Max-Planck Events Spring 2008

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

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

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

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

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

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

First issue of 2008's Journal du Droit International

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

The first is authored by Pascal de Vareilles-Sommieres, who teaches at Paris I University, and Anwar Fekini, who is a practising lawyer in Paris and Tripoli. It discusses The New International Oil Exploration and Sharing Agreements in Libya

(*Les nouveaux contrats internationaux d'exploration et de partage de production pétrolière en Libye. Problèmes choisis*). The English abstract reads:

> *The article intends to study the legal regime of the exploration and production sharing agreements (EPSAs) entered into by the Libyan National Oil Company with foreign oil companies since 2005. In this first part, the authors focus on legal sources governing Libyan EPSAs. Though admitting the prominent part of Libyan law chosen by the parties in a choice of law provision among these sources, the authors wonder whether the parties simultaneously intended to get other possible legal sources combined with it. A possible choice of public international law is first examined. Scrutinising the parties intention, the article comes to the conclusion that no sign pointing to an internationalisation of the EPSAs appears in the agreements. As a consequence, international contract law is not to be combined with Libyan law as far as the legal regime of the EPSAs is concerned. The study then looks for possible hints of the parties intention to get the lex mercatoria involved in the regulation of their agreement along with Libyan law. Several signs are brought to the light showing the parties' common intention to let international trade usages interfere with Libyan law to be combined with it in order to finally make up the lex contractus.*
>
> *The second part of this study will be published this year in a forthcoming issue of this Journal.*

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

> *The aim of this article is to present Regulation (EC) n° 864/2007 known as « Rome II », which is the result of a long process of elaboration. Codecision procedure has been used to adopt this text which harmonises rules of conflict of laws regarding noncontractual obligations to improve predictability concerning the law applicable. It constitutes a new step towards the construction of a private international community law. The Regulation follows current private international law trends that give competence to the law of the country in which the damage arises. Nevertheless, an escape clause introduces a flexible approach when the lex loci damni seems to be inappropriate. Specific rules for*

certain torts and restitutionary obligations are also laid down. They derogate the general rule. Moreover, the Regulation upholds in an extensive way the choice of law principle and determines the link with other norms such as the Hague Conventions on which it does not take precedence.

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

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

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

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

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

European text and brings, notwithstanding sovereign judicial appreciation, solutions to the difficulties its implementation might create in France.

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

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

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

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

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

persons and associations, the applicable law is to be that under which they are organised. Furthermore, the proposed bill clarifies the scope of "the law of establishment" and contains regulations regarding the law applicable to cross-border reorganisations, the change of applicable law and other aspects of cross-border cases.

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

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

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

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

On 28 December 2006, after a period of almost three years of debate and political manoeuvring, the European directive on services (2006/123/EC) came into force. It will have to be implemented by the Member States by 28 December 2009 at the latest. The directive applies to a wide range of service activities based upon the case law of the European Court of Justice relating to the freedom of establishment and the free movement of services. In order to make it easier for businesses to set up in other Member States or to provide services across-border on a temporary basis, each Member State shall set up Points of Single Contact. These shall ensure that providers have access to all necessary information and can complete the formalities necessary for doing business in other Member States. Moreover regulatory and authorization bodies across the EU are meant to cooperate more effectively. The directive is expected to engender consumer confidence in cross-border services through access to information. Restrictive legislation and practices shall be abolished after having been screened. A rather neglected aspect in public discussion are the directive's implications on private international law. Nevertheless they should be examined for both practical and systematic reasons.

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

The injured party may bring an action directly against the insurer in the courts of the place in a Member State where the injured party is domiciled, provided that such a direct action is permitted and the insurer is domiciled in a Member State. This follows, according to the judgment of the ECJ, from the reference in Article 11 (2) of the Brussels I Regulation to Article 9 (1) (b). The previous judgment of the first instance court in Bremen was based on the same argument. However, according to a judgment of the court of appeal in Karlsruhe, courts at the place of domicile of the injured party lack international

jurisdiction under the Lugano Convention. Fuchs argues that neither the wording nor the historic interpretation support the assumption of jurisdiction of the courts in the state where the injured party is domiciled. This situation has not been altered in the course of the transfer of the Brussels Convention into a regulation. The main argument in favour of admitting direct claims before the courts of the injured party's domicile can be drawn from the systematic interpretation. However, this additional place of jurisdiction will have undesirable consequences such as forum shopping and race to the court. In case of Article 11 (3), it will lead to unforeseeable results for the policyholder or the insured. Furthermore, it may have a negative economic impact for drivers in relatively poor Member States. The author criticizes the European legislator for not having discussed these issues openly in the context of the Brussels I Regulation.

- ***A. Staudinger*** on a decision of the German Federal Supreme Court on the scope of the head of jurisdiction of Art. 15 (2) Brussels I Regulation ("Reichweite des Verbrauchergerichtsstandes nach Art. 15 Abs. 2 EuGVVO"), (Federal Supreme Court, 12.6.2007 – XI ZR 290/06)
- ***E. Eichenhofer*** on a decision of the Higher Labour Court Frankfurt (Main) dealing with the question of international jurisdiction regarding contribution claims of German social security benefits offices against employers having their seat in another EU Member State ("Internationale Zuständigkeit für Beitragsforderungen deutscher tariflicher Sozialkassen gegen Arbeitgeber mit Sitz in anderen EU-Staaten"), (Higher Labour Court Frankfurt (Main), 12.2.2007 – 16 Sa 1366/06)
- ***J. von Hein*** on the concentration of jurisdiction regarding appeals in cross-border cases according to § 119 (1) No. 1 lit. b GVG ("Die Zuständigkeitskonzentration für die Berufung in Auslandssachen nach § 119 Abs. 1 Nr. 1 lit. b GVG – ein gescheitertes Experiment?"), (Federal Supreme Court, 19.6.2007 – VI ZB 3/07 and 27.6.2007 – XII ZB 114/06)
- ***D. Henrich*** on the question of renvoi in PIL of names occurring due to a different qualification by foreign law ("Rückverweisung aufgrund abweichender Qualifikation im internationalen Namensrecht"), (Federal Supreme Court, 20.6.2007 – XII ZB 17/04)

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

- ***A. Laptew/S. Kopylov*** on the requirement of reciprocity with regard to the enforcement of foreign judgments between the Russian Federation and Germany (Yukos Oil Company) ("Zum Erfordernis der Gegenseitgkeit bei der Vollstreckung ausländischer Urteile zwischen der Russischen Föderation und der Bundesrepublick Deutschland (Fall Yukos Oil Company)"), (Federal Commercial District Court Moscow, 2.3.2006 – KG-A40/698-06P)

- ***H. Krüger*** on the recognition and enforcement of foreign titels in Cameroon ("Zur Anerkennung und Vollstreckung ausländischer Titel in Kamerun")

- ***A. Jahn*** on PIL questions in the context of withdrawals of wills due to marriage in anglo-american legal systems ("Kollisionsrechtliche Fragen des Widerrufs eines Testamentes durch Heirat in anglo-amerikanischen Rechtsordnungen")

- ***C. Jessel-Holst*** on the Statute of Private International Law of the Republic of Macedonia ("Zum Gesetzbuch über internationales Privatrecht der Republik Mazedonien")

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

- Statute of Private International Law of the Republic of Macedonia of 4 July 2007 ("Gesetz über internationales Privatrecht – Gesetz der Republik Mazedonien vom 4.7.2007")

- Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock – signed in Luxembourg on 23 February 2007 ("Protokoll von Luxemburg zum Übereinkommen über internationale Sicherungsrechte an beweglicher Ausrüstung betreffend Besonderheiten des rollenden Eisenbahnmaterials – unterzeichnet in Luxemburg am 23.2.2007")

As well as the following **information**:

- ***H.-G. Bollweg/K. Kreuzer*** on the Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock ("Das Luxemburger Eisenbahnprotokoll – „Protokoll zum Übereinkommen über internationale Sicherungsrechte an beweglicher Ausrüstung betreffend Besonderheiten des rollenden Eisenbahnmaterials" vom 23. 2. 2007")
- ***E. Jayme*** on the (critical) debate in France about the Community's competence in PIL which was made public by French PIL professors by means of open letters on this issue ("Frankreich: Professorenstreit zum Europäischen IPR – einige Betrachtungen")
- ***E. Jayme*** on the convention of the Ludwig-Boltzmann-Institutes in Vienna ("Kodifikation des IPR, des grenzüberschreitenden Zivilrechts und Zivilverfahrensrechts in der Europäischen Union – Tagung der Ludwig-Boltzmann-Institute in Wien")
- ***C. Gross:*** report on the 40th UNCITRAL session ("Bericht über die 40. Sitzung der Kommission der Vereinten Nationen zum internationalen Handelsrecht (UNCITRAL)")

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

(Many thanks to Prof. Dr. Heinz-Peter Mansel, editor of the journal (University of Cologne) for providing the English abstracts.)

European Commission adopts Green Paper on Effective Enforcement of Judgments in the EU

On 6 March, the European Commission adopted the Green Paper

"Effective Enforcement of judgments in the European Union: The Transparency of Debtor assets".

As stated in the press release, Vice-President *Franco Frattini*, Commissioner responsible for Justice, Freedom and Security declared:

> *"The objective of this Green paper is to find possible measures at a European level to improve the transparency of debtors' assets and the right of creditors to obtain information whilst at the same time respecting the principles of protection of the debtor's privacy which counterbalances the creditor's right to efficient recovery" .*

The press release continues as follows:

> *Problems in cross-border debt recovery represent an obstacle to the free circulation of payment orders within the European Union and may impede the proper functioning of the Internal Market. Late payment and non-payment jeopardise the interests of businesses and consumers alike. This is particularly the case when the creditor and the enforcement authorities have no information about the debtor's whereabouts or his assets.*
>
> *The search for the debtor's address and/or for information about his financial situation is often the starting point of enforcement proceedings. At present, transparency of debtors' assets is generally achieved at a national level through different sources of information, in particular through registers and the debtor's declaration. While the basic structures of the national systems appear similar, there are considerable differences in the conditions of access, the procedures for obtaining information, the content and the overall efficiency of*

the systems. The cross-border recovery of debts is hampered by the differences between the national legal systems and by insufficient knowledge on the part of creditors about the information structures in other Member States. However, the similarity of the underlying structures of the legal systems of the Member States could provide a basis for approximation.

This Green Paper aims to launch a broad consultation among interested parties on how to improve the transparency of debtors' assets which can be provided through registers and by the debtor's declaration. The Commission believes that it is worth taking into account a number of measures that might improve the current situation, helping to ensure that the creditor obtains reliable information on his debtor's assets within a reasonable period of time, and in particular:

- *Drawing up a manual of national enforcement laws and practices*
- *Increasing the information available in and improving access to registers (Commercial registers – Population registers – Social security and tax registers).*
- *Exchange of information between enforcement authorities*
- *Measures relating to the debtor's declaration (a Community instrument setting out the obligation of Member States to introduce a procedure for the taking of a debtor's declaration or the introduction of a uniform "European Assets Declaration).*

The Green Paper, the full press release as well as information on the submission of comments to the Green Paper can be found at the website of the European Judicial Network.

See in this context also the Study JAI/A3/2002/02 on making more efficient the enforcement of judicial decisions within the European Union which has been prepared by the University of Heidelberg under the direction of Prof. Dr. Burkhard Hess on behalf of the European Commission.

New Publication: Principles, Definitions and Model Rules of European Private Law

Recently, **Principles, Definitions and Model Rules of European Private Law**, prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), has been published. The abstract reads as follows:

> *In this volume the Study Group and the Acquis Group present the first academic Draft of a Common Frame of Reference (DCFR). It is based in part on a revised version of the PECL and contains Principles, Definitions and Model Rules of European Private Law in an interim outline edition. It covers the Books on contracts and other juridical acts, obligations and corresponding rights, certain specific contracts and non-contractual obligations. One purpose of the text is to provide material for a possible "political" Common Frame of Reference (CFR) which was called for by the European Commission's "Action Plan on A More Coherent European Contract Law" of January 2003.*

More information, in particular the table of contents as well as an extract can be found at the publisher's website.

Fourth Issue of 2007's Revue Critique de Droit International Privé

The last issue of *Revue Critique de Droit International Privé* for 2007 was just released. It contains two articles dealing with conflict issues.

The first is authored by Fabien Marchadier who lectures at the Law Faculty of Limoges University. It discusses the Contribution of the European Court of Human Rights to the Efficacy of the Hague Conventions on Judicial and Administrative Cooperation (*La contribution de la CEDH à l'efficacité des conventions de La Haye de coopération judiciaire et administrative*). The English abstract reads:

> *The first encounters between the Hague Conventions and European human rights law have revealed in particular that there is an issue of compatibility of transnational cooperation with the ECHR. While the Hague Conventions aim to implement various rights and freedoms of which the Court of Strasbourg is the guardian, they are exposed at the same time to requirement of conformity, thereby providing the Court with the opportunity of ensuring the respect by national public authorities both of their reciprocal obligations to cooperate and of individual fundamental rights. Thus, the Court participates in the efficiency and effectiveness of the Hague Conventions by exercising an international control, otherwise lacking, over the compulsory nature of the cooperation and its effective implementation.*

The second article is authored by Maria Lopez de Tejada (Paris II University) and Louis D'Avout (Lyon III University). It is a study of Regulation 1896/2006 creating a European order for payment procedure (*Les non-dits de la procédure européenne d'injonction de payer*). Here is the English abstract:

> *After evoking successively the genesis of the Regulation which introduces into the Common judicial area an injunction to pay, the needs which this procedure is intended to cover and the means it has chosen to attain procedural uniformity, the study of this novelty, on the one hand, highlights the inadequate content of the new instrument, which rests on rules which are both incomplete and insufficiently attentive to the protection of the addressee of the injunction as far as notification and jurisdiction ar concerned, and on the other hand, detects a number of deficiencies affecting the use of this procedure, linked to the defective definition of its scope or a short-sighted view of its practical follow-up.*

Nova Scotia Court of Appeal on Substance-Procedure Distinction

In *Vogler v. Szendroi* (available here) the plaintiff, resident in Nova Scotia, was injured in a car accident in Wyoming. Three years later he issued legal process in Nova Scotia. This was inside the four-year Wyoming limitation period, which applied as part of the substantive law applicable to the claim (under the place of the tort rule in *Tolofson v. Jensen*). However, he did not serve the defendant for another three years.

Under Wyoming law, an action is commenced by filing process with the court (the same is true in Nova Scotia), but if service is not made within 60 days of filing, the action is not considered to have been commenced until the date of service (Nova Scotia has no similar provision).

The issue therefore was whether the specific rule of Wyoming law focusing on the date of service was substantive, and so applied in the Nova Scotia litigation, or procedural, and so did not apply. The lower court held that the rule was "integral" to the Wyoming limitations rule and was therefore substantive. But the Court of Appeal reversed and characterized it as procedural.

The court's analysis is quite lengthy – longer than necessary for this issue. But it does contain some useful comments about the substance-procedure distinction (at paras. 17-22 and 26). It also relies on a useful academic source on this specific issue by Professor Janet Walker (at paras. 37-39). Ultimately the court concludes the Wyoming rule is not bound up in its limitations rule, and is rather a separate procedural rule.

International Reach of French Attachments

Can attachments reach foreign bank accounts? For the French, the answer had always been clearly negative, until the French supreme court for private matters (*Cour de cassation*) held in a judgment of 14 February 2008 that a French attachment could reach a bank account in Monte Carlo.



In this case, a creditor had carried out an attachment on the bank account of its debtor, Société Exsymol. The account had been opened at the Monte Carlo branch of French bank BNP Paribas, but the creditor chose to carry out the attachment in Paris. The issue arose as to whether the attachment had reached the Monte Carlo account. The *Cour de cassation* held that it had.

French *saisies attribution*

The attachment was a *saisie attribution*. It is only available to creditors who have enforcement titles such as judgments or arbitral awards declared enforceable. Such attachments purport to transfer the property of the monies from the debtor to the creditor. They thus clearly belong to the enforcement of decisions. They are no freezing orders.

It should also be underlined that they are available to judgment creditors without any judicial intervention or even leave. Any French judgment creditor may directly hire an enforcement officer (*huissier de justice*) who will carry out the attachment on his behalf.



Scope of the rule

The Court insisted that the French *saisie* had reached the foreign account because it was held by a branch of the bank. It is ruled that the rationale of the solution is that *saisies* reach all assets owned by the corporate entity, irrespective of their location. It seems clear thus, that they would not reach assets held by a foreign subsidiary of the bank. But it also seems to follow that whether the bank

had its headquarters in France is irrelevant.

Was European law relevant?

The judgment does not mention the Brussels I Regulation. Was it indeed irrelevant? I think so. I would argue that the regulation governs the jurisdiction of courts, not the power (jurisdiction?) of other state bodies such as enforcement officers to act internationally.

Additionally, Monte Carlo does not belong to the European Union. In enforcement matters, wouldn't the regulation apply only to the enforcement on the territories of member states? Would the enforcement here be the action of the French *huissier* in Paris or the transfer of ownership of the assets, thus taking place outside of the EU?

Is enforcement strictly territorial?

BNP Paribas is The bank for a Changing World. Changing it is indeed! In French legal circles, enforcement had always been regarded as strictly territorial. It was argued that it would be an infringment of the sovereignty of the foreign state to carry out enforcement on assets situated on its territory. It seems that the *Cour de cassation* is not convinced anymore.

All comments welcome! I would also love to hear from similar experiences in other jurisdictions.

Interesting Conflicts Decision from the Sixth Circuit: COGSA or Hague-Visby?

The Sixth Circuit Court of Appeals recently issued an interesting conflicts decision on the competing applicability of COGSA rules or Hague-Visby Rules. According to Judge Karen Nelson Moore, writing for the panel:

> *This case requires us to consider whether COGSA or the Hague-Visby Rules or both apply as a matter of law to the ocean voyage between Le Havre, France and Montreal, Canada, [where the goods would then travel by land to inland cities in the United States]. . . . The case presents an intellectual puzzle that we must resolve without direct precedent as guidance, and our analysis should be understood as a default rule around which cargo owners and carriers can contract.*

After a thorough introduction of the issue, and the genesis of the competing laws, the panel determined that:

> *an intermediary stop en route pursuant to a multimodal maritime contract with an ultimate destination in the United States, regardless of whether the stop is during the sea stage of transport or between the sea and land legs, should not prevent the application of COGSA liability rules as a matter of federal common law. Our decision effectuates Congress's intent when it passed COGSA in 1936 to promote uniformity in shipping. We think that applying COGSA's liability rules to all carriage of goods by sea, in contracts for transportation with ultimate destinations in the United States, effectuates Congress's intent in a context that Congress could never have predicted: one in which containerized transport and "through" bills of lading prevail.*

The decision in *Royal Insurance Co. of Am. v. Ford Motor Co.*, No. 06-1199 (6th Cir., January 30, 2008) is an interesting read, both for the substantive rule of maritime law and the conflicts analysis. The slip opinion is available here.

Guest Editorial: Harris on "Reflections on the Proposed EU

Regulation on Succession and Wills”

The second instalment of our 2008 series of Guest Editorials is by Professor Jonathan Harris: **Reflections on the Proposed EU Regulation on Succession and Wills.**

Prof. Jonathan Harris is Professor of International Commercial Law and Deputy Head of the Law School at the University of Birmingham, UK. He also practises as a barrister at Brick Court Chambers, London. He is an editor of Dicey, Morris and Collins, *The Conflict of Laws* (14th ed 2006; First Supplement 2007) and co-editor of the *Journal of Private International Law*. He is author of *The Hague Trusts Convention* (Hart Publishing, 2002) and co-author of *International Sale of Goods in the Conflict of Laws* (OUP, 2005). He has numerous articles and book chapters in the field of private international law. He is also a contributor to Underhill and Hayton, *Law of Trusts and Trustees* (16th and 17th editions, Butterworths). Professor Harris has recently been advising the UK Ministry of Justice on the proposed EU Regulation on Wills and Succession and gave oral evidence to the House of Lords Select Committee on European Union Law in October 2007. The transcript of this evidence is available here.

Reflections on the Proposed EU Regulation on Succession and Wills.

In March 2005, the European Commission issued its Green Paper on Succession and Wills (COM(2005) 65 final). It is now starting work on a draft Regulation. The United Kingdom will, of course, have to decide in due course whether to participate in this venture.

Those not directly concerned with matters of succession law may be excused for taking only a passing interest in the subject. Others may be sceptical about the internal market justification for this initiative. Closer inspection, however, shows that this is a potentially extraordinarily wide ranging and ambitious initiative, which demands attention. The Regulation may, for instance: alter the procedures adopted in Member States for the administration of estate; affect lifetime dispositions made by gift or on trust prior to the testator’s death; and even require Member States to recognise property rights that are unknown in their

own domestic legal systems.

The Regulation is intended to cover jurisdiction, recognition of foreign judgments and choice of law. Perhaps the most familiar issue for most people is the choice of law rule for succession to movable and immovable property. For the former, English courts have adopted the common law test of domicile at the time of death. We can confidently expect that this connecting factor will be replaced by habitual residence. If the United Kingdom participates in the Regulation, then, depending upon how the habitual residence test is defined, this might cause some significant change in respect of, for example, a person who dies whilst they are employed overseas for a number of years in State X, whilst intending to return to their state of origin, State Y, in due course.

Much more difficult, however, is the choice of law rule for immovables. It is clear that the European powers that be favour a unitarian system, applying the law of the deceased's last habitual residence to the devolution of the entire estate. Some onlookers will see this as a positive development; not least because it allows a local lawyer to provide advice as to the devolution of a client's estate across Europe, with apparent consequential improvement for the legal position of citizens. Others, however, will wonder about the desirability and feasibility of applying foreign law in relation to land located within the jurisdiction. It is true that, for Contracting States to the Hague Trusts Convention, the possibility of creating a valid trust governed by a foreign law over land located in the jurisdiction already exists. But it seems inconceivable that a court could apply a foreign governing law to, for example, the process by which a right in land is transferred on death; or to the question of whether that right should appear on the land register. Appropriate derogations to the law of the situs will need to be carved out.

A more fundamental matter, however, is the scope of the Regulation and the subject matter that it will encompass. In particular, the Regulation is likely to cover a far wider canvass than what would, in English law, be regarded as matters of succession. For instance, in English law, there is a clear delineation between succession rights and the prior process by which a deceased person's estate is administered. In England, property is first vested in an executor (if named in the will) or an administrator (if not) appointed by the court, who will deal with outstanding liabilities before distributing the estate. English law also does not automatically recognise the status and competence of an administrator

appointed overseas. It may very well be, however, that the Regulation will apply the lex successionis to the administration of estates; even if, for instance, that law vests the property directly in the beneficiaries and requires them to deal with administrative matters. This will, of course, constitute a fundamental change to national procedural processes for dealing with the estates of deceased persons.

But perhaps the most extraordinary aspect of the Regulation is that it seems distinctly possible that it will attempt to address the panoply of property rights that might be created upon death. A testator might, for instance, leave his property on testamentary trust; or subject to a usufruct or a tontine. There was a marked uncertainty in the Green Paper as to the relationship between trusts and the law of succession. The question of whether X has left his property to Y to be held on trust is a succession law issue; but the question of whether the trust itself is valid, the terms of the trust and the rights and obligations of the trustee are trusts specific issues (which, in the United Kingdom, are covered by the Hague Trusts Convention) and emphatically are not succession issues. This distinction between succession law and trusts has properly been drawn in the context of the Hague Succession Convention (Article 14) and the Hague Trusts Convention (Article 15). Indeed, the Hague Trusts Convention is applicable to the operation of the trust itself but not to the preliminary acts by which the property is vested in trustees (Article 4).

If the Regulation were to lay down choice of law rules and recognition rules which extend to all rights arising upon death, then doubtless, the United Kingdom would gain considerably if its testamentary trusts were routinely recognised across Europe. But this does not seem a terribly realistic aspiration. Most Member States of the European Union have shunned the Hague Trusts Convention, pursuant to which they would be required to recognise trusts qua trusts. It is difficult to believe that they will now relish having to recognise such trusts in their legal systems. Moreover, this would lead to the rather bizarre result that Member States would recognise testamentary trusts; but not be required to recognise inter vivos trusts. Yet once the trust is up and running, its genesis is arguably irrelevant to the legal regime that should govern it. Since the Regulation will also extend to matters of jurisdiction, the possibility exists that the courts of a civilian Member State would be required, for example, to consider the operation of a discretionary trust contained in a will which gives the trustee the discretion to distribute the trust property amongst a group of person specified by the

testator, but compels him to exercise the discretion; and to have to determine such questions as whether the trustee has exercised his discretion properly.

Conversely, English courts might be asked to recognise foreign property rights unknown in its legal system such as, for example, a usufruct or a tontine, that might arise according to the lex successionis. Yet it is difficult to see how a Regulation on succession law can seek to regulate all the property rights that exist in the Member States (and, if the Regulation has universal scope, all the property rights that exist in non-Member States as well), or require overseas courts to assert jurisdiction in proceedings relating to such rights. Still less can those States automatically recognise such foreign interests, register them and give effective to them within the context of their own legal systems. Such a Regulation would, in reality, not be a pure succession law Regulation at all; and its potential impact would be enormous.

An equally difficult problem in formulating a suitable Regulation is the issue of clawback. Many legal systems have wide ranging rules on the inclusion in the deceased's estate of assets which he disposed of prior to his death. English law has only a very circumscribed right for relatives of the deceased to make an application to the court for a discretionary award under the Inheritance (Provision for Family and Dependants) Act 1975 where the deceased died domiciled in England and Wales. Otherwise, it places great weight on the sanctity and validity of inter vivos dispositions. Other Member States prefer more extensive protection against testators dissipating assets to prevent their nearest and dearest from getting at them; and in some cases, will include dispositions made many years prior to death. From an English perspective, this has the potential to undermine trusts that were validly created by their governing law, or at least threatens that these assets will be taken into account in assessing a person's entitlement under the will. This, in turn, might also drive investors to offshore trusts jurisdictions, which have legislation that can offer much greater protection against the application of foreign rules of clawback. It remains to be seen if an exclusion from the along the lines of Article 1(2)(d) of the Hague Succession Convention might be feasible. This excludes "Property rights, interests or assets created or transferred otherwise than by succession, such as in joint ownership with right of survival, pension plans insurance contracts or other arrangements of a similar nature". Article 7(2)(c) muddies the waters somewhat, however, in stating that the lex successionis applies to " any obligation to restore or account for gifts,

advancements or legacies when determining the shares of heirs, devisees or legatees". In any event, it is likely that many Member States will wish the question of clawback, and of what assets are included in the deceased's estate, simply to be left to the lex successionis.

The question of testator freedom to choose the governing law will also be an important issue. The ability to choose, for instance, the law of one's habitual residence at the time of making a will would increase the testator's confidence as to the devolution of his estate. For cross-border workers, there may also be benefit in allowing a choice between connecting factors, so as to allow e.g. a person domiciled in England but currently resident in France whilst working there for a fixed term of five years to choose the law of his domicile rather than that of his habitual residence. But too wide a choice might simply allow a testator to evade the policies and protection of his "home" law, as where he chooses English law so as to avoid rules of compulsory heirship of another legal system which require him to leave a fixed percentage of his estate to his family members.

The Regulation will also need to formulate suitable rules of jurisdiction. Given the very wide range of issues that could arise under the Regulation, this will be no easy matter. It is likely, however, that the default rule will be to confer jurisdiction on the courts of the deceased's habitual residence at death. Equally difficult will be rules on the mutual recognition of foreign judgments. A Regulation of wide scope, which includes within its ambit judgments on the administration of the estate, the validity of property rights unknown in the state where recognition is sought, or provides for clawback of assets disposed of by inter vivos trust, may create acute issues of public policy for the state which is asked to recognise the judgment. There is also the question of how the United Kingdom would accommodate the acts of notaries, since it does not have a notarial tradition.

The Green Paper also reveals plans for a standard European Certificate of Inheritance, which would be issued by courts in Member States and contain a statement as to the assets of the estate and the entitlement of beneficiaries. But even if the courts of every Member State were willing and able to adapt their domestic procedures so as to issue such a document, difficulties would remain. In view of the problems considered above in deciding what assets should be included in the testator's estate, it may be difficult for a court to accept a conclusive statement from another Member State's courts as to the assets of the estate. It

remains to be seen whether a less ambitious approach, which recognises the certificate as having only evidential value, might be acceptable.

Finally, the Green Paper makes reference to a system of registration of wills. Such a development may be desirable, at least on an optional basis. It would, however, cause certain problems if an obligation to register a will were imposed. It is not clear how that system would be policed, or what would happen to a will that had not been registered. Nor is it clear what the register would contain, who could access it and when. Some testators may not wish the existence of their will to be disclosed prior to death.

The proposed Regulation is, in summary, a very complex initiative, not least because of the considerable disparity in the ways in which the domestic legal systems of Member States deal with the devolution of a person's estate upon death. Moreover, the true scope and potential effects of the Regulation are extremely significant. It remains to be seen whether that ambition will be realised; and whether, in attempting to achieve so much, the European institutions will be able to produce a Regulation that meets with general approval and which enables the United Kingdom, in particular, to participate in the initiative.

The March Guest Editorial will be by Professor Paul Beaumont; details to follow).