Submission of Abstracts for the 2009 NYU Conference

 The *Journal of Private International Law* will hold its third major conference at New York University on April 17-18, 2009. As was the practice at the prior conferences at the University of Aberdeen in 2005 and at the University of Birmingham in 2007, we are including a "**call for papers**" to be presented at the conference with a view to having the final papers submitted for consideration for publication in the Journal. Thus, in addition to a number of previously-invited speakers, **a limited number of paper-presenters will be selected on the basis of abstracts of 500 words submitted to Professor Linda Silberman at New York University (linda.silberman@nyu.edu) and Professor Paul Beaumont at the University of Aberdeen (p.beaumont@abdn.ac.uk) by October 31, 2008**. The abstracts will be considered by Professor Silberman and the editors of the Journal, Professor Paul Beaumont and Professor Jonathan Harris, and a decision made by 1 December, 2008.

There are three specific conference panels planned over the course of the afternoon of April 17th and the full day on April 18th. They are

1. International Commercial Law
2. US and European Conflicts Methodologies: Is It Time for a U.S. Restatement?
3. Transnational Litigation and Arbitration

We will be selecting papers and presenters related to these topics. Even if your paper is not selected for presentation at the Conference given the limited number of slots, we hope you will consider submitting the paper to the Journal for eventual publication. In addition, the morning of April 17th will be devoted to presentations of papers by legal scholars at an early stage in their academic or professional careers, and we particularly encourage doctoral students, students completing fellowships, and those who have relatively recently completed their doctoral studies to offer abstracts on any aspect of private international law. We contemplate smaller parallel sessions in order to offer opportunity for presentations by a large number of such scholars.

Also note that on April 16, 2009, there will be a day-long conference in tribute to the work of Professor Andreas Lowenfeld of New York University. Journal Conference participants may wish to attend that event as well.

Further details about both the Lowenfeld tribute and the Journal Conference will follow shortly.

Weintraub on Rome II: Simple and Predictable, Consequences-Based, or Neither?

Prof. Russell J Weintraub (University of Texas at Austin, School of Law) has published an interesting article on the Rome II Regulation in the latest issue of the *Texas International Law Journal* (Summer 2008): "**The Choice-of-Law Rules of the European Community Regulation on the Law Applicable to Non-Contractual Obligations: Simple and Predictable, Consequences-Based, or Neither?**" (43 Tex. Int'l L.J. 401).

The introductory paragraph reads as follows:

> *The European Community Regulation on the Law Applicable to Non-Contractual Obligations ("Rome II") will take effect on January 11, 2009. This regulation is part of a widespread effort to draft new choice-of-law rules. For example, in 2007 a new conflict-of-laws code took effect in Japan. China is drafting a comprehensive civil code, which includes choice-of-law rules. What should be the objectives of these drafting projects? Should the new rules, as law-and-economics scholars urge, be simple and afford clearly predictable results? Or should choice-of-law rules endeavor to select the jurisdiction that experiences the consequences when the chosen law is applied? A third possibility is to draft rules that provide substantial predictability and are likely to be consistent with a consequences-based approach. Rome II falls into this third category: reasonably predictable results that are likely to give effect to the policies of the*

jurisdiction that will experience the consequences when the chosen law is applied.

There is now an extensive law-and-economics literature devoted to choice of law. Sections II and III summarize this economics approach to drafting conflicts rules and evaluate Rome II under this perspective. Sections IV and V outline a consequences-based approach to choice-of-law and appraise the extent to which Rome II is consistent with this methodology.

And here's the conclusion:

Rome II provides reasonably foreseeable answers to choice-of-law issues. The various exceptions to the regulation's rules create the major predictability problems: (1) the cryptic "more closely connected" exception that appears in the general rule of article 4 and in several other articles, (2) the "public policy" exception of article 26, and (3) the "mandatory provisions" exception of article 16. The uncertainty caused by these exceptions can be alleviated by (1) replacing the "more closely connected" language with a reference to the country that will experience the consequences if its law is not applied; (2) providing that if a court refuses on "public policy" grounds to apply the law that Rome II selects, the court is not to seize this excuse to apply its own law, but is to dismiss without affecting the plaintiff's ability to sue elsewhere; and (3) giving some guidance as to what can qualify as internationally "mandatory" forum law.

The common residence exception to application of the law of the place of damage is partially, but insufficiently, consequences oriented. Rome II gets high marks for including time limitations and burden of proof within the scope of its rules. If it is to achieve its main purpose of making the result independent of the forum, Rome II should clearly indicate that quantification of damages is also within its scope.

The article can be downloaded from the Journal's website.

Another interesting article on Rome II has been written by *Prof. Weintraub* at an earlier stage of the regulation's legislative procedure, and was presented at a seminar hosted in March 2005 by the European Parliament's Rapporteur *Diana*

Wallis: "**Discretion Versus Strict Rules in the Field of Cross-Border Torts**". It is available for download, along with papers by other prominent scholars who took part in the seminar, on Diana Wallis' website (Rome II seminars' page).

A slightly revised version, under the title "Rome II and the Tension between Predictability and Flexibility", has been also published in *Rivista di diritto internazionale privato e processuale* (2005, no. 3, p. 561 ff.).

Hamburg Lectures on Maritime Affairs

From 25 August to 20 October 2008 this year's Hamburg Lectures on Maritime Affairs, organised by the International Max Planck Research School for Maritime Affairs and the International Tribunal of the Law of the Sea (ITLOS), will take place in Hamburg.

The lectures feature renowned scholars and practitioners and address current developments in the maritime field.

Registration in advance is required.

The programme and further information is available here.

Rome I Regulation Conference – Now CPD Accredited

Our conference on the **Rome I Regulation: New Choice of Law Rules in Contract**, to take place at Herbert Smith's offices in London on 19th September

2008, is now **accredited with CPD** by both the Solicitors Regulation Authority (5.5 hours) and the Bar Standards Board (5 hours).

The full programme, as well as the details on fees and booking, can be found on our **dedicated conference page**. The speakers are all internationally recognised experts in the fields of private international law, insurance e-commerce and IP, and financial services. The keynote speech is to be delivered by The Honourable Mr Justice Richard Plender, Royal Courts of Justice.

If you intend to attend, then I strongly suggest you book now, as places *are* limited. Hope to see you there.

Drawing a Line in the Sand: Personal Jurisdiction for Acts of Terrorism

The Second Circuit today issued a noteworthy decision on whether and when foreign individuals are subject to personal jurisdiction in U.S. Courts for acts of international terrorism. See In re Terrorist Attacks on September 11, 2001, No. 06-cv-0319 (2d Cir., August 14, 2008). In a case that sought to hold Saudi Arabia and four of its princes liable for the Sept. 11 attacks—because they allegedly provided financial and logistical support to al Quaeda—the court held that the defendants are protected by sovereign immunity from suit in their official capacities, and that there is no personal jurisdiction to sue them in their personal capacities.

On the jurisdictional question (part VI of the decision), the court contrasted this case with "five opinions from other circuits" which held foreign persons amenable to suit for acts of terrorism. Those cases all involved defendants who had consciously and purposely "directed terror" at the United States and/or its citizens (*e.g.* Osama bin Laden, an individual al Quaeda member who fought U.S. forces in Afghanistan, the Republic of Libya with regard to Pan Am Flight 103,

and the Republic of Iraq with regard to the invasion of Kuwait). In this case, however:

> *Th[e] burden [of establishing the necessary jurisdictional nexus] is not satisfied by the allegation that the Four Princes intended to fund al Qaeda through their donations to Muslim charities. Even assuming that the Four Princes were aware of Osama bin Laden's public announcements of jihad against the United States and al Qaeda's attacks on the African embassies and U.S.S. Cole, their contacts with the United States would remain far too attenuated to establish personal jurisdiction in American courts. It may be the case that acts of violence committed against residents of the United States were a foreseeable consequence of the princes' alleged indirect funding of al Qaeda, but foreseeability is not the standard for recognizing personal jurisdiction. Rather, the plaintiffs must establish that the Four Princes "expressly aimed" intentional tortious acts at residents of the United States. Providing indirect funding to an organization that was openly hostile to the United States does not constitute this type of intentional conduct. In the absence of such a showing, American courts lacked personal jurisdiction over the Four Princes.*

"How Appealing" initially reported on the decision, as did the Associated Press.

Article on Rome I Regulation

Stefan Leible and *Matthias Lehmann* (both University of Bayreuth, Germany) have published an article on the Rome I Regulation: "Die Verordnung über das auf vertragliche Schuldverhältnisse anzuwendende Recht ("Rom I"). The article has appeared in the August issue of the German legal journal *Recht der Internationalen Wirtschaft* (RIW), 2008, pp. 528-544.

The authors have kindly provided the following English abstract:

> *The article provides an in-depth-analysis of the Regulation. It covers each of its provisions, starting from the scope of application to the relationship with other*

Community instruments. Major problems are highlighted, such as the application of consumer law (Art. 6), overriding mandatory provisions (Art. 9) or the law governing assignment and subrogation (Art. 14). A number of practical examples is used to illustrate the workings of the Regulation's rules. The authors do not spare their criticism. For instance, they portray the treatment of insurance contracts (Art. 7) as overly complex and unsatisfactory. The Regulation's provision allowing the application of certain foreign mandatory provisions (Art. 9 para 3) is criticized for not achieving the intended results.

See with regard to Rome I also our previous posts which can be found here.

Reminder: Essay Competition in Private International Law 1st September Deadline

A short note to remind all that the deadline for the **Conflict of Laws .net Essay Competition in Private International Law**, sponsored by Clifford Chance LLP and Hart Publishing, is **1st September 2008** at 6pm.

There are substantial prizes for the top three entries, and the best essays will be submitted for consideration to the Journal of Private International Law. The Competition is open to any student of a higher education institution anywhere in the world, writing in English on any aspect of private international law.

See the competition page for the rules and submission details.

Jurisdiction over Foreign Defendants and Jurisdiction over Foreign Land: One Question or Two?

The Court of Appeal for Ontario has released its decision in *Precious Metal Capital Corp. v. Smith* (available here). In many ways the decision is unexceptional: it agrees with a quite sensible decision by the judge at first instance. But there may be a more interesting, and contentious, aspect to the decision in the way the court has expressed its reasons.

The defendants had raised four separate objections to the litigation proceeding in Ontario: (1) the claims advanced against foreign defendants did not fit within the procedural rules allowing for service outside the province, (2) the court lacked jurisdiction because there was not a real and substantial connection between the dispute and Ontario, (3) the court lacked jurisdiction because the claim concerned foreign land (the *Mocambique* rule), and (4) if the court had jurisdiction, it should order a stay based on *forum non conveniens*. Getting to the right result on each of these objections was not difficult – they all failed both before the motions judge and the Court of Appeal.

The point of interest was in the analysis adopted by the Court of Appeal. The motions judge had separately considered objections (2) and (3). In contrast, the Court of Appeal held that issues related to the remedy being sought (in respect of foreign land) should, in cases involving foreign defendants, not be analyzed separately. Rather, they should be subsumed as part of the court's analysis of whether there was a real and substantial connection to Ontario (see paras. 15-18 among others).

This works no evils in this particular case, but I question the benefit of running issues (2) and (3) together. The latter has tended to be a separate question for two reasons: it focuses on subject-matter jurisdiction rather than jurisdiction over the defendant, and as an issue it can arise whether the case is one of service in or service out. To me it seems a cleaner analysis to continue to treat these as

distinct questions rather than running them together.

Does running them together, for example, make it possible for the court to conclude it has jurisdiction even in a case squarely involving title to foreign land and not falling within the historic *Penn v. Baltimore* exception, based on other elements of the *Muscutt* test for a real and substantial connection? Is this then a signal that the *Mocambique* rule itself is under threat?

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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subscribing to the *Journal of Private International Law*. The subscription rates for the Journal are already very good for both institutions and individuals, and our discount makes them even better. **Download the order form** (PDF) to receive your discount.

Symeonides: Choice of Law for Products Liability

Symeon C. Symeonides, Dean of the College of Law at Willamette University, has just last week posted Choice of Law for Products Liability: The 1990s and Beyond (forthcoming on the Tulane Law Review, Vol. 78, No. 1247, 2004) on SSRN. Here is the abstract:

> *This Article provides a comprehensive review of product-liability conflicts cases decided by American courts between 1989 and 2004 and involving significant choice-of-law questions.*
>
> *Among the Article's findings are that choice-of-law methodology plays a less significant role in the courts' choice of the governing law than do other factors, such as the number and pertinence of factual contacts with a given state. For example, regardless of methodology, in 79% of the cases in which the product's acquisition and the victim's domicile and injury were in the same state, the courts applied that state's law, regardless of whether it favored the plaintiff or the defendant and regardless of whether that state was also the forum. Among the Article's unexpected findings are that, contrary to prevailing perceptions, forum-shopping is not as common or rewarding as critics assume, and that courts do not unduly favor plaintiffs as a class nor the law or the domiciliaries of the forum state.*
>
> *The Article concludes that an all-inclusive review of the cases reveals that, on the whole, the record of American courts in resolving these most intractable of conflicts is much better than one might assume from a selective reading of a few cases. However, because this record entails a heavy cost in time and*

resources for courts and litigants, the Article proposes a new choice-of-law rule that would produce mostly the same results as the decided cases, but much more quickly and at a lower cost.

The proposed rule differentiates between liability and damages and, within certain narrow parameters, allows plaintiffs and secondarily defendants to choose the state whose law will determine liability. Surprisingly, this rule will not favor plaintiffs more than the decided cases, but it should increase the incentive for early negotiations with regard to damages and encourage settlements without resort to litigation.

The complete list of Prof. Symeonides' works (where are often announced on this site) can be found on the SSRN author page.