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**.

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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.

Flashairlines and Declaratory Relief Under French Law

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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

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.

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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.*
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> *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.