- *Francesca Clara Villata*, La legge applicabile ai «contratti dei mercati

regolamentati» nel Regolamento Roma I;
- *Gaetano Vitellino*, Conflitti di leggi e di giurisdizioni in materia di azione inibitoria collettiva.

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Title: **Liber Fausto Pocar – Vol. II: Nuovi strumenti del diritto internazionale privato**, edited by *Gabriella Venturini* and *Stefania Bariatti*, Giuffrè, Milano, 2009, XXXVII – 1020 pages.

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Dickinson on West Tankers: Another One Bites the Dust

Andrew Dickinson is a Solicitor Advocate, Consultant to Clifford Chance LLP and Visiting Fellow in Private International Law at the British Institute of International & Comparative Law. His commentary on the Rome II Regulation is published by Oxford University Press.

The views expressed below are the author's personal, initial reaction to the judgment.

> ***Scaramanga: "A duel between titans, my golden gun against your Walther PPK. Each of us with a 50-50 chance."***
>
> ***James Bond: "Six bullets to your one?"***
>
> ***Scaramanga: "I only need one."***
>
> ***(from The Man with the Golden Gun (1974))***

Reading the decision of the Court of Justice in the *West Tankers* case is a little like watching a sub-standard James Bond Movie (*The World is Not Enough*, perhaps). You know the outcome, but do not know exactly how 007 will overcome the latest plan for global domination. You check your watch, hoping that he will get on with it before last orders at the bar. So it is here, but in reverse. The common law deploys its latest weapon to defeat a perceived attempt to pervert the course of justice, but it is defeated by the greater might of European Community law. The only reason to read to the end is to see exactly how the deed is done and the corpse disposed of.

The Court's reasoning is brief, more than can be said of some of Mr Bond's adventures. It is, nevertheless, unconvincing.

The Court concludes, it is submitted correctly, that the subject matter of the English proceedings falls outside the scope of the Brussels I Regulation (para 23) whereas the (principal) subject matter of the Italian proceedings falls within scope (para 26). The second of these findings, in accordance with the reasoning in the *Van Uden* case, would arguably have been sufficient in itself to dispose of the question presented to the Court in *West Tankers*, having regard to the very broad way in which the injunction had been framed by the English Court (preventing the taking of any steps in connection with the Italian case).

No doubt mindful of a more targeted weapon being produced by the enemy (perhaps an injunction to restrain a party from making any application or submission before the Italian court contesting the validity or applicability of the arbitration agreement) the Court felt it necessary to supplement its reasoning with the propositions that (a) a preliminary issue concerning the applicability of an arbitration agreement, including in particular its validity also comes within the scope of application (para 26), (b) under the Brussels I Regulation, this preliminary issue is exclusively a matter for the court (here, the Italian court) seised of the proceedings in which the issue is raised (para 27), and (c) the anti-suit injunction constitutes an unwarranted interference in the Italian court's decision making process (paras 28-30).

It cannot be denied that an anti-suit injunction, whether in the wider or narrower form suggested above, indirectly interferes with the foreign proceedings to which it refers. For some, that is enough to condemn it as an unwarranted interference in the affairs of a foreign sovereign State. It may be questioned, however,

whether an injunction in the narrower form woud interfere in any way with the effectiveness of Community law, in the form of the Brussels I Regulation. That, of course, is the only question that the Court could address.

We can accept, for the sake of argument at least, that (putative) competence under the Regulation's rules of jurisdiction carries with it competence to determine any question of fact or law bearing on the application of those rules. The Court, drawing succour from a passage in the Evrigenis and Kerameus Report, no less, concludes that questions concerning the validity or application of an arbitration agreement relate to the scope of application of the Regulation and, therefore, fall within this category (paras 26 and 29).

The conclusion seems, however, open to several objections. First, the Regulation excludes "arbitration" (Art 1(2)(d)). The Court accepts that proceedings founded on an arbitration agreement, and having therefore as their subject matter the validity and application of an arbitration agreement, fall outside the the Regulation's scope (para 23). The Court fails, however, to explain why a preliminary issue of precisely the same character is brought within scope. As the Court recognised in its decision in *Hoffmann v Krieg*, a decision may relate partly to matters within scope and partly to matters outside – the fact that the former may be said to constitute the principal subject matter of proceedings does not (or at least has never before been understood by the author to) require a decision, often a separate decision, on the latter in the same case to be recognised under the Regulation. If the Court was intending to develop a theory of parasitic jurisdiction/recognition in this context (cf. Schlosser Report, para 64; *Van Uden*, para 32), it should have made this clear and explained its reasoning in greater detail.

Secondly, the Court's view that the right to apply the Regulation includes the right to determine its scope, fails to lift its argument to a higher level. As the decision in *Van Uden* makes clear, the assessment whether the subject matter of proceedings falls within the scope of the Regulation (and outside the scope of the arbitration exception in Art 1(2)(d)) cannot be influenced by the fact that the parties may have chosen arbitration as their method of dispute resolution or that arbitration proceedings have been commenced. Accordingly, the Italian court could determine that the proceedings before it fell outside the arbitration exception and within scope without the need to characterise the preliminary issue, still less to treat that issue as independently or parasitically falling within

the scope of the Regulation.

Thirdly, as the Court admitted (para 33), the Italian court in considering whether to give effect to an arbitration agreement between the parties is not applying a rule in the Brussels I Regulation but, instead, is applying the rules contained in the New York Convention, as a convention which (to the extent that its effect is not excluded from scope by Art 1(2)(d)) takes priority over the Regulation's rules by virtue of Art 71(1) of the Regulation. On this view, the anti-suit injunction (at least in the narrower form suggested above) interferes only with the proper functioning of that Convention rather than with the Regulation and does not fall foul of the EC Treaty. Even if, as the Court appeared to assume, it is contrary to the letter or spirit of the New York Convention to preclude a Contracting State court from carrying out its functions under Art II(3), that question was not one that the ECJ had power to determine. Without the New York Convention, there might be scope for argument that the Regulation's rules of jurisdiction are somehow modified by an arbitration agreement (cf. *Van Uden*, para 24), Where the New York Convention applies, the Regulation's rules provide merely the preliminary course and do not apply at all to determine the validity or effect of the arbitration agreement.

Returning to the Court's first conclusion, that the English proceedings to obtain an injunction fell outside the Regulation's scope, it may be thought to follow that, equally, proceedings in a Member State court for a declaration that the parties have entered into a valid arbitration agreement or for damages following breach of an arbitration agreement would also fall outside scope, having as their subject matter the arbitration agreement (whether it is seen as having a contractual or quasi-public law effect). On that view, judgments in such proceedings would not be recognised or enforceable under the Regulation but, in view of this characteristic, might also be argued not to interfere directly or indirectly with the "right" of another Member State court to determine its own jurisdiction under the Regulation. These questions must be faced by the Englsh courts and perhaps even the ECJ in years to come. Further, the possibility would appear to remain open of taking steps (by default processes, if necessary, as occurred in the *West Tankers* case) to establish an arbitration tribunal for the purpose not only of disposing swiftly of the substantive dispute between the parties in such a way as to create an award enforceable under the New York Convention, but of obtaining an enforceable award for an anti-suit injunction or damages for breach of the

arbitration agreement. Although arbitrators sitting in Member States are bound, to a certain extent, to apply EC law (Case C-126/97, *Eco Swiss*), an interesting debate may emerge as to whether they are obliged to comply with the principle of "mutual trust" embodied in the Brussels I Regulation.

Finally, if some satisfaction is to be gained from the *West Tankers* judgment, it is that arbitration and jurisdiction agreements have been restored to greater parity in terms of securing their effectiveness within the Community legal order. One curious side-product of the ECJ's decisions in *Gasser* and *Turner* was that the potential availability of an anti-suit injunction was thought to provide a reason for choosing arbitration instead of judicial resolution. *West Tankers* has once again levelled the playing field in this respect, at least within the legal systems of the Member States. The unsatisfactory consequences of *Gasser* and the risk of a flight to dispute resolution outside the European Community, by whatever method, must be addressed head on in the forthcoming review of the Brussels I Regulation.

ERA Conference: Complete agenda spring and summer 2009

ERA Conference: Complete agenda spring and summer 2009

In our previous posts we have informed about the ERA conferences for the spring 2009 titled "Annual Conference on European Insurance Law 2009" and " Cross-Border insolvency proceedings". Here are the rest of the conferences for the spring and summer 2009:

Successions and Wills in a European context, Prague, 20-21 Apr 2009

From the conference website: The Czech Ministry of Justice in the framework of the Czech Presidency of the Council of the EU organizes in cooperation with ERA (Dr Angelika Fuchs) a conference titled "Successions and Wills in a European context".

The conference will provide an in-depth discussion of the most topical issues regarding succession and wills in a European context. The draft Regulation on Succession and Wills, expected to be issued soon, will serve as the basis of the discussion. A case-study will be presented. The conference will then address the following highly current issues:

- Scope of the instrument: The Regulation will cover jurisdiction, recognition and choice of law. To what extent should property rights be covered? Will foreign property rights unknown to a legal system (e.g. trust) have to be recognised?
- Choice of law: Will the testator be free to choose the governing law? If yes, will there be restrictions to the freedom to choose? What will be the relationship to the rules of compulsory heirship of the legal system otherwise applicable?
- Choice-of-law rule for succession to movable and immovable property: What is the appro-priate connecting factor? Will there be one rule for movables and immovables? Will there be exceptions to that rule? How will the habitual residence test be defined?
- Relationship to dispositions inter vivos: If, and to what extent, will the Regulation affect the validity of dispositions disposed of inter vivos?
- Registration of wills and European Certificate of Inheritance: Will there be a compulsory or an optional system of registration of wills? What will be the scope of a European Certificate of Inheritance?

Practical Issues of Cross-Border Mediation and Mediation Techniques, Trier, 14-15 May 2009

From the conference website: Dr Angelika Fuchs (ERA) organizes in cooperation with the European Judicial Training Network (EJTN), the Council of the Bars and Law Societies of the European Union (CCBE) and the Council of the Notariats of the European Union (CNUE) a conference titled ” Practical Issues of Cross-Border Mediation and Mediation Techniques”.

This conference will concentrate on practical issues of cross-border mediation:

- Interaction between mediation and civil proceedings, especially the

impact of the Directive on certain aspects of mediation in civil and commercial matters in the Member States. Topics include the Directive's scope; cross-border disputes: the inter-State requirement; voluntary or compulsory nature of mediation; mediation's effect on limitation and prescription periods, and recognition and enforcement of mediation agreements.

- Encouraging mediation. The role of the legal professions, especially the cooperation between lawyers, notaries and judges.
- Quality of mediation services. A practical and continuing training of mediators is required: life-long learning is essential. In cross-border situations, co-mediation is particularly important. Quality control mechanisms and the added value of the (voluntary) European Code of Conduct for Mediators will be discussed.
- Mediation procedure. The conference will further concentrate on fundamental minimum procedural guarantees for a fair mediation procedure. The European Code of Conduct for Mediators will be looked at in detail.

The conference will include workshops which will address specific areas such as family mediation and consumer mediation.

Summer Course on European Private Law, Trier, 29 Jun-3 Jul 2009

From the conference website: Dr Angelika Fuchs organizes a Summer Course on European Private Law.

Participants will gain an introduction to the following topics:

- European civil procedure: The summer course will present the status quo of civil procedural law on a European level, including the most recent developments. Special attention will be paid to EC legislation and the case law of the European Court of Justice.
- Private international law, especially the new Rome I & Rome II Regulations on the applicable law in contractual and non-contractual obligations.
- Consumer protection, concerning e.g. unfair commercial practices, e-

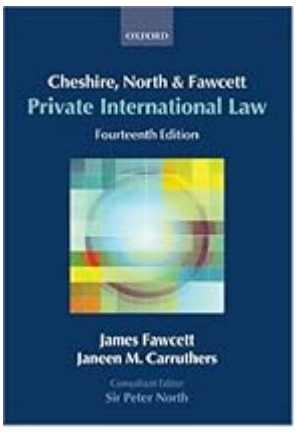
commerce, consumer rights, product safety, product liability.

This course should prove of particular interest to lawyers who wish to specialise in or acquire an in-depth knowledge of European private law. A general knowledge of EU law is suitable but no previous knowledge or experience of European private law is required to attend the course.

Participants will have the opportunity to prepare in advance through an e-learning course via the ERA website, and to deepen their knowledge through case-studies and workshops during the summer course.

A visit to the European Court of Justice in Luxembourg with the opportunity to attend a hearing is an integral part of the programme.

Publication: Cheshire, North & Fawcett on Private International Law



The fourteenth edition of one of the world's leading texts on private international law has just been published. Professor James Fawcett has been elevated to the status of co-author, after twenty-one years at the editorial helm. Sir Peter North, who has been involved with the text since 1970, has handed over his responsibilities to Dr Janeen Carruthers for this edition (though North remains a Consultant Editor).

The publishers describe the new edition thus:

> *The new edition of this well-established and highly regarded work has been fully updated to encompass the major changes and developments in the law, including the newly finalised Rome II Regulation. The book is invaluable for the*

practitioner as well as being one of the leading students' textbooks in the field, giving comprehensive and accessible coverage of the basic principles of private international law, a popular law school option.

It offers students, teachers and practitioners not only a rigorous academic examination of the subject, but also a practical guide to the complex subject of private international law. Written by academics who both previously worked as solicitors, there is extensive coverage of commercial topics such as the jurisdiction of various courts and their limitations, stays of proceedings and restraining foreign proceedings, the recognition and enforcement of judgments, the law of obligations with respect to contractual and non-contractual obligations. There are also sections on the various aspects of family law in private international law, and the law of property, including the transfer of property, administration of estates, succession and trusts.

ISBN: 978-0-19-928438-2. Price: £39.95 (paperback) or £95.00 (hardback). You can purchase the book from our secure, Amazon-powered bookstore in **paperback** or **hardback**, or from the OUP website. Stay tuned – a review of the book will follow here in the coming weeks.

Third Issue of 2008's Revue Critique Droit Int'l Privé

The third issue of French *Revue Critique de Droit International privé* for 2008 will be released shortly. It will include four articles, all relating to conflict issues.

In the first article, Charalambos Pamboukis, who is a professor at the university of Athens, Greece, explores the renewal and metamorphosis of recognition as a method to address conflicts problems (*La renaissance-métamorphose de la méthode de la reconnaissance*). The English abstract reads:

The recent renewal of a methodology of recognition is the result of two factors.

First, a political factor. Globalisation requires international coherence for private relationships, while the construction of Europe reconstitutes a community of laws. A paradigm change emerges. Second, a technical factor. Traditional conflict rules are not adapted to the recognition of legal relationships which already exist. The characteristic of the method of recognition is its function of confirmation and reception, and its object, which is a concrete, pre-existing legal relationship. It excludes any recourse to the conflict rule, but it does not necessarily represent an underhand form of lex forism nor does it signify reverse discrimination. But its scope is still uncertain, since it covers relationships which have been consecrated by an official but created by private actors. The latter distinction could contribute to clarify the much debated issue.

In the second second article, Marie-Elodie Ancel wonders what the Rome I Regulation will change for distribution contracts (*Les contrats de distribution et la nouvelle donne du règlement Rome I*). The author, who is a professor of international private law at Paris Val-de-Marne (Paris XII) university, has kindly provided the following abstract:

According to French case law, distribution contracts are governed by the law of the manufacturer in the absence of a choice of law and the forum contractus is determined under Article 5.1 a) of the Brussels I Regulation. This study examines how the French Cour de cassation has been led to these solutions and how Article 4.1 and Recital 17 of the Rome I Regulation take the opposite course.

The third article is a comprehensive study of the Rome II Regulation by Geneva professor Thomas Kadner Graziano (*Le nouveau droit international privé communautaire en matière de responsabilité extracontractuelle*).

Finally, the fourth article is an essay on class actions in international private law building on the American *Vivendi Universal* case (*Régulation de l'économie globale et l'émergence de compétences déléguées : sur le droit international privé des actions de groupe (à propos de l'affaire* Vivendi Universal)). Its author is Horatia Muir Watt, who teaches at Paris I university.

At the present time, I do not have an English abstract for the last two pieces.

Volume 4, Issue 2, Journal of Private International Law (August 2008)

The August 2008 issue of the *Journal of Private International Law* has just been published. The contents are (click on the links to view the abstracts on the Hart Publishing website):

- A Bucher, **'The New Swiss Federal Act on International Child Abduction'**
- J Neels, **'Falconbridge in Africa'**
- A Mills, **'The Dimensions of Public Policy in Private International Law'**
- T Dornis, **'Contribution and Indemnification among Joint Torteasors in Multi-State Conflict Cases: A Study of Doctrine and the Current Law in the US and under the Rome II Regulation'**
- A Gray, **'Loss Distribution Issues in Multinational Tort Claims: Giving Substance to Substance'**
- R Frimpong Oppong, **'Roman-Dutch Law Meets the Common Law on Jurisdiction in International Matters'**
- O Sibanda, **'Jurisdictional Arrest of a Foreign Peregrinus now Unconstitutional in South Africa: Bid Industrial Holdings v Strang'**

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Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (4/2008)

Recently, the July/August issue of the German legal journal "Praxis des Internationalen Privat- und Verfahrensrechts" (**IPRax)** was released.

It contains the following **articles/case notes (including the reviewed decisions)**:

- ***Burkhard Hess/David Bittmann***: "Die Verordnungen zur Einführung eines Europäischen Mahnverfahrens und eines Europäischen Verfahrens für geringfügige Forderungen – ein substantieller Integrationsschritt im Europäischen Zivilprozessrecht" – the English abstract reads as follows:

Two new European instruments, Regulation (EC) No. 1896/2006 concerning the creation of a European Payment Order and Regulation (EC) No. 861/2007 establishing a European Procedure for Small Claims, will enter into force on the 9th of December 2008 and the 1st of January 2009, respectively. Both constitute a new step in the integration of European Civil Procedural Law, introducing a genuine European title and creating genuine European civil procedures in specific areas. The following article presents and analyses these new instruments. Furthermore, it scrutinizes the German implementation rules, which are currently still at a draft stage. Finally, the article assesses the interplay between the new parallel regulations and examines their implications for European as well as national procedural laws. In the long run, the vast number of different regulations on the cross-border recovery of debts may entail the fragmentation of European Civil Procedural Law.

- ***Rolf Wagner***: "Änderungsbedarf im autonomen deutschen internationalen Privatrecht aufgrund der Rom II-Verordnung? – Ein Überblick über den Regierungsentwurf eines Gesetzes zur Anpassung der Vorschriften des Internationalen Privatrechts an die Rom II Verordnung" – the English abstract reads as follows:

Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II Regulation) will enter into force in the EU member states (except for Denmark) as from 11 January 2009. The following observations examine whether national German law has to be changed as a consequence of the Rome II Regulation. In particular, the question arises as to whether the rules on non-contractual obligations in Articles 38 seqq. of the German Introductory Act to the Civil Code may be deleted, and whether further changes are necessary in order to give full effect to the Rome II Regulation.

- ***Sven Rugullis*** on anticipated choice of law by the parties with regard to non-contractual obligations: "Die antizipierte Rechtswahl in außervertraglichen Schuldverhältnissen"
- ***David Einhaus*** on the Regulation creating a European Order for Payment Procedure: "Qual der Wahl: Europäisches oder internationales deutsches Mahnverfahren?"
- ***Sascha Reichardt*** on a judgment of the Federal Supreme Court of 28 June 2007 (I ZR 49/04) dealing with the question of international jurisdiction regarding intellectual property rights: "Internationale Zuständigkeit deutscher Gerichte bei immaterialgüterrechtlichen Klagen"
- ***Peter Mankowski*** on a judgment of the Higher Regional Court Karlsruhe of 24 August 2007 (14 U 72/06) on Art. 15 (1) lit. c Brussels I Regulation: "Muss zwischen ausgerichteter Tätigkeit und konkretem Vertrag bei Art. 15 Abs. 1 lit. c EuGVVO ein Zusammenhang bestehen?"
- ***Rolf Stürner/Therese Müller*** show developments of the German-American mutual judicial assistance by analysing two recent decisions of the Federal Supreme Court (28 March 2007 – IV AR (VZ) 2/07) and the Higher Regional Court Celle (6 July 2007 – 16 VA 5/07) dealing respectively with the question of service of American class actions in Germany and the granting of assistance by German courts to obtain evidence for US-American pre-trial discovery-proceedings: "Aktuelle Entwicklungstendenzen im deutsch-amerikanischen Rechtshilfeverkehr"
- ***Fügen Sargin***: "A Critical Analysis of the Requirements of Recognition and Enforcement of Foreign Judgments under Turkish Law"
- ***Zeynep Derya Tarman*** on the acquisition of real estate by foreigners in Turkey and its restrictions: "Grundsätze und Beschränkungen beim Erweb

von Grundstücken durch Ausländer in der Türkei”
- ***Torstein Frantzen*** on the recognition of foreign divorces in Norway: “Anerkennung ausländischer Ehen in Norwegen”

Further, this issue contains the following **materials**:

- Draft statute of the Federal Government for the adaptation of the German PIL rules (EGBGB) to the Rome II Regulation: Gesetzentwurf der Bundesregierung (2008) für ein Gesetz zur Anpassung der Vorschriften des Internationalen Privatrechts an die Verordnung (EG) Nr. 864/2007
- ***Peter Kindler/Karla Klemann***: Synopsis of the German PIL rules, Rome I and Rome II: “Synopse zum Inkrafttreten der Verordnungen Rom I und Rom II”

As well as the following **information**:

- ***Michael Stürner/Moritz Brinkmann*** on the conference of the Academy of European Law in Trier on the Draft Common Frame of Reference which has taken place in March 2008: “The Draft Common Frame of Reference – Tagung der Europäischen Rechtsakademie am 6. und 7.3.2008 in Trier”
- ***Erik Jayme/Carl Friedrich Nordmeier*** on seminars having taken place in Thrace (Greece) in April 2008 on private international law of family and succession law and in particular on legal questions of Muslim Greek nationals: “Griechische Muslime in Thrazien: Internationales Familien- und Erbrecht in europäischer Perspektive”

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.

2007’s Yearbook of Private International Law

The Yearbook of Private International Law for 2007 will soon be out. Its main focus is on the Rome II Regulation, with the following articles:

Gerhard Hohloch:
Place of Injury, Habitual Residence, Closer Connections and Substantive Scope – the Basic Principles

Th.M. De Boer:
Party Autonomy and its Limitations in the Rome II Regulation

Peter Huber / Martin Illmer:
International Product Liability. A Commentary on Article 5 of the Rome II Regulation

Michael Hellner:
Unfair Competition and Acts Restricting Free Competition. A Commentary on Article 6 of the Rome II Regulation

Thomas Kadner Graziano:
The Law Applicable to Cross-Border Damage to the Environment. A Commentary on Article 7 of the Rome II Regulation

Nerina Boschiero:
Infringement of Intellectual Property Rights. A Commentary on Article 8 of the Rome II Regulation

Guillermo Palao Moreno:
The Law Applicable to a Non-Contractual Obligation with Respect to an Industrial Action. A Commentary on Article 9 of the Rome II Regulation

Bart Volders:
Culpa in Contrahendo in the Conflict of Laws. A Commentary on Article 12 of the

Rome II Regulation

Georgina Garriga:
Relationship between Rome II and Other International Instruments. A Commentary on Article 28 of the Rome II Regulation

Symeon C. Symeonides:
Rome II: A Centrist Critique

Yuko Nishitani:
The Rome II Regulation from a Japanese Point of View

Cecilia Fresnedo de Aguirre / Diego P. Fernandez Arroyo:
A Quick Latin American Look at the Rome II Regulation

Reid Mortensen:
A Common Law Cocoon: Australia and the Rome II Regulation

The *Yearbook* also includes national reports and case notes. The full table of contents can be found here.

Guest Editorial: Muir-Watt on Reshaping Private International Law in a Changing World

April's Guest Editorial is by Professor Horatia Muir-Watt: **Reshaping Private International Law in a Changing World**.

Horatia Muir Watt is Professor of Private International and Comparative Law at the University of Paris I (Panthéon-Sorbonne). She prepared her doctorate in private international law (University of Paris 2, 1985) and was admitted to the *agrégation* in 1986. She was then appointed to the University of Tours, then the University of Paris XI, before joining Paris I in 1996. She is

Deputy Director of the Comparative Law Center of Paris (UMR de Droit comparé, Paris I-CNRS) and Editor in Chief of the *Revue critique de droit international privé*, the leading law review on private international law in France. She directs the Masters program in Anglo-American Business Law and co-directs the Masters program in Global Business law (Paris I/Institute of Political Science). She has been regular visitor to the University of Texas in Austin, where she has taught the Conflict of Laws. She lectured in July 2004 at the Hague Academy of International Law. Her course on "Aspects économiques de droit international privé" has been published in vol. 307 of the *Recueil des Cours*. She has published two other books: *Common law et tradition civiliste*, PUF 2006, with Duncan Fairgrieve (a pocket comparative study) and Droit international privé, PUF, 2007, with Dominique Bureau (a treatise in 2 volumes). She publishes numerous law review articles, contributions to Mélanges and legal encyclopedieas, case-notes and book reviews, introductions and prefaces (including, recently, The making of European Private Law: Regulatory Strategies and Governance, with Fabrizio Cafaggi, to be published, Sellier, 2008). A full list of her publications is available here.

Reshaping Private International Law in a Changing World

The past few decades have witnessed profound changes in the world order – changes affecting the nature of sovereignty or the significance of territory – which require measuring the methodological impact of political and technological transformations on traditional ways of thinking about allocation of prescriptive and adjudicatory authority as between states. Myriads of issues arise in this respect within the new global environment, such as the extraterritorial reach of regulatory law, the decline of the private/public divide in the international field, the renewed foundations of adjudicatory jurisdiction (particularly in cyberspace), the implications of individual and collective access to justice in the international sphere, the impact of fundamental rights on choice of law, the ability of parties to cross regulatory frontiers and the subsequent transformation of the relationship between law and market. Indeed, one of the most important issues raised by globalization from a private international law perspective is the extent to which private economic actors are now achieving "lift-off" ((As Robert Wai has so aptly put it, in "Transnational lift-off and Juridical Touchdown: The Regulatory Function of Private International Law in a Global Age", 40 *Colum. J. Transnat.* L 209 (2002).)) from the sway of territorial legal systems. To some extent, traditional rules on jurisdiction, choice of law and recognition/enforcement of judgments and

arbitral awards have favored the undermining of law's (geographical) empire, which is already threatened by the increasing transparency of national barriers to cross-border trade and investment. Party mobility through choice of law and forum induces a worldwide supply and demand for legal products. When such a market is unregulated, the consequences of such legislative competition may be disastrous.

An excellent illustration of the way in which rules on choice of law and forum, combined with a liberal regime relating to enforcement of foreign judgments, allow private confiscation of the governing law can be found in the circumstances which gave rise to the notorious Lloyd's litigation. ((Among many: *Bonny v. Society of Lloyd's* (3 F.3d 156, 7th Circuit, 1993) ; *The Society of Lloyd's v. Ashenden* (233 F.3d 473, 7th Circuit 2000).)) Here, securities offerings accompanied by inadequate disclosure on the American market managed to slip through the net of the federal Securities Acts. This example shows how "barrier-crossing" – escaping the sway of mandatory provisions by opting out of a legal system, and *de facto* redefining jurisdictional boundaries to suit oneself ((W. Bratton & J. McCahery, "The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second Best World", 86 *Georgetown L J* 201 (1997).)) – through the mobility conferred by unfettered choice of forum alters the status of *lois de police* or internationally mandatory laws, which become merely "semi-mandatory" ((L. Radicati di Brozolo, "Mondialisation, jurisdiction, arbitrage: vers des règles d'application semi-nécessaires?", *Rev crit DIP* 2003.1.)) before the chosen foreign forum. Other well-known examples can be found in the field of tort, where the use of *forum non conveniens* to prevent access by the victims of accidents linked to delocalized industrial activities, to justice in the country of the (parent) corporate defendant, seals the downward spiral in which developing counties are trapped when economically dependant upon versatile foreign capital; lowering the cost of security, environmental protection, or social legislation will attract investment, but will maintain any liability incurred within the limits designed by the low standards of the *lex loci delicti* as applied by local courts. ((As the *Nike* case shows, the powerful market leverage of consumer arbitrage in the defendant's home country may contribute to remedy the problem through consumer refusal to buy products manufactured by means of child labour, etc: see *Nike Inc. v. Kasky* 539 US 654 (2003).)) Here, rules of jurisdiction and choice of law contribute to the "global tragedy of the commons", where in the absence of a central regulator or universally accepted standards of conduct,

nothing prevents a state from abetting the exportation by its private sector of industrial costs (pollution, economies on social protection, etc) in the direction of the global community.

Insofar that it is felt desirable to ensure the "touch-down" of economic actors in this context, private international methodology may require considerable reshaping, so as to harness it to the new need for strong yet adjusted regulation of the consequences of private mobility and the inter-jurisdictional competition which it inevitably generates. Approaches developed in a world where the prescriptive authority of State was coextensive with territory are clearly no longer adapted to this function; this is particularly true of the methods inspired by the private interest paradigm on which continental Europe doctrine thrived throughout the second half of the twentieth century and is loath even today to abandon. ((On this point, I express courteous disagreement with Pierre Mayer, who has devoted a chapter of his excellent Hague lectures to challenging the relevance of the changes discussed here: "Le phénomène de la coordination des rdres juridiques étatiques en droit privé", RCADI t327 (2007).)) The message of this editorial is to the effect that private international law should adjust to the stakes involved in real world conflicts of laws, which do not, or do no longer, implicate purely private interests playing out on a closed field, ((This is the "unilateralists' complaint": see P. Gothot, "Le renouveau de la tendance unilatéraliste", *Rev crit DIP* 1971.1; D. Boden, *L'ordre public : limite et condition de la tolérance (essai sur le pluralisme juridique)*.)) but involve strong state policies or substantive values perceived as fundamental by the global community; in turn, it is mistaken and indeed harmful to continue to represent the rules designed to respond to these conflicts as being "neutral", since this leads to underestimate the needs generated by the novel ways in which national laws inter-relate in a global setting and prevents private international law from being fully invested with an appropriate regulatory function. ((There is nothing particularly surprising in the emergence of new needs in this field, insofar as they mirror those which increasingly affect the role and content of private law as a whole: see Cafaggi & Muir Watt, "The making of European Private Law: Regulatory Strategies and Governance", Sellier, forthcoming 2008.)) Just three examples (among many more) will serve to draw attention to the tectonic upheavals currently occurring and to the pressing need to devote further thought to the reshaping of traditional methods and approaches.

1. *Choice of law and economic due process.*

Within the European Union, the appearance of a market for law is not of course a mere and perverse side-effect of other policies geared to enhancing party autonomy. Carefully designed regulatory competition in the field of goods and services ((Jukka Snell*, Goods and Services in EC Law, A Study of the relationships between the Freedoms,* OUP 2002.)) has been shown to – deliberately – overturn the very concept of "monopolistic states", even in the field of public law and services. ((Ch. Kerber, Interjurisdctional Competition within the European Union", 23 *Fordham Int'l L J*. 217 (2000).)) Indeed, inter-jurisdictional mobility of firms, products and services is once again the means by which law is made to appear as offering on a competitive market, designed in turn to stimulate legislative reactivity and creativity. As illustrated in the global context, one of the market failures to be feared in the context of unregulated competition is the exporting of costs or externalities linked to legislative choices of which the consequences may affect other communities. However, in an integrated legal system, these risks are restricted by the existence of a central regulator, armed with tools such as approximation of substantive rules, or, where diversity is deemed to be desirable, constitutional instruments designed to discipline the various States in their mutual dealings. ((In the US, these are the Commerce Clause, Due Process, Full Faith and Credit)) Here, as recent conflicts of laws implicating both economic freedoms and workers' rights have shown, the Court of justice is invested with an important balancing function which clearly overflows into the political sphere. ((*Viking* aff. C-438/05, *Laval* aff. C-341/05))

This is where uniform choice of law rules come in, as tools of governance designed to fulfill the requirements of economic due process on a Community level. Economic due process, which is now thought to explain the requirements of the Commerce Clause in the US federal Constitution, ((In the field of cyber torts, see J. Goldsmith & A Sykes, "The Internet and the Dormant Commerce Clause", 110 Yale L J 785 (2001).)) ensures that a given community does not impose costs on out of state interests which were not represented in its decision-making process. Thus, for instance, the cost of a law providing for lax standards of environmental protection should not be exported towards a neighbouring state with different priorities: in cases of cross-border pollution, environmental damage

caused in the the latter state by firms legally using low standards of protection on the other side of the frontier must be internalized by application of the more protective rule. Posting workers employed under lax labor standards to a host state with higher social protection in order to benefit from the competitive advantage of low cost labor requires application of local law for the duration of the posting in order to avoid unhealthy distorsions of competiton between firms. To a large extent, recent choice of law provisions have integrated this change. ((See article 7 of the new Rome II Regulation for environmental torts and, in the field of employment relationships, the conflict of law provisions of the 1996 Posted Workers Directive.)) Typically, the recitals introducing Rome II attribute virtues to the determination of the applicable law which are far removed from the traditional private interest paradigm. There is still room for further improvement, however. Scrutinizing Rome II through the lenses governmental interest analysis, Symeon Symeonides has shown that in many cases, it would be desirable, as in the field of environmental pollution, to take account of true conduct-regulating conflicts, and to give effect if necessary to the prohibitive rules of the state of the place of conduct if its interest in regulating a given conduct is greater than the that of the state where the harm occurs, when it provides for a laxer standard of care. ((“Tort Conflicts and Rome II: A View from Across”, *Festschrift Ehrich Jayme*, Sellier, Munich, 2004, p. 935.)) For the moment, this result is only possible through article 16. ((Article 17 does not seem intended to be interpreted bilaterally, and the escape clause of article 4-3 does not appear to allow an issue by issue approach.))

2. *The “new unilateralism”*

The requirements of human rights in cross-border cases are also bringing about profound methodological changes whenever the continuity of an enduring personal or family relationship requires the host state to refrain from refusing recognition under its own private international law rules. Thus, the progressive appearance of a “unilateral method of recognition of foreign situations”, implemented both by the European Court of Justice, the European Court of Human Rights, and subsequently by national courts ((See CA Paris, 25th October 2007, not yet published, but a commentary posted by G. Cuniberti is available on this website.)) , ousts traditional bilateral choice of law rules and favors the cross-border validity of what look very like vested rights in fields such as adoption,

other parent/child relationships, marriage, same-sex partnerships, etc. Grounds for such change have been discovered in fundamental rights and European citizenship, heralding an adjustment of the philosophical foundations of the conflict of laws to the ideology of recognition and identity which also forms the basis of contemporary European substantive law. ((See for instance, S. Rodota, *Dal soggetto alla persona*, Editoriale Scientifica, Rome, 2007))

Although the objective of recognizing existing personal or family relationships in cross-border situations is entirely legitimate, its implementation certainly requires further thought. Indeed, the common thread which seems to run through the case-law is the principle of non-discrimination. This principle appears both as a fundamental value in itself and, in a Community context, as an essential component of European citizenship. The implication of the new recourse to non-discrimination as a foundation for choice of law is that the traditional use of nationality or domicile as connecting factor generates unjustified discrepancies in the field of personal status. This may in itself suggest that non-discrimination as conflict of laws methodology is totally misguided. Among the most notorious illustrations of judicial use of this principle is the European Court of Justice's judgment in the *Garcia Avello* case. ((ECJ *Garcia Avello*, C-148/02, 2003.)) It was held to be discriminatory for a Belgian court to apply choice of law rules on personal status which lead to the name of a Belgo-Spanish child residing in Belgium being governed by Belgian law, as if he was in the same situation as a child whose parents are both Belgian. The principle of non-discrimination, inherent in the concept of European citizenship, mandates that he benefit from the rules of Spanish law on this point. The Spanish perspective on the determination of the name of a Spanish child must be recognized in Belgium on the basis of non-discrimination. This reasoning is flawed. The Garcia-Weber child had been born and was still resident in Belgium, which might have provided additional credit to the claim of Belgian law to regulate his family name. By deciding the contrary, and thereby allowing the child to benefit from whichever set of rules he chose to invoke, the Court of justice seems to imply that the sole fact of possessing dual citizenship suffices to differentiate a child from those who possess only the nationality of the country of his or her domicile. Of course, a child with strong personal connections to two different communities may well encounter difficulties in as far as the coherence of his or her personal status is concerned, if each adopts a different stance (whether on name, validity of marriage, adoption, etc). Avoiding limping personal status in this sort of situation

is one of the principal policies behind many choice of law rules. But here, the Court's reasoning is distorted because it purported to resolve a difficulty linked to the impact of cross-border mobility on individual status, whereas in fact, there was no such mobility under the facts of the case other than the dual citizenship of the child. It was not unreasonable in the present case that Belgium, which was the country of both citizenship and domicile, sought to regulate the child's name in the same way as that of other purely Belgian children living in Belgium. It would therefore have been far more satisfactory to look towards other principles which, mindful of identity and the protection of persons, have significant implications as far as choice of law is concerned, such as the fundamental right to protection of one's personal and family life under article 8 of the ECHR. Of course, one the proper basis for full faith and credit due to foreign situations is determined, the task for the future will be to define its precise requirements in this respect in practice.

3. *Conflicts of public law*

Is it still true, that, as is so often asserted, the conflict of laws is limited to the field of private law? It has been apparent for some time that the some of the most significant evolutions, for private international law purposes, induced by the new quasi-federal environment in Europe, concern public, administrative or regulatory law. Such law is given extraterritorial effect, through mutual recognition; independant regulatory authorities appear, with a duty to cooperate transnationally; elaborate schemes allocate regulatory authority among the Member States. In particular, in the field of securities regulation, the 2001 Lamfalussy Report provided considerable impetus for transnational cooperation between regulatory agencies. Thus, borrowing on the Admission Directive, ((Consolidated Directive 2001/34 EC coodinating the condtions for admission of securities to official stock exchange listing.)) which has served as a model for securities regulation as a whole, the Community has established a complete system of decentralised supervision and enforcement of the harmonised regime, supported by cooperation between administrative authorities. ((See Niamh Moloney, *EC Securities regulation Oxford EC Law Library*, 2002, p.100.)) The interesting point is that the administrative duty to cooperate, which justifies negotiation and dialogue when it comes to deciding upon the shared exercise of regulatory authority, may also lead to administrative bodies having to apply

foreign regulatory law, which means in turn that conflict of laws principles will need to extend, with certain adjustments, to the field of public law. For an academic discipline which was epistemologically harnassed to the public/private divide – or rather, the public law taboo – this is all something of a landslide. However, it is also remarkable that even before the courts, where traditional approaches tends to linger, there are signs that transnational litigation in regulatory fields is throwing up evidence of shared state interests – so much so that one author has suggested that such litigation, albeit subject to domestic economic law, may bring substantive regulatory benefits to the international community. ((Hannah Buxbaum, Transnational Regulatory litigation, 48 Va J Int'l L 251 (2006).))

Here again, however, there is room for debate as to the appropriate approach to public or regulatory conflicts. An academic proposal on the regulation of global capital markets through interjurisdictional competition, ((S. Choi & A. Guzman, « Portable reciprocity : Rethinking the International reach of Securities Regulation », 71 S. Cal. L. Rev. 903 (1998).)) building on the mutual recognition theme, rejects administrative cooperation as insufficient, time-consuming and overly costly in terms of monitoring compliance. Free choice by issuers and investors as to how, or according to which national rules, they should be regulated (a choice which would then be "mutually" recognised by all states participating in the market according to a system of "portable reciprocity") would supposedly enhance competition across the board and ensure a wide range of legal products catering for risk-takers and risk averse alike. Although this proposal will no doubt meet some scepticism on this side of the Atlantic, where there is less faith in the regulatory virtues of party freedom, it is extremely interesting, first, because it emphasises once again the radical change in the relationship (or at least in the perception of this relationship) between law and market in a global environment, where party mobility (whether through free choice or exit from the sway of mandatory rules) is already a reality. Second, because it includes in this reversal the activity of regulatory agencies, which to some extent would be functioning on a delocalised basis. If one links these ideas to equally intriguing recent proposals to delocalise the adjudicatory activity of the courts in order to enhance global efficiency with the cooperative consent of states, ((It has even been suggested that accessing the courts of a chosen jurisdiction can be seen as an "after-sale service" bundled with the choice of the applicable law in the field of contracts or corporate charters, so that such access should also be available extraterritorially

in the form of delocalized courts, in the context of a competitive global market for legal services: see H. Hansmann “Extraterritorial Courts for Corporate Law”, *Yale Law School Faculty Scholarship Papers*, 2005, Paper 3.)) the vision of the global world it projects is quite startling. Clearly, private international law needs be ready to meet the challenge of its new regulatory rôle.