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

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

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

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

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

French Muslims Getting Divorced Back Home

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

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

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

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

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

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

an Algerian divorce decision where the wife had participated to the foreign proceedings and had been awarded a (tiny) allowance.

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

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

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

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

> *As a popular choice of law doctrine, party autonomy allows the parties in international contracts (or foreign contracts) to choose governing law of particular jurisdiction they prefer. Premised on freedom of contract, this*

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

Download the article.

Publication: Forum Shopping in the European Judicial Area

A new addition to the Hart Publishing private international law catalogue for 2008 is ***Forum Shopping in the European Judicial Area***, a collection of essays by English and French scholars, edited by Pascal de Vareilles-Sommières (*Université Paris 1 Panthéon Sorbonne*). Here's the blurb:

One of the issues left untouched by the Brussels Convention of 27 September 1968 (and by the Brussels-1 Regulation replacing it) concerns the leeway left to domestic courts when applying European rules on international jurisdiction in civil and commercial matters. For instance, is the court under a duty of strict compliance with the jurisdiction rule as it is drafted? Would such a duty go so far as to require the court to abide by the jurisdiction rule, even though it is

being used by one of the litigants to achieve an unfair result, for example to delay adjudication on the merits? Under what conditions may the Court decline jurisdiction on account of any unsuitable forum shopping, thus ruling out the European provision on jurisdiction?

Recent litigation in the ECJ has yielded rather, even excessively, restrictive answers, ruling out any discretion by domestic courts to remedy any inconvenience arising from the strict application of the European provisions, if such discretion were provided for by the lex fori (the Gasser case, the Turner case, and the Owusu case). This series of rulings from the ECJ raises several questions. Most observers have questioned the appropriateness of prescribing a blind application of European rules on jurisdiction by domestic courts, relying on the legal traditions of EC Member States usually providing for corrective mechanisms – such as 'forum non conveniens' in English Law and 'exception de fraude' in French Law – in cases when a party abusively triggers the jurisdiction of a court in order to obtain an unjust advantage, thus practising unacceptable forum shopping.

The time has now come for an analysis, under both Community and comparative law, of the ramifications of the recent Gasser/Turner/Owusu cases. Readers will find in this book a collection of studies by some of the leading English and French experts today, analysing the ins and outs of jurisdiction and forum shopping in Europe.

The Table of Contents:

Part I: The Gasser Case: the Fate of Jurisdiction Clauses in Case of Lis Pendens

Part II: The Turner Case: The Prohibition on Anti-suit Injunctions

- 3 Le Principe de Confiance Mutuelle et Les Injonctions Anti-Suit 77 – Marie-Laure Niboyet
- 4 The Prohibition on Anti-Suit Injunctions and the Relationship Between European Rules on Jurisdiction and Domestic Rules on Procedure 91 – Alexander Layton

Part III: The Owusu Case: The Rejection of the 'Forum Non Conveniens'

- 5 The Mandatory Nature of Article 2 of the Brussels Convention and Derogation from the Rule It Lays Down 101 – Pascal de Vareilles-Sommières
- 6 Legal Certainty and the Brussels Convention — Too Much of a Good Thing? 115 – Andrew Dickinson
- 7 Forum non conveniens et Application Uniforme des Règles de Compétence 137 – Pierre Mayer
- Conclusion 145 – Horatia Muir Watt

Price: **£50.00**. ISBN: 1-84113-783-9 / 9781841137834. **Purchase the book from Hart Publishing**.

University of Milan: Prof. Pocar's Lecture on the Conversion of the Rome Convention into an EC

Regulation

On Tuesday 12 February 2008, at 16.30, the Faculty of Political and Social Sciences of the **University of Milan** will host a lecture (in Italian) by *Prof. Fausto Pocar* (University of Milan, President of the ICTY) on **"The Conversion of the Rome Convention on the Law Applicable to Contractual Obligations into a Community Regulation"** (La trasformazione della Convenzione di Roma del 19 giugno 1980 sulla legge applicabile alle obbligazioni contrattuali in regolamento comunitario).

The lecture is the inaugural event of the Jean Monnet European Module "Internal Market and EC Private International Law".

(Many thanks to Matteo Barra, Bocconi University, for the tip-off)

Rome III: EP LIBE Committee's Draft Report on the Commission's Proposal

On 9 January 2008 *Evelyne Gebhardt*, Rapporteur in the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), has released her **Draft report on the Commission's Proposal for a Council regulation amending regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters** (COM(2006)399 of 17 July 2006).

Pursuant to Rule 47 of the European Parliament's Rules of Procedure (16th edition – November 2007), the Rome III regulation is subject to the procedure with associated committees, since its subject matter 'falls almost equally within the competence of two committees' (as determined in Annex VI to the Rules of Procedure), and it is under the primary responsibility of the LIBE Committee,

while the Committee on Legal Affairs (JURI) has been asked for an opinion. *Carlo Casini*, draftsman for the JURI Committee, presented a Draft opinion on 4 December 2007, that was discussed in the meeting of 19 December 2007.

The 'Rome III' file currently being examined by the LIBE Committee is thus formed by the following documents, besides the initial Commission's Proposal and Annexes – SEC(2006)949 and SEC(2006)950 – of 17 July 2006:

- a **Draft report** prepared by Rapporteur Gebhardt, containing 27 amendments to the text proposed by the Commission;
- an interesting **Working document on the law applicable in matrimonial matters**, prepared by the Rapporteur;
- a **Draft opinion delivered by the JURI Committee** (draftsman: Carlo Casini).

Once the Report is adopted in the LIBE Committee, the exam of the Rome III regulation is scheduled in the plenary session of the European Parliament on 22 April 2008 (see the OEIL page on the status of the procedure).

It must be stressed that, pursuant to Art. 67(5) of the EC Treaty, the **Rome III regulation is subject to the consultation procedure**, so the Council is not bound by Parliament's position. The latest Council's document publicly available on the matter is a text drafted in June by the German and Portuguese Presidency on the basis of the meetings of the Committee on Civil Law Matters and of the comments of Member States' delegations (doc. n. 11295 of 28 June 2007). The latest 'Summary of discussions' (doc. n. 5753/08, currently not accessible) was prepared by the Committee on Civil Law Matters on 28 January 2008.

A political agreement is expected to be reached in the Council by the end of the Slovenian Presidency (June 2008). For further information on the Rome III regulation, see the dedicated section of our site.

Austrian Reference for a Preliminary Ruling on the Brussels I Regulation

The Austrian Supreme Court of Justice (*Oberster Gerichtshof*) has referred the following questions to the ECJ for a preliminary ruling:

> *1. Is a contract under which the owner of an incorporeal right grants the other contracting party the right to use that right (a licence agreement) a contract regarding 'the provision of services' within the meaning of Article 5(1)(b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Brussels I Regulation)?*
>
> *2. If Question 1 is answered in the affirmative:*
>
> *2.1. Is the service provided at each place in a Member State where use of the right is allowed under the contract and also actually occurs?*
>
> *2.2. Or is the service provided where the licensor is domiciled or, as the case may be, at the place of the licensor's central administration?*
>
> *2.3. If Question 2.1 or Question 2.2 is answered in the affirmative, does the court which thereby has jurisdiction also have the power to rule on royalties which result from use of the right in another Member State or in a third country?*
>
> *3. If Question 1 or Questions 2.1 and 2.2 are answered in the negative: Is jurisdiction as regards payment of royalties under Article 5(1)(a) and (c) of the Brussels I Regulation still to be determined in accordance with the principles which result from the case-law of the Court of Justice on Article 5(1) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (the Brussels Convention)?*

The reference can be found at the website of the ECJ – *Falco Privatstiftung and Thomas Rabitsch v Gisela Weller-Lindhorst* (Case C-533/07).

Urgent Procedure Adopted for Preliminary Rulings in the Area of Freedom, Security & Justice

The excellent EU Law Blog has noted the adoption of an urgent procedure for preliminary rulings in the area of freedom, security and justice. Their post, in part, states,

> *Some time ago we posted a note about future amendments to the Rules of Procedure of the Court of Justice to provide for an urgent procedure for preliminary rulings in the areas of freedom, security and justice.*
>
> *Those amendments have now been adopted and published.*
>
> *The Protocol on the Statute of the Court of Justice is now amended by Council Decision 2008/79, published today, which allows for the possibility of an urgent procedure in the areas covered by Title VI of the EU Treaty and Title IV of the EC Treaty.*
>
> *The Rules of Procedure of the Court of Justice are amended accordingly by inserting a new Article 104b that sets out the new urgent procedure. The referring national court may request that the urgent procedure be applied or the Court of Justice may decide to apply it of its own motion in exceptional cases.*

Hop over to the EU Law Blog to **read the full post**. The statement by the Court of Justice on how the new procedure will be implemented can be found here. Readers may also be interested in our recent **Guest Editorial by Andrew Dickinson**, which highlights (amongst other things) some of the ECJ's current procedural deficiencies.

PIL at law teachers' conference in Pretoria

PIL abstracts of law teachers' conferenceA special session on Private International Law was held at the conference of the Society for Law Teachers of Southern Africa, held in Pretoria from 21 to 24 January 2008.

The following papers were delivered:
• Classification and liberative prescription in private international law by Jan Neels
• The role of Private International Law in International Trade by Eesa A Fredericks
• Could a South African court be expected to apply the CISG by virtue of article 1(1)(b)? by Marlene Wethmar-Lemmer
• The Strict Approach to Party Autonomy and Choice of Law in E-contracts in South Africa: Does the Approach Render South Africa an Unacceptable Jurisdiction? by Omphemetse Sibanda
• Regional organisations and the jurisdiction of their dispute settlement bodies by Thalia Kruger

(Follow the link at the top for the abstracts and contact details of the authors.)

Max-Planck Event: Brussels Jurisdiction and Common-Law

Jurisdiction

Max Planck Institute for Comparative and International Private Law organizes on 4 February 2008 (17:00) a guest lecture to be given by Professor Adrian Briggs (University of Oxford, UK).

Professor Briggs' lecture is titled "**Brussels Jurisdiction and Common Law Jurisdiction: understanding and misunderstanding what courts may be asked to do**".