Aberdeen Lectureship in Private International Law

The University of Aberdeen invites applications from suitably qualified candidates for a post at Lecturer level in the School of Law. The Law School received a rating of 5B in the 1996 and 2001 Research Assessment Exercises and candidates should demonstrate an aptitude for research commensurate with that high ranking. In the 2001 RAE a 'substantial' proportion of those submitted produced publications of 'international' quality. The Law School will welcome applications from candidates in any field of law but **will give a preference to someone who can teach on the new LLM programme in Private International Law** that commences in February 2008. The starting date is **1 February 2008**.

Informal enquires may be made to Professor Beaumont (tel: 01224 272439, e-mail p.beaumont@abdn.ac.uk).

Online application forms and further particulars are available from **here**. Alternatively email jobs@abdn.ac.uk or telephone (01224) 272727 (24-hour answering service) quoting reference number **FLS426A** for an application pack.

The closing date for the receipt of applications is 27 July 2007.

Choice of Law and Contribution Claims in Australia

The Supreme Court of Victoria has recently addressed the choice of law implications of claims for contribution within the Australian federal context. The decision will be of particular interest to UK readers. The Victorian contribution statute under consideration, Part IV of the *Wrongs Act 1958* (Vic), is materially identical to the *Civil Liability (Contribution) Act 1978* (UK), but the Court declined

to follow the view of the UK courts regarding the choice of law consequences of the statute.

The case concerned a claim for contribution brought in Victoria by Fluor Australia Pty Ltd against ASC Engineering Pty Ltd, relating to the breach of a contract governed by the law of Western Australia. In Victoria, as in the UK, the statutory right to contribution covers all forms of liability. In contrast, in WA (and all Australian jurisdictions except Victoria) contribution is governed by equitable principles in conjunction with a limited and gap-filling statutory right to contribution between tortfeasors.

Section 23B(6) of the Victorian Act provides that:

> *References in this section to a person's liability in respect of any damage are references to any such liability which has been or could be established in an action brought against that person in Victoria by or on behalf of the person who suffered the damage and it is immaterial whether any issue arising in any such action was or would be determined (in accordance with the rules of private international law) by reference to the law of a place outside Victoria.*

Fluor argued that this constituted a statutory choice of law rule in favour of the Victorian lex fori, notwithstanding that common law rules of private international law might have directed the application of WA law. This reasoning was said to be supported by a series of decisions on the equivalent section of the UK Act. In each of those cases, English courts applied the UK Act to claims for contribution regardless of whether those claims would have been governed by English law according to the common law choice of law rule for contribution claims.

Bongiorno J declined to follow this view, holding that it would "encourage forum shopping to the detriment of the whole Australian legal system [and] would be antipathetic to the federal compact itself, with obvious consequences for state sovereignty and the integrity of individual state legal systems." Rather, common law choice of law rules for contribution applied. Section 23B(6) of the Victorian Act was held to be merely "facultative", its role being to confirm that if the common law choice of law rules for contribution directed the application of the Act, the fact that the "underlying liability" of the person from whom contribution is sought to the person who suffered the loss would be governed by the law of another jurisdiction would not preclude application of the Act.

Although there is uncertainty in Australia as to the applicable common law choice of law rule – both a delictual analysis (favouring the contribution law of the place of commission of the wrong by the person from whom contribution is sought) and a restitutionary analysis (favouring the contribution law of the place with the closest connection to the contribution claim) having been previously posited by Australian courts –his Honour considered that whichever rule applied, the Victorian Act did not apply to Fluor's claim against ASCE. Consequently, his Honour did not express a preference for either possible rule and Australian lawyers are therefore no closer to knowing the applicable common law rule for choice of law in contribution claims.

Fluor Australia Pty Ltd v ASC Engineering Pty Ltd [2007] VSC 262 (17 July 2007)

(Note: Both Perry Herzfeld and I were involved in this case while at Allens Arthur Robinson.)

Article on Jurisdiction and Choice of Law in Economic Perspective

An article by *Katrin Lantermann* and *Hans-Bernd Schäfer* (both Hamburg) has recently been released on SSRN:

"**Jurisdiction and Choice of Law in Economic Perspective**".

Here is the abstract which can be found on the SSRN website:

> *This article looks at choice of law rules from an economic perspective.The aim is to understand whether particular choice of law norms are wealth creating or wealth destroying and which of different norms should be preferred from this point of view. In this article we do not try to understand the forces that generate and sustain particular choice of law rules. We restrict ourselves to an efficiency analysis of existing or proposed choice of law rules. In the first part of the paper we argue that a free choice of law should be granted, whenever the*

choice causes no third party effects. We show that this criterion would extend free choice beyond the present scope. Free menu choice of law increases the wealth of the parties and creates institutional competition. It should be extended to fields of the law other than contract and tort law. In the second part we proceed with choice of law rules if the choice leads to positive or negative third party effects. To take care of these effects mandatory choice rules are sometimes but not always necessary. Methodologically choice of law rules should be market-mimicking rules, which reflect the interests of a grand coalition of the parties and all third parties affected by the choice rule. In the third part of the paper we discuss existing rules for the choice of tort law and refer to the discussion on a draft proposal for a European Council regulation of the law applicable to non-contractual obligations . In the fourth part we discuss whether the German or the US approach of international comparative law is preferable from an economic perspective. The US approach gives more judicial discretion for the choice of law than the German approach. We argue that the choice of law rules should lead to precise and clear legal commands with escape clauses for the judiciary only in exceptional and obvious cases. As Guzman pointed out it is striking that choice of law scholars have paid virtually no attention on how choice of law rules affect individual behaviour. But any economic analysis has to focus on this aspect as otherwise the social consequences of legal norms remain unknown and consequently little can be said about whether the consequences of one rule are socially better than those of another rule .

The full PDF version of the article can be downloaded here.

EC Regulation Establishing a European Small Claims Procedure

Adopted

In its last meeting under the German Presidency (12/13 June 2007), the JHA Council has adopted the text of the **Regulation establishing a European Small Claims Procedure** (ESCP), accepting in their entirety the amendments voted by the European Parliament at first reading.

The reasons for the successful outcome of the negotiations at the very first stage of the codecision procedure are expressed in a Council's note, stressing that

> *In accordance with the joint declaration on practical arrangements for the codecision procedure, informal talks have been held between the Council, the European Parliament and the Commission with a view to reaching an agreement at first reading. The European Parliament delivered its first-reading opinion on 14 December 2006, adopting 105 amendments to the Commission proposal. The outcome of voting in the European Parliament broadly reflects the compromise agreement reached between the institutions […].*

The main features of the ESCP are presented as follows in a summary of the Parliament's amendments (see the OEIL page of the Regulation):

> *[T]he procedure should apply only to cross-border cases, rather than be available also for claims within individual Member States as originally proposed by the Commission. […]*
>
> *Accordingly, the Regulation will apply, in cross-border cases, where the value of a claim does not exceed EUR 2000 at the time when the claim is received by the competent court or tribunal, excluding all interest, expenses and outlays. It shall not apply, in particular, to revenue, customs or administrative matters or the liability of the State for acts and omissions in the exercise of state authority ("acta iure imperii"). The Regulation will not apply, inter alia, to maintenance obligations; tenancies of immovable property, except actions on monetary claims; violations of privacy and rights relating to personality, including defamation.*
>
> *The ESCP will be a written procedure. The Regulation provides for a specific form, available in all EU official languages, to be used to submit a claim under*

the ESCP. It would also facilitate the recognition and the enforcement of an ESCP judgment in all Member States by eliminating any intermediate measures required by a Member State to enforce the decision. The claim form will include a description of evidence supporting the claim and be accompanied, where appropriate, by any relevant supporting documents. The claim form, the response, any counterclaim, any response to a counterclaim and any description of relevant supporting documents shall be submitted in the language of the court or tribunal. If any other document received by the court or tribunal is in a language other than the language in which the procedure is conducted, the court or tribunal may require a translation of that document only if the translation appears to be necessary for rendering the judgment. The Member States shall ensure that the parties can receive practical assistance in completing the forms.

[…] The court or tribunal must render the judgment within 30 days of any hearing or after having received all information necessary for delivering the judgment. The court may hold a hearing through a video conference or other communications technology if the technical means are available.

Parliament substantially amended the enforcement procedure, the refusal of enforcement and stay of enforcement. The enforcement procedures will be governed by the law of the Member State of enforcement. A judgment delivered in a European Small Claims Procedure will be enforced under the same conditions as a judgment handed down in the Member State of enforcement. Under no circumstances may the judgment be reviewed as to its substance in the Member State of enforcement.

After the signature by the President of the European Parliament and the President of the Council, the ESCP Regulation will be soon published in the Official Journal. **It will apply in all Member States, with the exception of Denmark, from 1 January 2009**.

German Article on the Procedure for a Declaration of Enforceability under the Brussels Regulation

Burkhard Hess and *David Bittmann* (both Heidelberg) have published a very interesting article on the possibilities for an increase of efficiency of the procedure for a declaration of enforceability according to the Brussels I-Regulation ("Die Effektuierung des Exequaturverfahrens nach der Europäischen Gerichtsstands- und Vollstreckungsverordnung") in the latest issue of the "Praxis des Internationalen Privat- und Wirtschaftsrecht" (IPRax 2007, 277 et seq.).

An English abstract has kindly been provided by *David Bittmann*:

> *The article evaluates possible ways to increase the efficiency in cross-border enforcement proceedings according to the Brussels I-Regulation. This contribution is based on a comparative study of the application of the Regulation in 25 Member States conducted by the Institute for Private International Law and Business Law of the University of Heidelberg (Prof. Dr. Burkhard Hess and Prof. Dr. Thomas Pfeiffer) in cooperation with Prof. Dr. Peter Schlosser (University of Munich). The study has been supervised by the European Commission. In the first part of the article, the authors show possible ways forward to accelerate the time for obtaining a declaration of enforceability by shifting the competence for granting the declaration from the presiding judge of the Landgericht (Regional Court) to a court's clerk (Rechtspfleger). A comparison is drawn with the proceedings according to the Regulation creating a European Enforcement Order for uncontested claims and to the national proceedings for obtaining a warrant of execution. These proceedings lie already, in most of the Member States evaluated in the article, in the hands of a court's clerk. As a consequence, the same procedure should be chosen for the declaration of enforceability. The second part deals with possible improvements of the procedure of exequatur. The authors suggest an extension of the standard form in Annex V of the Brussels I-Regulation. The standard form should be drafted in accordance with the standard form of the new Regulation creating a European Payment Order, which entails all necessary details for an immediate enforcement of the foreign title, such as interest or the maturity of*

> *the claim. The result of such an extension was, that the time-consuming procedure for obtaining a declaration of enforceability would no longer be necessary, at least for the enforcement because of money debts. The foreign bailiff could start enforcement proceedings without the interference of the court, because all details concerning the foreign claim can be taken directly from the form. The standard form would have the effect of a "judicial passport".*

Ontario: Jurisdiction and Family Law

In *Okmyansky v. Okmyansk*, 2007 ONCA 427 (available here) the court answered three questions about its jurisdiction to hear different types of family law issues.

It held that under the (federal) *Divorce Act* it did not have jurisdiction to hear an application for spousal support following a valid divorce in a foreign jurisdiction (in this case Russia). The divorce had to have been a Canadian divorce for the court to be able to address support. On this issue the court's decision is in line with recent British Columbia authority and is contrary to recent authority from Quebec.

It held that under the (provincial) *Family Law Act* it equally did not have jurisdiction to hear an application for spousal support following a foreign divorce.

It held that under the *Family Law Act* it did have jurisdiction to hear a claim for equalization of the family assets following a foreign divorce. Accordingly, this claim was allowed to proceed in Ontario.

On each issue the analysis focuses mainly on statutory interpretation and the fact that under the Canadian constitution the federal government's ability to make laws governing support (otherwise a provincial matter) is only ancillary to its exclusive ability to make laws about divorce.

Second Issue of 2007's Journal du Droit International

The second issue of the French *Journal du Droit International* for 2007 was released a few days ago. As a journal covering the whole spectrum of international law, it contains articles on topics related to public international law, European Union law and European human rights. For a complete table of content in French, see here.

The Journal also contains a few articles dealing with conflicts issues, all written in French.

The first was written by Gian Paolo Romano and wonders how one can reconciliate the choice of the UNIDROIT Principles by contracting parties with mandatory rules (*Le choix des principes UNIDROIT par les cocontractants à l'épreuve des dispositions impératives*). The English abstract reads:

> *The intensity of the internationally mandatory character of a legal rule varies depending on the strength of the ties existing between the State and the contract. A rule which is mandatory with respect to a given contract may be no longer mandatory with respect to another contract. To the extent that it aims to protect the contracting parties, such rule then gives up its internationally mandatory character thereby becoming either "internationally dispositive", if the State from which it emanates is the one whose law would be applicable in the absence of choice, or, if not, "internationally available" to the parties, who may freely let themselves be governed by it. If the rule is, with respect to a particuler contract, internationally dispositive or available to the parties within the proposed definition, it can hardly be maintained that the State has an interest in applying it to such a contract notwithstanding the choice of the UNIDROIT Principles by the parties. While questioning the practical importance of the dichotomy "substantive – conflict autonomy", the present study allows itself to venture into the realm, still little explored, of the internationally dispositive scope of application of a mandatory rule.*

The second article is authored by Philippe Singer and Jean-Charles Engel, who are members of the staff of the European Court of Justice (for Mr Singer) or the Court of First Instance (for Mr Engel). Its title is the Importance of Comparative Research for Community Justice (*L'importance de la recherche comparative pour la justice communautaire*). The English abstract reads:

> *More than a passage required in certain cases by the Treaties or the expression of a concern to avoid a denial of justice, recourse to comparative law constitutes for the Community judge a real step in deciding a case. If this importance attached to comparative research in Community justice is well-known, its concrete realization and its formalization are perhaps a little less so. The "research notes" requested by the "research and documentation" Service testify, however, to the institutionalization of this method in the heart of the Community Court.*

The third article was written by Francois Melin, who lectures at Amiens Faculty of Law. It deals with the applicable law to set off in European insolvency proceedings (*La loi applicable à la compensation dans les procédures communautaires d'insolvabilité*). The English abstract reads:

> *The role of set off in case of insolvency is particularly important. The EC Regulation on insolvency proceedings alludes therefore to it in two provisions. Article 4.2.d indicates that the law of the State of the opening of the proceedings shall determine the conditions under which set off may be involved. Article 6 states that the opening of insolvency proceedings shall not affect the right of creditors to demand the set off of their claims against the claims of the debtor, where such set off is permitted by the law applicable to the insolvent debtor's claim. The difficulty consists in establishing the relationship between these two provisions.*

Articles of the *Journal* cannot be downloaded.

Federal Court of Australia Sets Aside Order for Non-Party Discovery from the Russian Federation

The decision on appeal of the Full Court of the Federal Court in *Federal Treasury Enterprise (FKP) Sojuzplodoimport v Spirits International NV* (2007) 157 FCR 558; [2007] FCAFC 43 has now been reported in the authorised Federal Court Reports (available online to subscribers to Lawbook).

The case arose out of a claim by Spirits and a related company in relation to the ownership of certain registered trademarks, including marks incorporating the words 'Stolichnaya' and 'Moskovskaya'. FKP, as the second respondent to the claim, filed a cross-claim against Spirits and the first respondent seeking the transfer or cancellation of registration of the disputed trademarks. (Related proceedings have been brought in other countries.) FKP is an economic entity existing under the laws of the Russian Federation. Another such entity, Federal Public Unitary Enterprise External Economic Union Sojuzplodoimport (FGUP VO), was joined as a second cross-claimant.

FKP and FGUP alleged that, prior to 1992, the disputed trade marks were owned by an entity existing under the laws of the former Soviet Union and that, following the dissolution of the former Soviet Union in 1992, the marks were wrongfully appropriated by certain individuals and ultimately came to be held by Spirits. Spirits sought discovery of certain documents from the Russian Federation pursuant to the provision of the *Federal Court Rules* permitting the Court in its discretion to order discovery from non-parties. The trial judge concluded that the Russian Federation was the 'real' party to the cross-claim brought by FKP and FGUP, and ordered that it should make the discovery sought and that, unless it did so, the cross-claim would be stayed.

The Full Court set aside the trial judge's orders. The Court noted that it had been conceded (and the Court apparently agreed with the view) that the trial judge had power to make an order for discovery against a non-party foreign state, even if

the foreign state was not the 'real' party to the litigation. However, the Court said that the trial judge did not 'act with the caution that the principled exercise of the discretion requires where there is an intrusion upon the sovereignty of a foreign state.' Even though the intrusion upon the sovereignty of the Russian Federation was only indirect 'and possibly only as a matter of perception' (in the sense that the only sanction for non-compliance was a stay of the cross-claim), 'comity dictated that caution be exercised before making the order'. The Court concluded that the Russian Federation should first be given the opportunity to provide the discovery sought voluntarily and in cooperation with FKP and FGUP.

Broad Grounds for Service of Australian Originating Process Outside of Australia in Tort Cases

Heilbrunn v Lightwood PLC [2007] FCA 433 is a recent Federal Court of Australia decision which evidences the breadth of rules for service of originating process outside of Australia in tort cases, which are common to all Australian superior courts except the Supreme Court of Western Australia.

A vintage Vauxhall motor car made in 1921, owned by the Australian-resident plaintiff, was damaged while being loaded into a container in England by an employee of the English-based defendant. The Vauxhall had been shipped to England from Australia to participate in a celebration of the centenary of production of Vauxhalls and the damage occurred while it was being loaded for the return journey. Repairs to the car were undertaken in Australia upon its return.

The plaintiff sought leave to serve the defendant, which did not carry out business in Australia, in England pursuant to the provision of the *Federal Court Rules* permitting service overseas in a proceeding 'based on, or seeking the recovery of, damage suffered wholly or partly in Australia caused by a tortious act or omission

(wherever occurring)'. Unlike the rules of some other Australian superior courts, the *Federal Court Rules* require leave of the Court before service can be made out of the jurisdiction.

Following the interpretation adopted in relation to similar rules by other Australian courts, the Federal Court held that the rule did not require that the injury which completed the tort occur in Australia, but only that the disadvantage or detriment suffered by the plaintiff as a result of the tort occur in Australia. This can be satisfied where a degree of personal suffering or expenditure has occurred within the jurisdiction, as took place in this case by virtue of the fact that the repairs to the car were undertaken and paid for by the plaintiff in Australia.

On the basis of the broad interpretation of the rule evidenced by this case, Australian courts have jurisdiction based on service overseas in many tort cases where the only connection to Australia is the fact that the plaintiff has come to Australia (even where they were not previously resident in Australia) and personal suffering or expenditure has occurred in Australia. Indeed, the *Federal Court Rules* make it clear that service out is permitted where a tort claim causing damage in Australia is only one of several causes of action alleged in a proceeding, even if service out would not be authorised in respect of the other causes of action. The rules of some other Australian superior courts are narrower on this point, requiring that service out be authorised in respect of each of the causes of action alleged.

Or course, even if an Australian court would have jurisdiction based on service overseas, it may decline to exercise jurisdiction on the basis that the court is a clearly inappropriate forum pursuant to the narrow Australian doctrine of *forum non conveniens*, but this is a relatively difficult test to satisfy: see the High Court of Australia decision of *Regie National des Usines Renault SA v Zhang* (2002) 210 CLR 491; 187 ALR 1; [2002] HCA 10.

Some Significant Forum Non Conveniens Decisions Since Sinochem

While the long-term practical effect of *Sinochem* on the American doctrine of forum non conveniens remains to be seen, the Federal Courts of Appeals are beginning to shape the landscape in the first six months since the Court's decision.

The most significant forum non conveniens decision since *Sinochem* was recently handed-down by the Seventh Circuit. In *Gullone v. Bayer Corp.*, 484 F.3d 951 (7th Cir. 2007), a group of U.K.-based plaintiffs were among those that sued defendant drug companies for allegedly being exposed to the HIV or Hepatitis C virus during blood transfusions. Judge Diane Wood, writing for a unanimous panel, reviewed the current state of the forum non conveniens doctrine in U.S. courts, and affirmed a district court's dismissal of U.K plaintiffs on forum non conveneins grounds in favor of an English forum:

> *Although we find it a close call, largely because the district court placed surprisingly little weight on the interest of . . . the original forum in this litigation and it may have overestimated the administrative difficulties in keeping the case in the United States, we conclude in the end that the court acted within its discretion when it dismissed the case.*

While Judge Wood engaged a scoping review of English case law regarding Plaintiff's causes of action, in particular the recent decision of the House of Lords in *Fairchild v. Glenhaven Funeral Servs., Ltd.*, (2003) 1 A.C. 32 (H.L.), the decision tends to presage that the ultimate battleground for forum non conveniens will rest in the U.S. district courts. Sinochem's strong authorization of trial-court discretion over this fact-based inquiry will continue to scare appellate courts from more intense review. The Seventh Circuit website has a link to the oral argument in *Gullone*.

For sure, *Gullone* is not the only FNC dismissal in favor of a foreign forum in the wake of *Sinochem*; other circuits have similarly affirmed such dismissals, though

in unpublished decisions. *See, e.g., Gilstrap v. Radianz, Ltd*., No. 06-3984, 2007 U.S. App. LEXIS 13686 (June 11, 2007) (dismissing a tortious interference claim in favor of an English forum).

Of the most interesting unpublished decisions applying the actual holding in *Sinochem*, the Third Circuit has ironically moved to the forefront. In *Davis Int'l, LLC v. New Start Group Corp*., Nos-06-2294/2408, U.S. App. LEXIS 12032 (3rd Cir., May 23, 2007), a group of Russian defendants were sued in the District Court for the District of Delaware, and sought to dismiss the claims based on, *inter alia*, subject-matter jurisdiction, personal jurisdiction, and direct estoppel of a prior federal decision. The latter motion was based on a 2000 decision by the Southern District of New York that dismissed indentical claims against the Defendants on forum non conveniens grounds in favor of a Russian forum. The District of Delaware dismissed the new claims "by reason of the estoppel effect of another court's forum non conveniens decision, without first deciding [Plaintiff's] subject-matter and personal jurisdiction motions." The Third Circuit (per judge Debevoise, sitting by designation) affirmed this course "in light of" *Sinochem* . *Davis* thus represents a slight expansion of *Sinochem;* not only are forum non conveniens dismissals proper before jurisdiction is established, but so are estoppel dismissals based on a prior forum non conveniens determination