Volume 4, Issue 1, Journal of Private International Law

The April 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):

Articles

M. Keyes, "**Statutes, Choice of Law, and the Role of Forum Choice**"

Z. Tang, "**The Interrelationship of European Jurisdiction and Choice of Law in Contract**"

C. Kotuby, "**Private International Law before the United States Supreme Court: Recent Terms in Review**"

M. Pauknerova, "**Private International Law in the Czech Republic: Tradition, New Experience and Prohibition of Discrimination of Grounds of Nationality**"

N. Dariescu & C. Dariescu, "**The Difficulties of Solving Litigation Concerning the Patrimonial Effects of a Marriage Between an Italian Citizen and a Romanian Citizen**"

Review Articles

R. Michaels, "***Public and Private International Law: German Views on Global Issues – S Leible and M Ruffert (eds) Völkerrecht und IPR***"

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Conference: International Law Association Conference 2008

The 73rd. Conference of the International Law Association, hosted by its Brazilian Branch, will take place in the city of Rio de Janeiro, at the InterContinental Hotel, August 17-21 2008. The central theme of the Conference will be "Law for the Future," focusing on Natural Resources and Sustainable Development, Rights of the Human Person, Resolution of Private International Disputes, Business and Trade Law, and International Security. Regarding International Private Dispute Resolution, two issues will be addressed:

International Commercial Arbitration

- International Arbitration: Autonomy v. Territorialism
- Public Policy and Mandatory Rules: Influence on the Applicable Law
- The Influence of Cultural Factors on the Choice of the Arbitrator
- Distortions in Contemporary Arbitration: The Problems of Becoming Popular

International Civil Litigation

- Towards World Cooperation Standards: Prospects for the Hague Convention
- The Realities of Regional Judicial Cooperation: Existing Experiences

Registration for the 73rd ILA Biennial Conference is open here.

Article: Jurisdiction for Insolvency-Related Proceedings

Anatol Dutta (Hamburg) has written an article on the German reference for a preliminary ruling in *Seagon v. Deko Marty Belgium NV* (Case C-339/07): **Jurisdiction for insolvency-related proceedings caught between European legislation**, Lloyd's Maritime and Commercial Law Quarterly (LMCLQ) 2008, p. 88-96.

Here is the abstract:

> *The stock of European legislation in the area of private international law is growing steadily. The pointillist technique employed by the European legislator, however, necessarily entails friction between the different legislative acts. One illustrative example, which shall be examined in this article, concerns jurisdiction for insolvency-related proceedings. Such individual proceedings which derive directly from the bankruptcy and are closely connected to collective insolvency proceedings could be governed by different European regulations or even by national law.*

See with regard to this reference also our previous post which can be found here.

Research School on Successful Dispute Settlement in International Law

The University of Heidelberg Law School awards in cooperation with the Max-Planck-Institute for Comparative Public Law and International Law **Doctoral Research Positions** (starting June 2008, duration: up to 3 years) for studies leading to a Doctorate in Law (Dr. jur.) with the following research objective:

How can the success of international dispute resolution be explained? How must successful dispute resolution be organized? The topic includes private and public international law (arbitration, mediation) as well as international criminal law.

For more information on the research program, the coordinators, the stipends as well as requirements and the application procedure see the website of the Institute for Private International Law, University of Heidelberg which can be found (in English) here.

Book: The External Dimension of EC Private International Law in Family and Succession Matters

The papers presented at the international conference held in March 2007 at the University Carlo Cattaneo of Castellanza (see our previous post), and a final report drafted on the basis of the discussion that arose in the colloquium, have been published by CEDAM, under the editorship of *Alberto Malatesta*, *Stefania Bariatti* and *Fausto Pocar*: "**The External Dimension of EC Private International Law in Family and Succession Matters**".

Here's an excerpt from the *Foreword* of the volume:

> *Under the 2005 Framework Programme for Judicial Cooperation in Civil Matters, the European Commission funded an International Research Project presented by the University Carlo Cattaneo of Castellanza on the EC harmonisation of Private International Law and the external relations in family and succession law.*
>
> *A group of scholars coming from various European countries agreed to undertake the task of carrying out an in-depth analysis of the scope of the Community powers in the field of Private International Law in the above*

matters, with special reference to relationships connected with third States.

The focus on family and succession law was deemed crucial in the light of the many initiatives of the European Community in this field pursuant to Articles 61(c) and 65 of the EC Treaty, and of the hot debate they raised about the need itself of such measures and their content. On the other hand, in the course of the Research Project, the European Court of Justice rendered the long-awaited Lugano Opinion (Opinion No 1/03), that provided some general guidelines about the future external dimension of the Community action in the conflicts of laws and its role in the international community.

And this is the table of contents (available as a .pdf file on the publisher's website):

Introductory Speech – *Fausto Pocar*: The "Communitarization" of Private International Law and its Impact on the External Relations of the European Union;

First Part – EC EXTERNAL RELATIONS AND PRIVATE INTERNATIONAL LAW

- *Alberto Malatesta*: The Lugano Opinion and its Consequences in Family and Succession Matters;
- *Andrea Santini*: The Doctrine of Implied External Powers and Private International Law Concerning Family and Succession Matters;
- *David McClean*: Bilateral Agreements with non-Member States after the Lugano Opinion;
- *Stefania Bariatti*: Bilateral Agreements with non-Member States after the Lugano Opinion: Some Procedural Issues.

General Discussion

- *Laura Tomasi*: The Application of EC Law to non-Purely intra-Community Situations.

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Second Part – GENERAL PROBLEMS OF EC PRIVATE INTERNATIONAL LAW WITH REGARD TO RELATIONS WITH THIRD STATES

Section 1: Jurisdiction, Recognition and Enforcement of Judgments and Administrative Cooperation

- *Alegría Borrás*: Lights and Shadows of Communitarisation of Private International Law: Jurisdiction and Enforcement in Family Matters with regard to Relations with Third States;
- *Etienne Pataut*: International Jurisdiction and Third States: A View from the EC in Family Matters;
- *Andrea Bonomi*: The Opportunity and the Modalities of the Introduction of Erga Omnes EC Rules on Jurisdiction;
- *Marta Pertegás*: Recognition and Enforcement of Judgments in Family and Succession Matters;
- *Roberto Baratta*: Short Remarks on EC Competence in Matters of Family Law;
- *William Duncan*: Administrative Cooperation with regard to the International Protection of Children.

General Discussion

- *Carola Ricci*: Habitual Residence as a Ground of Jurisdiction in Matrimonial Disputes: From Brussels II-bis to Rome III;
- *Gaetano Vitellino*: European Private International Law and Parallel Proceedings in Third States in Family Matters.

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Section 2: Applicable Law

- *Kurt Siehr*: Connecting Factors, Party Autonomy and Renvoi;
- *Peter McEleavy*: Applicable Law and Relations with Third States: The Use and Application of Habitual Residence;
- *Th. M. de Boer*: Unwelcome Foreign Law: Public Policy and Other Means to Protect the Fundamental Values and Public Interests of the European Community;
- *Johan Meeusen*: Public Policy in European Private International Law: In Response to the Contribution of Professor Th. M. de Boer on "Unwelcome Foreign Law";
- *Carmen Parra Rodríguez*: Characterisation and Interpretation in European Family Law Matters;

- *Luigi Fumagalli*: Characterization in European Private International Law: Short Notes on the Interpretation Process from Independence to Functionality and Return (to the Tradition).

General Discussion

- *Cristina Mariottini*: The Internal and External Dimensions in the Harmonization of European Conflict Rules on the Administration of Estates.

Final Report*: Alberto Malatesta*.

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Title: **The External Dimension of EC Private International Law in Family and Succession Matters**, edited by *Alberto Malatesta*, *Stefania Bariatti* and *Fausto Pocar*, CEDAM (Studi e pubblicazioni della Rivista di diritto internazionale privato e processuale, n. 71), Padova, 2008, XIV-392 pages.

ISBN: 978-88-13-27276-0. Price: EUR 36.

(Many thanks to Gaetano Vitellino, University "Carlo Cattaneo" of Castellanza, for the tip-off)

BIICL event: Cross-border insolvency of financial groups

As part of the BIICL's 2007-2008 Seminar Series on Private International Law the BIICL organizes on Thursday 17 April 2008 17:30 to 19:30 (at British Institute of International and Comparative Law, Charles Clore House, 17 Russell Square, London, WC1B 5JP) a seminar titled "Financial Groups: A Fragmented EU Insolvency Regime". The seminar will deal with cross-border insolvency of financial groups; In the event of the insolvency of a financial group, within the EU, banks, insurance companies and other financial institutions are subject to

different insolvency regimes. The purpose of the seminar is to analyse and explain how the different insolvency regimes might operate in the event of a default triggering the insolvency of a group of financial companies. Jurisdiction to open main insolvency proceedings may be allocated to the state in which the centre of main interests of the legal entity is located (under the EU Insolvency Regulation) or where the registered office and/or head office is based (e.g. under the EU Directive on Winding up of Credit Institutions). When cross-border insolvency extends beyond the EU, the UNCITRAL Model Law on Cross-Border Insolvency may come into play. The result is a complicated patchwork of regulation, which does not fit easily with the way in which multinational financial groups conduct cross-border business.

Gabriel Moss QC and John Breslin, an Irish barrister, will tackle a case study involving the collapse of a financial group (see below), following a brief description of the legislative framework by Jane Welch, and an outline of the history of the EU Insolvency Regulation and in particular the development and interpretation of the concept of "centre of main interests" by Professor Ian Fletcher. The seminar is chaired by Mr. Justice David Richards. The case study that will be analysed and discussed involves a group containing a UK bank and its Irish fund-raising subsidiary, a management company incorporated in Gibraltar and a UK insurance company. The sub-prime crisis leads to the insolvency of the Irish subsidiary and the other group companies. For more information about the seminar, its Chair, speakers and sponsor, have a look at the website.

Rome I: Statements by the Council and the Commission on Insurance Contracts and by the French

Delegation on Consumer Contracts

Following our post on the release of the final text of the Rome I Regulation, an internal document by the *General Secretariat of the Council* to the *Permanent Representatives Committee* (COREPER) confirms that the new Regulation will be soon adopted by the Council (doc. n. 7689/08 of 7 April 2008):

> *5. The Permanent Representatives Committee is therefore asked to confirm agreement and* ***advise the Council to:***
>
> - ***adopt the Regulation, as set out in PE-CONS 3691/07 JUSTCIV 334 CODEC 1401, as an "A" item at a forthcoming meeting****;*
> - *decide to enter in the minutes of that meeting the statements set out in the addendum to this note.*
>
> *After being signed by the President of the European Parliament, the President of the Council and the Secretaries-General of the two institutions, the legislative act will be published in the Official Journal of the European Union.*

Quite surprisingly, as regards the participation of the United Kingdom in the adoption of the Regulation, a footnote of the document states:

> *In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, the United Kingdom and Ireland have given notice of their wish to take part in the adoption and application of this Regulation.*

This is probably a mistake, since the United Kingdom has not so far officially opted in (see Recital n. 45 of the Regulation), and a consultation paper on the matter was launched last week by the Ministry of Justice (see our post here).

[**UPDATE on the position of the United Kingdom**: a revised version of the document has been released – doc. n. 7689/1/08 REV 1 of 9 April 2008 -, where it is clearly stated that, at present, "[i]n accordance with Articles 1 and 2 of the Protocol […] and without prejudice to Article 4 of the said Protocol, the United Kingdom is not taking part in the adoption of this Regulation and is not bound by

it or subject to its application“]

Two statements are set out in the Addendum (doc. n. 7689/08 ADD 1 of 7 April 2008): one by the Council and the Commission, relating to the new conflict rule **on insurance contracts** (Art. 7 of the new Regulation), and one by the French delegation, **on the consistency between the rule on applicable law in consumer contracts** (Art. 6) **and future revisions of Brussels I Regulation** as regards the provisions relating to jurisdiction in the same matter (Section 4, Articles 15-17 of Brussels I Reg.). Here’s the text:

> ***DECLARATION BY THE COUNCIL AND THE COMMISSION RELATING TO THE LAW APPLICABLE TO INSURANCE CONTRACTS***
>
> *The Council and the Commission note that the rules contained in Article 7 essentially reflect the legal situation as regards applicable law as presently included in the insurance Directives. Any future substantive revision of the present regime should take place in the context of the review clause of this Regulation.*
>
> ***DECLARATION BY THE FRENCH DELEGATION RELATING TO ARTICLE 6 OF ROME I ON THE LAW APPLICABLE TO CONSUMERS***
>
> *In view of the importance of conflict-of-law rules in international private law, and in order to achieve the objective, laid down in Article 153 of the EC Treaty, of ensuring a high level of consumer protection within the Community, France wishes to state that, in the revision of Regulation 44/2001 EC on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, the provisions relating to jurisdiction (section 4 of Brussels I) must be consistent with Article 6 of the Regulation applicable to contractual obligations (Rome I), concerning the law applicable to consumer contracts.*

Summer Seminar in Urbino

Readers of the blog may be interested in this summer seminar where many courses on conflicts are taught.

The seminar has been hosted by the university of Urbino, Italy, for 50 years. Courses of Private International Law, Comparative Law and European Law are taught either in French or in Italian (with a translation in the other language). Professors are not only Italian (L. Mari, T. Ballarino) and French (H. Muir Watt, B. Audit) but also German (E. Jayme) or Portuguese (M. Rui Moura Ramos, D. Pina).

The program of the 2008 Seminar can be found here.

I personally participated to the seminar years ago and had a great time, so I can only recommend it!

Dutch Supreme Court Refers Questions on Article 5(3) Brussels I Regulation

Hoge Raad, 4 April 2008, *Zuid-Chemie/Philippo's Mineralenfabriek* Nr. C06/310HR (link is to decision in Dutch).

On Friday 4 April, the Dutch Supreme Court (Hoge Raad) made a preliminary reference to the ECJ, with regard to the interpretation of article 5(3) of Regulation 44/2001 (jurisdiction in matters relating to tort). What follows is a short description of the facts as they emerge from the Supreme Court's decision and a provisional translation of the referred questions.

In July 2000, Zuid-Chemie, a producer of fertilizers in Sas van Gent (NL), bought two cargoes of 'micromix' from HCI Chemicals Benelux in Rotterdam (NL). HCI, who were unable to produce this micromix on their own, ordered the product

from Philippo's, in Essen (Belgium), and delivered all necessary ingredients bar one at Philippo's factory. In consultation with HCI, Philippo's bought the missing ingredient (zinc sulphate) from a company called Poortershaven, established in Rotterdam (NL). Philippo's produced the micromix at her factory in Essen, where Zuid-Chemie took delivery. Zuid-Chemie, subsequently, used the micromix in multiple cargoes of fertilizer-products, some of which were sold to (foreign) buyers. It has become clear since then that the zinc sulphate obtained from Poortershaven was contaminated with cadmium, as a result of which the produced fertiziler is unusable. Zuid-Chemie has claimed damages in tort from Philippo's in the District Court (Rechtbank) in Middelburg (NL) . Philippo's alleged delict ("onrechtmatige daad") consists of having produced a product that has caused damage in the course of its normal use.

Philippo's argues that the Dutch court does not have jurisdiction, because in its view *the place of delivery of the contaminated micromix* – in Essen (Belgium) – should be regarded as 'the place where the harmful event occurred' (art. 5(3) Brussels I Regulation). Zuid-Chemie argues that the place where the harmful event occurred is *the place where different components (including the contaminated micromix) were mixed into the final product*, which was at its factory in Sas van Gent (NL).

At first instance, the District Court noted that 'the place where the harmful event occurred' could be both the '*Handlungsort*' and the '*Erfolgsort*' (both terms used in the Dutch text, as is common in Dutch decisions), and concluded that Essen was the place where Zuid-Chemie suffered initial damage ("initiële schade") because that was the place where the contaminated micromix was delivered *ex works*. The Court of Appeal in The Hague (Gerechtshof 's-Gravenhage) has upheld this decision, noting that the place of production of the contaminated micromix (Essen) should be regarded as the '*Handlungsort*'.

In his Opinion in the Case (of 1 February 2008), Advocate General Strikwerda, observed that the ECJ had not yet pronounced itself on the question of whether "the distinction between '*Handlungsort*' and '*Erfolgsort*' is limited to situations involving a tortious act which leads to physical damage to persons or property" and whether, "in the case of tortious acts which cause non-physical damage and purely economic loss no such distinction should be made, even where this damage is the direct (initial) consequence of the damage-causing act ("schadebrengende feit")" (par. 14).

Following the suggestion of the Advocate General, the Supreme Court, in its decision of 4 April 2008, referred to the ECJ the following questions:

1. In the case of a tortious act as alleged by Zuid-Chemie, what damage should be regarded as the initial damage resulting from this act: the damage resulting from the delivery of the defective product, or the damage resulting in the course of the normal use for which this product was intended?
2. In case the latter option is correct: may the place where this damage occurs be regarded as 'the place where the harmful event occurs' only where the damage consists of physical damage to persons or property, or is this allowed also when (for the time being) merely economic loss has been suffered?

The Croatian Administrative Court Ruling: Foreigners Eligible for Compensation for, or Return of, the Property in Croatia Taken During the Communist Era

On 14 February 2008, the Administrative Court of the Republic of Croatia rendered the first decision that will enable the return of the nationalised property to a foreigner. The right to return of or the right to be compensated for the apartment building, located in the centre of the Croatian capital Zagreb and taken immediately after the Second World War, has been recognized to Zlata Ebenspanger, a Brazilian national, i.e. to her son who stepped into her procedural position upon her passing away. The Administrative Court annulled the first-instance administrative decision rejecting the application and along with the instructions on the proper interpretation of the Act remitted the case back for

decision by the same body.

According to the initial text of the 1996 Compensation for the Taken Property during the Yugoslav Communist Government Act, former owners had no right to request the return of property or compensation for it if on the day this Act was rendered they did not have Croatian citizenship at the time the Act was rendered (Article 9). The Act further provided that the right to return/compensation does not exist in case where an international treaty has already settled that matter (Article 10). It was additionally prescribed that persons (natural and legal) not having Croatian citizenship were not eligible, except in cases where an international treaty specifically provided otherwise (Article 11). The Constitutional Court of the Republic of Croatia was asked to rule on the constitutionality of the cited provisions. In 1999, the Constitutional Court declared the limitations concerning the foreign natural (but not legal!) persons unconstitutional and the respective provisions void (Decision docket number U-I-673/96, published in Official Gazette of the Republic of Croatia 39/1999, accessible here). In its reasons the Constitutional Court stated:

> *Differentiating former owners on the basis of their legal bond to a certain state (i.e. on the basis of citizenship) – when at the same time some are granted the compensation (Croatian nationals) while others are not at all granted this right – is unjust and cannot be justified by the need to protect some other important constitutional or other right. All the more since to all persons, Croatian nationals and those who are not, the property was taken by the same means, at the same time and on the basis of the same legal grounds, and their property – if still preserved – remained in the Republic of Croatia owned by the state or other legal entities.*
>
> *Differentiation in the volume of potential rights of Croatian nationals and foreigners is common (and not contrary to the Constitution) in cases when the legal entities are regulated under the public laws or laws concerning the commencement of the employment relation. Nonetheless, when the relations concerning the property are at stake such differentiation in such a general, wide-ranging form cannot exist and it is contrary to the Constitution.*
>
> *For these reasons, by the law that will be adopted instead of the void one, the former owners who are not Croatian citizens should in principle be granted the right to compensation or return of the property, and defined the preconditions*

under which these persons will be granted the right to compensation. The right of foreigners to have the immovable returned to them should be regulated in accordance with the provisions of other acts on the rights of foreigners to acquire immoveable on the territory of the Republic of Croatia.

In 2002, the Croatian Parliament passed the Act Amending and Supplementing the 1996 Compensation for the Taken Property during the Yugoslav Communist Government Act (Official Gazette of the Republic of Croatia 80/2002 and 81/2002) which, amending Article 10 and deleting Article 11, on top of the part of Article 9 being deleted by the Constitutional Court, made it possible for foreign natural persons to acquire the right to be compensated for the taken property yet only if so determined by an international treaty. Until recently, the interpretation of this provision was that if the state, whose citizenship the applicant has, has not concluded an international treaty in respect to these matters with the Republic of Croatia, its citizens cannot be granted the right to compensation or return of property. A case in point is a decision of the Administrative Court of the Republic of Croatia, Us-10052/2004 of 28 April 2005, accessible via this link.

However, the interpretation of this Act has been reversed in the latest decision of 14 February 2008. According to this precedent, the requirement of an international treaty is no longer a preclusive element, although the provision actually says so. Namely, the Administrative Court did not rest solely on the linguistic interpretation, but took account of the fact that the Constitutional Court erased the part of Article 9 which set the precondition of applicant's Croatian citizenship and concluded that right to be compensated belongs to all foreign natural persons in respect to which the issue of the taken property has not been resolved by an international treaty. This interpretation has been taken at the February 2008 session of the respective section of the Administrative Court which is available here. Whether this interpretation may be considered justified is indeed arguable, but the outcome seems to be in accordance with the principles highlighted in the Constitutional Court decision.