Flashairlines and Declaratory Relief Under French Law

Emmanuel Jeuland is a professor of law at Paris I University (Panthéon-Sorbonne) and a specialist of civil procedure.

In this post, I would like to offer some brief thoughts on the Paris Court of appeal's judgment of the 6th of March 2008. It is my opinion that the legal foundation of the judgement as far as victims' right to sue is concerned is questionable and is not consistent with the French procedural system.

The court of appeal held:

> *le juge français n'est pas saisi par voie d'exception de sa compétence internationale mais par voie d'action ce qui rend inopérant le disposition de l'article 75 CPC… l'action ayant pour objet l'obtention d'une décision sur la compétence internationale française est inséparable du contexte judiciaire dans lequel la demande s'insère et qu'elle n'est pas contradictoire avec la saisine du juge pour qu'il se prononce …*
>
> *le juge français ne peut être le seul à être exclu du débat sur sa compétence internationale dès lors que la question s'inscrit dans un contexte de confiance mutuelle qui appelle à une coopération et une coordination des systèmes judiciaires …*
>
> *les victimes ont un intérêt légitime et actuel à obtenir une décision française sur la compétence internationale en raison de la décision du juge californien .*

This statement means that the issue of international jurisdiction in *Flash Airlines* is not referred to the French judge by way of defence but by way of action, so that article 75 CPC which deals with the defence of lack of jurisdiction is not applicable. Article 75 states that "*where it is alleged that the court seized lacks jurisdiction, the party who shall proffer the plea shall have, under penalty of it otherwise being inadmissible, to provide reasons thereof and to indicate, at all event, court before which the matter should be brought*".

Nevertheless the *Cour de cassation* has held that an action claiming that the court

lacks jurisdiction is not admissible since article 75 CPC indicates that the lack of jurisdiction is a matter of defence, not of action:

> *les exceptions d'incompétence figurant au nombre des moyens de défense, le demandeur n'est pas recevable à contester la compétence territoriale de la juridiction qu'il a lui-même saisie (Cass. 2° Civ., 7 December 2000, Bull. n°163).*

This sentence means that the issue of jurisdiction is a means of defence, therefore the claimant is not admissible to challenge the territorial jurisdiction of the court to which he submitted his case. The international jurisdiction is so close to the territorial jurisdiction, that rules of territorial jurisdiction are usually extended to international matter in French international litigation.

This case of the 7th of December 2000 is not a formalistic decision. The code of civil procedure is consistent. There are actions and defences. An action is defined by article 30: "*an action is the right, in relation to the originator of a claim, to be heard on the merits of the same in order that the judge shall pronounce it well or ill-founded*". An action deals with the main issue on the merits whereas the defences may be on the merits, on admissibility or on jurisdiction. Several scholars and judges wrote the code of procedural law with great attention (Motulsky, Cornu, Parodi, etc.). A defence of lack of jurisdiction has to be argued in limine litis (before the claim of non admissibility and before the defences on the merits).

An action is admissible if the claimant has a legitimate and present interest. It is why the declaratory action is not admissible, in principle, under French law. There are some rare exceptions especially in private international law but on the merits of the case not on procedural grounds. But the court of appeal does not consider that it is a declaratory judgment. The victim has a legitimate and present interest to sue. This interest to sue is the likeliness to obtain damages for the victims. Yet they don't claim damages, they submit a case to a judge in order to obtain from this judge that he refuses the case. The court of appeal indicates that there is no contradiction to declare admissible an action seeking that the court has no jurisdiction. It seems to me that it is not sufficient to say that there is no contradiction to avoid the contradiction (it looks like a "Competenz Competenz" rule or a preliminary reference to the French court). The risk is that lawyers try too often to use this new tool to determine jurisdiction. Courts would become on

this point legal consultants.

The word “legitimate interest” is rarely used in case law. It used to be applied to prevent concubine to seek damages when her concubine had been killed in a traffic accident. This case law was reversed in 1970. The condition of legitimate interest is a moral condition. In fact the court of appeal takes perhaps into account the victims’ interest to bring their action in California (because of discovery, punitive damages etc.). The equilibrium, the consistency and the integrity of French civil procedure is endangered by the court of appeal judgment.

The mutual trust and international cooperation is invoked by the court of appeal to justify its decision. But good willing does not make good decision. As a matter of fact the court of appeal does not like to be excluded of the debate concerning its own jurisdiction but that is a feeling, not a rule. There are other fields where the international cooperation and trust have not been taken into account (e. g. evidence matter in application of the Hague convention of 1970 in American and French case law etc.). The court of appeal’s judgment is more or less a unilateral disarmament. There is a need for an international convention which may be the new Lugano convention of the 30th October 2007 (JOUE n° L. 339, 21 déc. 2007, p. 3 ; Procédures 2008, n° 43, obs. Nourissat) which may be ratified by non European countries ! (nevertheless this convention is a copy of the Brussel regulation and so a European text).

Related posts:

Flashairlines – Online symposium
French court declines jurisdiction to transfer dispute back to U.S. court

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Flashairlines – Online Symposium

In a recent post, I reported how the Paris Court of appeal accepted to decline jurisdiction in order to meet the jurisdictional criteria of a U.S. court and enable plaintiffs, most of whom were French, to get back to California and resume proceedings there.

The *Flashairlines* litigation raises many fascinating issues. Here are just a few of them: were each of the courts calling for or even engaging into international judicial cooperation? Where does this case, that none of the courts initially wanted, belong? Should French (and more generally civil law) civil procedure be twisted in some of its most basic principles (availability of declaratory relief, conveniens analysis) in order to reach jurisdictional purposes, and which one?

In the days to come, *Conflictoflaws* would like to organise an online symposium on the case. We hope that many European and American scholars will want to share with us their thoughts on the issues it raises. If you are interested in participating, feel free to post comments or to contact us.

Related posts:

French court declines jurisdiction to transfer dispute back to U.S. court

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The American Revolution and the European Evolution in Choice of Law: Reciprocal Lessons

Symeon Symeonides (*Williamette*) has posted "**The American Revolution and the European Evolution in Choice of Law: Reciprocal Lessons**" on SSRN (forthcoming in *Tulane Law Review, Vol. 82, No. 5, 2008.*) Here's the abstract:

> *This Article is an invited contribution to a symposium held at Duke University Law School under the title "The New European Choice-of-Law Revolution: Lessons for the United States?" [see here] The Article disputes part of this title by contending that, unlike its American counterpart, European private international law (PIL) has rejected the route of revolution and has instead opted for a quiet and continuing evolution. Nevertheless, this evolution has produced statutory rules and exceptions that resolve several categories of tort conflicts in the same way as American courts after four decades of "revolution,"*

experimentation, and reinventing the wheel in each case. The quality and efficiency of these rules suggest that revolution is not necessarily the most productive nor quickest route to renewal and improvement. The Article concludes that the European experience can help American conflicts law overcome its innate anti-rule syndrome and develop its own rules without surrendering the methodological or substantive gains of the choice-of-law revolution. Thus, the Article answers affirmatively the question posed by the Symposium's subtitle.

The Article also turns the Symposium's question in the opposite direction by asking whether the American conflicts experience holds any lessons for Europe. The Article concludes that a discerning examination of this experience can help European PIL in several ways, including fine-tuning its own choice-of-law rules, allowing more flexible exceptions, overcoming its own phobias against issue-by-issue analysis and depecage, and recognizing and appropriately resolving certain false conflicts

Download the paper from SSRN.

New Book: Japanese and European Private International Law in Comparative Perspective

A very interesting volume, collecting the contributions presented by prominent European and Japanese scholars at a conference organised in 2007 by the Max Planck Institute for Private Law in Hamburg, has been recently published by Mohr Siebeck: **Japanese and European Private International Law in Comparative Perspective**. A presentation of the book, and the TOC, are available on the MPI's website:

Edited by Jürgen Basedow, Harald Baum und Yuko Nishitani, this conference

volume is based on a symposium of the same name that was held in March 2007 at the MPI for Private Law in Hamburg and represents the first comprehensive analysis of the new Japanese private international law in any western language.

The idea of national codification is advancing on a global scale in conflict of laws. A large number of legislative projects dealing with codifying and modernizing private international law, both on the national and the supranational level, have been launched in the past few years. Among such recent initiatives, the advances taken by the European and the Japanese legislators are particularly reflecting these developments. On January 1, 2007, the new Japanese 'Act on General Rules for Application of Laws' entered into force replacing the outdated conflict of laws statute of 1898. This major reform finds its parallels in the current efforts of the European Union to create a modern private international law regime for its member states.

This volume presents the first comprehensive analysis of the new Japanese private international law available in any western language and contrasts it with corresponding European developments. Most of the contributors from Japan are scholars who were actively involved in and responsible for preparing the new Act. All of them are renowned experts in the field of private international law. Leading European experts in the conflict of laws supplement the Japanese analyses with comparative contributions reflecting the pertinent discussion of parallel endeavours in the EU. To guarantee better understanding, English translations of both the present and the former Japanese statutes have been added.

Table of Contents:

Characteristic Performance in the Rome Convention and the Rome I Proposal – Fausto Pocar: Protection of Weaker Parties in the Rome Convention and the Rome I Proposal

III. Assignment of Receivables

Aki Kitazawa: Law Applicable to the Assignment of Receivables in Japan (Nihon ni okeru saiken jôto no junkyo-hô) – Eva-Maria Kieninger: General Principles on the Law Applicable to the Assignment of Receivables in Europe

IV. International Company Law

Dai Yokomizo: International Company Law in Japan – Sylvaine Poillot-Peruzzetto: International Company Law in the ECJ Decisions – Daniel Zimmer: The Proposal of the Deutscher Rat für Internationales Privatrecht

V. Non-Contractual Obligations

Toshiyuki Kono: Critical and Comparative Analysis of the Rome II Regulation on Applicable Laws to Non-contractual Obligations and the New Private International Law in Japan – Thomas Kadner Graziano: General Principles of Private International Law of Tort in Europe – Marc Fallon: The Law Applicable to Specific Torts in Europe

VI. International Family Law

Yasuhiro Okuda: Divorce, Protection of Minors, and Child Abduction in Japan's Private International Law – Maarit Jänterä-Jareborg: Jurisdiction and Applicable Law in Cross-Border Divorce Cases in Europe – Alegría Borrás: Protection of Minors and Child Abduction under the Hague Conventions and the Brussels II bis Regulation

VII. International Civil Procedure Law

Yoshihisa Hayakawa: International Adjudicative Jurisdiction in Japan – Dieter Martiny: Recognition and Enforcement of Foreign Judgments in Germany and Europe

Annex I

Major European Community Legislation in Private International Law

Annex II

Japanese Legislation in Private International Law

Title: **Japanese and European Private International Law in Comparative Perspective**, edited by *Jürgen Basedow*, *Harald Baum*, and *Yuko Nishitani*, Mohr Siebeck (Materialien zum ausländischen und internationalen Privatrecht/48), Tübingen, March 2008, XVIII + 434 pages.

ISBN: 978-3-16-149547-2. Price: euro 89.

French Court Declines Jurisdiction to Transfer Dispute Back to U.S. Court

On March 6th 2008, the Paris Court of Appeal agreed to decline jurisdiction in order to enable the plaintiffs to go back to California and resume the proceedings that they had initiated there. The U.S. Court had (almost) declined jurisdiction on the ground of forum non conveniens, but had fortunately made its decision conditional upon French courts retaining jurisdiction. Under French law, however, French courts did not have jurisdiction over the dispute, but it was hard to see how they could rule so without being petitioned by the defendants, who had no interest to do so. It seemed logical that the plaintiffs would apply to French courts for a declaration of lack of jurisdiction, but declaratory relief is traditionnally unavailable under French civil procedure.

The dispute arose after a Boeing 737-300 crashed in the Red Sea a few minutes after leaving Egypt for Paris. All 135 passengers, most of whom were French (and who included leading arbitration scholar Philippe Fouchard and many members of his family), and the 13 crew members, died. This was on January 4th, 2004.

The airline (Flash airlines) was Egyptian, and so was its insurer. The aircraft was owned by Californian corporation International Lease Finance. The manufacturer of the aircraft was obviously American (Boeing), and so were a variety of its subcontractors: Honeywell International, Parker Hannifin.

Hundreds of plaintiffs decided to bring legal proceedings. A first group of 646 plaintiffs sued Flash Airlines and its insurer before French courts. A second group of 281 plaintiffs, some of whom also belong to the first group, sued the American parties before the U.S. District Court of the Central District of California.

In a judgment of 28 June 2005, the U.S. Court declared itself forum non conveniens. It held, however, that it would only decline jurisdiction if either the defendants were to agree to submit to the jurisdiction of French courts, or if French courts were to retain jurisdiction over the dispute.

The second group of plaintiffs decided to petition French courts to obtain a judgment declining jurisdiction. But this is a kind of declaratory relief that has traditionnally been unavailable under French civil procedure. If you want a court not to retain jurisdiction, the received wisdom goes, you do not petition it in the first place. So the French first instance court held in a judgment of 27 June 2006 that the action was inadmissible.

The plaintiffs appealed to the Paris Court of Appeal which agreed to rule on its jurisdiction.

- It first ruled on the admissibility of the action and held that, because of the context of the action, an action seeking declaratory relief was admissible.

The traditional rule is that parties may not ask courts to rule on issues if it is not immediately necessary for the resolution of the dispute. However, as the point of the action was to secure the jurisdiction of a foreign court which had made it conditional upon the decision of the French court, knowing whether French courts had jurisdiction was immediately necessary for the resolution of the dispute.

The Court went on to rule that it did not have jurisdiction over the dispute between the second group of plaintiffs and the American defendants. As the defendants were US based, the European law of jurisdiction did not apply and submitting to the jurisdiction of French courts was irrelevant, as it is only a head of jurisdiction under European law. The French common law of jurisdiction provides that French courts have jurisdiction in tort cases when either the domicile of the defendant or the accident took place in France, which was not the case here. Finally, article 14 of the Civil code provides that French courts have jurisdiction over disputes involving French plaintiffs, but this jurisdictional

priviledge can be waived by suing abroad and failing to challenge the jurisdiction of the foreign court, which is what had happened (indeed, the French plaintiffs had initiated the American proceedings and argued that U.S. courts had jurisdiction).

Interestingly enough, in an obiter dictum, the French court insists that the American court was the most appropriate court, as some of the witnesses reside "mostly" in the U.S., the evidence related to the plane is to be found in the U.S., and pre-trial discovery is available under U.S. civil procedure. The substance of the dictum might be questionable. But the mere fact that the judgment discusses which court is the most appropriate is truly remarkable, because the jurisdiction of French courts is mandatory. French courts have no discretion in this respect, and whether the foreign court is the forum conveniens is meant to be irrelevant for the purpose of retaining or declining jurisdiction. Well, not completely irrelevant it seems.

French Judgment on Article 5(1) of the Brussels I Regulation, Part IV

On March 5, 2008, the French supreme court for private matters (*Cour de cassation*) confirmed its previous case law characterizing exclusive distribution agreements as contracts which are neither sales nor provisions of services for the purposes of article 5(1) of the Brussels I Regulation.

In this case, German company Wolman had awarded French company Cecil the exclusive distribution of its products (wood) in France. After Wolman terminated the contract in 2002, Cecil sued before a French commercial court in Isère.

The Court of Appeal of Grenoble ruled in a judgment of November 16, 2006 that French courts had jurisdiction over the dispute, as the distribution contract ought to be characterized as a provision of service, which had taken place in France.

The *Cour de cassation* reversed. It held that it was no provision of service for the purpose of article 5, and that the lower courts ought to have identified the obligation in question and found where it was meant to be performed according to the law governing the contract.

As usual, no reasons are given by the *Cour de cassation* in support of its solution.

Related posts:
French Judgment on Article 5(1) of the Brussels I Regulation, Part I
French Judgment on Article 5(1) of the Brussels I Regulation, Part II
French Judgment on Article 5(1) of the Brussels I Regulation, Part III

Conferences: Organized by ERA Spring/Summer 2008

The Academy of European Law (ERA) organizes a number of private international law related conferences, seminars and courses during the spring and summer of 2008:

3rd European Forum for In-house Counsel, *Brussels, 24-25 Apr 2008*

- Description from the ERA website: For the third consecutive year, ERA and ECLA are organising the European Forum for In-House Counsel, combining the pragmatism of an in-house lawyer association with the expertise of a first-class European training institute. The European Forum for In-House Counsel provides a forum for the exchange of practical experience, knowledge and views between all in-house counsel and other lawyers involved in business affairs. The aim is to provide in-house counsel, through expert input, with a comprehensive overview of and a practical insight into issues of European Community law with which an in-house counsel is confronted. The latest developments and the recent relevant case law of the Community courts in areas such as European competition law, European company law, European private law, as well as

the topic of legal privilege, will be analysed during the forum. Interaction among participants will be encouraged through periods of discussion and case studies.

- Target audience: In-house counsel and lawyers specialised in business affairs

Cross-Border Debt Recovery, *Trier, 15-16 May 2008*

- Description from the ERA website: Dr Angelika Fuchs (ERA) and Professor Burkhard Hess (University of Heidelberg) are organizing a conference on Cross-Border Debt Recovery. Freezing or "attaching" a debtor's bank account(s) is a very effective way for creditors to recover the amount owed to them. Most Member States have legislation, which provides for the attachment of bank accounts. Debtors can, however, transfer funds very quickly to other accounts that the creditor may not know about. The creditor is often not able to block such movements of funds as quickly and therefore loses a powerful weapon against recalcitrant debtors. The European Commission feels that problems of cross-border debt recovery are an obstacle to the free movement of payment orders within the European Union and to the proper functioning of the internal market. Late payment and non-payment are a risk for businesses and consumers alike. The Commission therefore proposes the creation of a European system for the attachment of bank accounts. The consultation process initiated by the Green Paper on the attachment of bank accounts has inspired a vivid debate among practitioners, governments and academics. Furthermore, a second Green Paper on measures enhancing the transparency of the debtor's assets will be published soon.

- Target audience: Lawyers in private practice, in-house lawyers, stakeholders, representatives of national authorities and academics specialised in civil procedure and banking law

Recent Developments in Private International Law and Business Law, *Trier, 5-6 Jun 2008*

- Description from the ERA website: Dr Angelika Fuchs, ERA, organizes a seminar on recent developments in private international law and business

law. Private international law and business law continue to be characterised by growing Europeanisation. The purpose of this seminar will be to present the latest developments in both legislation and jurisprudence in the following areas: Brussels I Regulation and anti-suit injunctions; Intellectual property and conflict of laws; New Regulation (EC) No. 1393/2007 on the service of documents; New Directive on certain aspects of mediation in civil and commercial matters; New Regulation (EC) on the law applicable to contractual obligations ("Rome I"); New Regulation (EC) No. 864/2007 on the law applicable to non?contractual obligations ("Rome II"); Trends in European company law: from Daily Mail to Sevic and Cartesio; Major decisions on cross-border insolvency.

- Target audience: Lawyers in private practice, in-house counsel in companies, associations, ministries and other public authorities, judges, notaries, academics

Summer Course: European Company Law, *Trier, 18-20 Jun 2008*

- Description from the ERA website: Tomasz Kramer, ERA, organizes a summer course on European company law. For the second time European company law will feature in ERA's series of summer courses in Trier. The impact of enlargement and globalisation on the internal market creates a special context for individuals and companies that operate across borders. The European Commission has launched a wide-ranging strategy to adapt and harmonise European company law to meet these new challenges. European law has considerably influenced the shape of modern company law in EU member states. Directives and the case law of the European Court of Justice have helped to harmonise national laws and regulations have introduced new legal forms for businesses. The 'Europeanisation' of company law continues apace. This course will offer an introduction to the principles and framework of European company law. It will provide a comprehensive overview of subjects including the formation of different types of companies, corporate governance and management options, capital requirements, shareholders' rights and insolvency. In addition, topics such as corporate restructuring and mobility as well as the characteristics of transnational financial vehicles will be addressed, albeit taking into consideration national particularities. The course will address

current challenges and the latest legislative proposals. The analysis of ECJ case law will be an essential element of the course. Participants will have the opportunity to take a preparatory online e-learning module.

- Target audience: Young lawyers in private practice, public administration or in-house counsel, as well as advanced or postgraduate students, academics, economists or auditors seeking a detailed introduction to European company law

Summer Course: European Private Law, *Trier, 30 Jun-4 Jul 2008*

- Description from the ERA website: Nuno Epifânio, ERA, organizes a summer course on European private law. The purpose of this course is to introduce lawyers to European private law. Among the areas covered during the seminar will be: European Civil Procedure; Private International Law; Contract Law; Insolvency Law; Financial Services; Consumer Protection. 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 in European Private Law is required to attend this course. Participants will be able to deepen their knowledge through case-studies and workshops. The course includes a visit to the European Court of Justice in Luxembourg. Participants will have the opportunity to take a preparatory onlinee-learning module.
- Target audience: Lawyers in private practice, in-house counsel, representatives of national authorities and academics

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Max-Planck Events Spring 2008

During the spring of 2008, the Max Planck Institute for Comparative and International Private Law will organize several events:

On 29 March 2008 the Max Planck Institute and the Claussen Simon Foundation will hold a **colloquium on the Education of Jurists and Judges**.

On 31 March 2008 Prof. Dr. Lu Song (Director, Institute of International Law, China Foreign Affairs University) will present a lecture titled **"Introduction to the New Conflict Rules for Foreign-related Contracts in China — Judicial Interpretation by the Chinese Supreme Court"**.

On 14 April 2008 Professor Dr. Joseph Thomson from the Scottish Law Commission, Edinburgh will hold a guest lecture titled, **"Some Thoughts about Loss"**.

On 19 and 20 May 2008 the Institute will host **the second Max Planck Postdoc Conference on European Private Law** at which junior researchers from throughout Europe will be invited to present and discuss their research work.

For further information, have a look at the MPI website.

First issue of 2008's Journal du Droit International

The first issue of French *Journal du Droit International* (also known as *Clunet*) will be released shortly. It contains four articles dealing with conflict issues.

The first is authored by Pascal de Vareilles-Sommieres, who teaches at Paris I University, and Anwar Fekini, who is a practising lawyer in Paris and Tripoli. It discusses The New International Oil Exploration and Sharing Agreements in Libya (*Les nouveaux contrats internationaux d'exploration et de partage de production pétrolière en Libye. Problèmes choisis*). The English abstract reads:

> *The article intends to study the legal regime of the exploration and production sharing agreements (EPSAs) entered into by the Libyan National Oil Company with foreign oil companies since 2005. In this first part, the authors focus on legal sources governing Libyan EPSAs. Though admitting the prominent part of Libyan law chosen by the parties in a choice of law provision among these*

sources, the authors wonder whether the parties simultaneously intended to get other possible legal sources combined with it. A possible choice of public international law is first examined. Scrutinising the parties intention, the article comes to the conclusion that no sign pointing to an internationalisation of the EPSAs appears in the agreements. As a consequence, international contract law is not to be combined with Libyan law as far as the legal regime of the EPSAs is concerned. The study then looks for possible hints of the parties intention to get the lex mercatoria involved in the regulation of their agreement along with Libyan law. Several signs are brought to the light showing the parties' common intention to let international trade usages interfere with Libyan law to be combined with it in order to finally make up the lex contractus.

The second part of this study will be published this year in a forthcoming issue of this Journal.

The second article is a study of the Rome II Regulation (*Le règlement (CE) n° 864/2007 du 11 juillet 2007 sur la loi applicable aux obligations non contractuelles (« Rome II »)*). It is authored by Carine Briere, who lectures at Rouen University. Here is the English abstract:

The aim of this article is to present Regulation (EC) n° 864/2007 known as « Rome II », which is the result of a long process of elaboration. Codecision procedure has been used to adopt this text which harmonises rules of conflict of laws regarding noncontractual obligations to improve predictability concerning the law applicable. It constitutes a new step towards the construction of a private international community law. The Regulation follows current private international law trends that give competence to the law of the country in which the damage arises. Nevertheless, an escape clause introduces a flexible approach when the lex loci damni seems to be inappropriate. Specific rules for certain torts and restitutionary obligations are also laid down. They derogate the general rule. Moreover, the Regulation upholds in an extensive way the choice of law principle and determines the link with other norms such as the Hague Conventions on which it does not take precedence.

However, this Regulation, adopted in order to facilitate correct workings of the internal market, shall not prejudice the application of internal market legislation.

The third article from Moustapha Lô Diatta from HEI in Geneva presents the Evolution of Bilateral Treaties on Migratory Workers (*L'évolution des accords bilatéraux sur les travailleurs migrants*). The abstract reads:

> *Bilateral labour agreements represent not only the oldest but also the most important source of international migrant workers law. Since their appearance in earlier twentieth century, they have been changing at contracting parties' will, by reference to the political and economic context, the developments of international labour migration and the progress made by international legislation in protecting migrant workers. The purpose of this study is to show to what extent the lessons that can be drawn from this evolution could contribute to the ongoing debate and consultations within the international bodies to establish a multilateral framework in which international labour migration would be mutually beneficial.*

Finally, Philippe Roussel Galle from Dijon University presents a Few Ideas on the Interpretation of Regulation 1346/2000 on Insolvency Proceedings after the French Circular of 15 December 2006 (*De quelques pistes d'interprétation du règlement
(CE) n° 1346/2000 sur les procédures d'insolvabilité : la circulaire du 15 décembre 2006*).

> *The entry into force of law n° 2005-845 of 26 July 2005 which institutes, among other things, a safeguard procedure, combined with the first court decisions enforcing regulation (EC) n° 1346/2000 on insolvency proceedings, have lead the French Ministry of Justice to repel and replace the circular of 17 March 2003 regarding the implementation of the regulation. The new circular, enacted on December 15th 2006, gives precisions and interpretation guidelines on the European text and brings, notwithstanding sovereign judicial appreciation, solutions to the difficulties its implementation might create in France.*

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts"

Recently, the March issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (**IPRax)** was released.

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

- ***R. Wagner/B. Timm*** on the German ministerial draft bill on the law applicable to companies, juristic persons and associations ("Der Referentenentwurf eines Gesetzes zum Internationalen Privatrecht der Gesellschaften, Vereine und juristischen Personen"). The English abstract reads as follows:

> *Companies that operate across borders need clarity with regard to which respective national law applies to them. There are some decisions of the European Court of Justice on the right of settlement according to the Treaty which touch this matter. However, no uniform picture has yet emerged in the European Union. A uniform European regulation would be desirable, but the EU-Commission has not taken up this question yet. In order to promote legal certainty, the German Federal Ministry of Justice has therefore presented a ministerial draft bill on the law applicable to companies, juristic persons and associations. The bill might later on serve as the basis for work on a European regulation. As a general rule, the ministerial draft bill provides for the "law of establishment", i.e. the law at the place of registration, as the law applicable to companies, legal persons and associations. For non-registered companies, legal persons and associations, the applicable law is to be that under which they are organised. Furthermore, the proposed bill clarifies the scope of "the law of establishment" and contains regulations regarding the law applicable to cross-border reorganisations, the change of applicable law and other aspects of cross-border cases.*

- ***J. Fingerhuth/J. Rumpf*** on the consequences of the German MoMiG for cross-border relocations of German entities ("MoMiG und die grenzüberschreitende Sitzverlegung – Die Sitztheorie ein (lebendes) Fossil?"). Here is the English abstract:

The German government rendered a top-to-bottom reform of the German Law on Limited Liability Companies ('GmbHG') with the governmental draft of the MoMiG dated 23 May 2007. The reform also covers the German law on Stock Corporations ('AktG') and general corporate law matters. It is intended by the reform to abandon the required concurrence of statutory seat and seat of the head office of a company and, therefore, to allow German GmbHs and AGs to move their head office to another country (cross-border relocation). Both GmbH and AG will have the same opportunities as entities from countries, where the incorporation theory is applicable. The article discusses the consequences of the MoMiG for cross-border relocations of German entities. In particular, by using the example of the GmbH & Co KG, the authors illustrate problems arising from the intentions of the MoMiG and the 'real seat' theory as it is currently applied in Germany. Furthermore, the authors discuss the need for German entities to completely apply the incorporation theory in Germany. The article comes to the conclusion that the 'real seat' theory will be entirely abandoned by the MoMiG becoming effective. The authors finally encourage the legislator to express this consequence literally within the reasoning of the MoMiG.

- ***A.-K. Bitter*** on the interpretative connection between the Brussels I Regulation and the (future) Rome I Regulation ("Auslegungszusammenhang zwischen der Brüssel I-Verordnung und der künftigen Rom I-Verordnung")

- ***A. Kampf*** on the implications of the European directive on services on PIL ("EU-Dienstleistungsrichtlinie und Kollisionsrecht"). The abstract reads:

On 28 December 2006, after a period of almost three years of debate and political manoeuvring, the European directive on services (2006/123/EC) came into force. It will have to be implemented by the Member States by 28 December 2009 at the latest. The directive applies to a wide range of service activities based upon the case law of the European Court of Justice relating to

the freedom of establishment and the free movement of services. In order to make it easier for businesses to set up in other Member States or to provide services across-border on a temporary basis, each Member State shall set up Points of Single Contact. These shall ensure that providers have access to all necessary information and can complete the formalities necessary for doing business in other Member States. Moreover regulatory and authorization bodies across the EU are meant to cooperate more effectively. The directive is expected to engender consumer confidence in cross-border services through access to information. Restrictive legislation and practices shall be abolished after having been screened. A rather neglected aspect in public discussion are the directive's implications on private international law. Nevertheless they should be examined for both practical and systematic reasons.

- ***A. Fuchs*** on the question of international jurisdiction for direct actions against the insurer in the courts of the Member State where the injured party is domiciled ("Internationale Zuständigkeit für Direktklagen"), (ECJ, 13.12.2007, C-463/06 (*FBTO Schadeverzekeringen N.V. v. Jack Odenbreit)*; Higher Regional Court Karlsruhe, 7.9.2007 – 14 W 31/07; Local Court Bremen, 6.2.2007 – 4 C 251/06). This is the English abstract:

The injured party may bring an action directly against the insurer in the courts of the place in a Member State where the injured party is domiciled, provided that such a direct action is permitted and the insurer is domiciled in a Member State. This follows, according to the judgment of the ECJ, from the reference in Article 11 (2) of the Brussels I Regulation to Article 9 (1) (b). The previous judgment of the first instance court in Bremen was based on the same argument. However, according to a judgment of the court of appeal in Karlsruhe, courts at the place of domicile of the injured party lack international jurisdiction under the Lugano Convention. Fuchs argues that neither the wording nor the historic interpretation support the assumption of jurisdiction of the courts in the state where the injured party is domiciled. This situation has not been altered in the course of the transfer of the Brussels Convention into a regulation. The main argument in favour of admitting direct claims before the courts of the injured party's domicile can be drawn from the systematic interpretation. However, this additional place of jurisdiction will have undesirable consequences such as forum shopping and race to the court. In case of Article 11 (3), it will lead to unforeseeable results for the policyholder or

the insured. Furthermore, it may have a negative economic impact for drivers in relatively poor Member States. The author criticizes the European legislator for not having discussed these issues openly in the context of the Brussels I Regulation.

- ***A. Staudinger*** on a decision of the German Federal Supreme Court on the scope of the head of jurisdiction of Art. 15 (2) Brussels I Regulation ("Reichweite des Verbrauchergerichtsstandes nach Art. 15 Abs. 2 EuGVVO"), (Federal Supreme Court, 12.6.2007 – XI ZR 290/06)

- ***E. Eichenhofer*** on a decision of the Higher Labour Court Frankfurt (Main) dealing with the question of international jurisdiction regarding contribution claims of German social security benefits offices against employers having their seat in another EU Member State ("Internationale Zuständigkeit für Beitragsforderungen deutscher tariflicher Sozialkassen gegen Arbeitgeber mit Sitz in anderen EU-Staaten"), (Higher Labour Court Frankfurt (Main), 12.2.2007 – 16 Sa 1366/06)

- ***J. von Hein*** on the concentration of jurisdiction regarding appeals in cross-border cases according to § 119 (1) No. 1 lit. b GVG ("Die Zuständigkeitskonzentration für die Berufung in Auslandssachen nach § 119 Abs. 1 Nr. 1 lit. b GVG – ein gescheitertes Experiment?"), (Federal Supreme Court, 19.6.2007 – VI ZB 3/07 and 27.6.2007 – XII ZB 114/06)

- ***D. Henrich*** on the question of renvoi in PIL of names occurring due to a different qualification by foreign law ("Rückverweisung aufgrund abweichender Qualifikation im internationalen Namensrecht"), (Federal Supreme Court, 20.6.2007 – XII ZB 17/04)

- ***B. König*** on the requirements of due information as well as the scope of application of the Regulation creating a European Enforcement Order for uncontested claims ("EuVTVO: Belehrungserfordernisse und Anwendungsbereich"), (Regional Court Wels, 5.6.2006 – 1 Cg 159/06m, Higher Regional Court Linz, 4.7.2007 – 1 R 124/07x)

- ***A. Laptew/S. Kopylov*** on the requirement of reciprocity with regard to the enforcement of foreign judgments between the Russian Federation and Germany (Yukos Oil Company) ("Zum Erfordernis der Gegenseitgkeit

bei der Vollstreckung ausländischer Urteile zwischen der Russischen Föderation und der Bundesrepublick Deutschland (Fall Yukos Oil Company)"), (Federal Commercial District Court Moscow, 2.3.2006 – KG-A40/698-06P)

- ***H. Krüger*** on the recognition and enforcement of foreign titels in Cameroon ("Zur Anerkennung und Vollstreckung ausländischer Titel in Kamerun")
- ***A. Jahn*** on PIL questions in the context of withdrawals of wills due to marriage in anglo-american legal systems ("Kollisionsrechtliche Fragen des Widerrufs eines Testamentes durch Heirat in anglo-amerikanischen Rechtsordnungen")
- ***C. Jessel-Holst*** on the Statute of Private International Law of the Republic of Macedonia ("Zum Gesetzbuch über internationales Privatrecht der Republik Mazedonien")

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

- Statute of Private International Law of the Republic of Macedonia of 4 July 2007 ("Gesetz über internationales Privatrecht – Gesetz der Republik Mazedonien vom 4.7.2007")
- Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock – signed in Luxembourg on 23 February 2007 ("Protokoll von Luxemburg zum Übereinkommen über internationale Sicherungsrechte an beweglicher Ausrüstung betreffend Besonderheiten des rollenden Eisenbahnmaterials – unterzeichnet in Luxemburg am 23.2.2007")

As well as the following **information**:

- ***H.-G. Bollweg/K. Kreuzer*** on the Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock ("Das Luxemburger Eisenbahnprotokoll – „Protokoll zum Übereinkommen über internationale Sicherungsrechte an beweglicher Ausrüstung betreffend Besonderheiten des rollenden Eisenbahnmaterials" vom 23. 2. 2007")

- ***E. Jayme*** on the (critical) debate in France about the Community's competence in PIL which was made public by French PIL professors by means of open letters on this issue ("Frankreich: Professorenstreit zum Europäischen IPR – einige Betrachtungen")
- ***E. Jayme*** on the convention of the Ludwig-Boltzmann-Institutes in Vienna ("Kodifikation des IPR, des grenzüberschreitenden Zivilrechts und Zivilverfahrensrechts in der Europäischen Union – Tagung der Ludwig-Boltzmann-Institute in Wien")
- ***C. Gross:*** report on the 40th UNCITRAL session ("Bericht über die 40. Sitzung der Kommission der Vereinten Nationen zum internationalen Handelsrecht (UNCITRAL)")

For recent information on PIL see also the website of the Institute for Private International Law, Cologne.

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