Articles on Family Law and English Private International Law

A few short articles on various aspects of private international law in family law have been published this week. They are:

James Copson (*Withers LLP*), Alain Berger (*Berger Recordon & de Saugy, Geneva*) and Alexandre Boiche (*Cabinet Veronique Chaveau, Paris*), "**Cross-border Matrimonial Law**" *Family Law Journal* (2006) No.60 October Pages 3-5. The abstract reads:

> *This, the second in a series of international articles, uses a case study involving an international couple who own properties in England, Switzerland and France and who are divorcing after a long marriage to explain how the choice of jurisdiction can effect the financial award made. Summarises the approach adopted in each jurisdiction to: (1) the division of assets, including the effect of prenuptial agreements; (2) applications for compensation for loss of the ability to share the other parties future income; (3) child support; and (4) taxation of awards. Outlines the position under European law to determining habitual residence and to the effect of competing proceedings.*

Suzanne Kingston and Faye Fitzsimmons (*Dawsons*), "**Miller and McFarlane – the international aspects**" *Family Law Journal* (2006) No.60 October Pages 16-18. The abstract reads:

> *This, the second of two articles considering the House of Lords judgment in Miller v Miller, discusses the potential for the decision to lead to an increase in forum shopping within the EU in divorce cases involving international couples with substantial assets. Uses a case study involving German nationals to compare the financial consequences of divorce proceedings commenced in England with those resulting from proceedings being issued in Germany. Considers the impact the proposed EU Regulation, known as Rome III, will have on choice of jurisdiction.*

Keith Gordon (Atlas Chambers), "**Jurisdiction jigsaw**" *Solicitors Journal* (2006)

Vol.150 No.41 Pages 1378,1380. The abstract reads:

> *Explains the importance of the law on domicile for applications made under the Inheritance (Provision for Family and Dependants) Act 1975 and other areas of the law. Considers the distinction between domicile of origin and domicile of choice, providing examples of a revived domicile of origin and the acquisition of a new domicile of choice. Notes the need to prove a permanent and indefinite intention to reside in a domicile of choice.*

All of the articles can be found on Lawtel.

German Publication: Private International Law and International Procedural Law

The 13th edition of the German collection of rules on private international law and international procedural law – "Internationales Privat- und Verfahrensrecht" – edited by Erik Jayme and Rainer Hausmann has been published. It contains the German conflict of law rules (EGBGB) as well as bi-and multilateral conventions and European rules on all areas of private international law and international procedural law.

More information can be found on the publisher´s website.

Community Competence to Conclude the New Lugano Convention

An interesting article discussing Opinion 1/03 where it has been held that "the conclusion of the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (…) falls entirely within the sphere of exclusive competence of the European Community" has been published in the German Law Journal Vol. 7 No. 8: Tristan Baumé: **Competence of the Community to Conclude the New Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters: Opinion 1/03 of 7 February 2006.**

The full article can be viewed here.

EU Commission Green Paper: Improving the efficiency of the enforcement of judgments in the EU: the attachment of bank accounts

On 24 October 2006, the European Commission adopted a Green Paper on **"Improving the efficiency of the enforcement of judgements in the European Union: the attachment of bank accounts"** (COM(2006) 618 final). The European Commission's newsroom website states:

> *The problems of cross-border debt recovery is an obstacle to the free*

circulation of payment orders within the European Union and an impediment for the proper functioning of the Internal Market.

By now, debtors are able to move their monies almost instantaneously, out of accounts known to their creditors into other accounts in the same or another Member State. At the contrary, creditors are not able to block these monies with the same swiftness and when seeking to enforce an order in another Member State they are confronted with legal, procedural and language obstacles which entail additional costs and delays. Above all, under existing Community instruments, it is not possible to obtain a bank attachment of one's debtor's bank account(s) which can be enforced throughout the European Union. Aware of the difficulties of cross-border debt recovery, the EU Commission has decided to concentrate in a first step the public Consultation on protective measures improving the attachment of bank accounts.

The Commission go on to state the need for consistency in the attachment of bank accounts thus:

Enforcement law has often been termed the "Achilles' heel" of the European Civil Judicial Area. While a number of Community instruments provide for the jurisdictional competence of the courts and the procedure to have judgments recognised and declared enforceable as well as mechanisms for co-operation of courts in civil procedures, no legislative proposal has yet been made for actual measures of enforcement. To date, execution on a court order after it has been declared enforceable in another Member State remains entirely a matter of national law.

Current fragmentation of national rules on enforcement severely hampers cross-border debt collection. While debtors are today able to move their monies, almost instantaneously, out of accounts known to their creditors into other accounts in the same or another Member State creditors are not able to block these monies with the same swiftness thereby risking that their claims remain unpaid. Under existing Community instruments, it is not possible to obtain a bank attachment which can be enforced throughout the European Union.

A consistency of approach amongst the Member States as regards the attachment of bank accounts would remedy to this situation and might also help

> *to avoid potentially discriminatory effects where remedies in different Member States create disparity in outcomes quite apart from the potential, and probably actual, affects on the functioning of the Internal Market.*

In addition, a "Green Paper on how to improve the transparency of the debtor's assets will follow by the end of 2007." It would appear that the drive towards a unified set of procedural rules, with the European Payment Procedure Order and the European Small Claims Procedure also at full steam ahead, shows no sign of slowing.

Documents (PDF):

- COM (2006) 618: Improving the efficiency of the enforcement of judgements in the European Union: the attachment of bank accounts
- SEC (2006) 1341: Commission staff working document annex to the green paper on improving the efficiency of the enforcement of judgments in the European Union: the attachment of bank accounts
- IP/06/1460: Improving the efficiency of the enforceability of cross-boarder debt collection
- MEMO/06/398: Green Paper on improving the efficiency of the enforceability of cross-boarder debt collection

Responses to the Green Paper must be submitted no later than **31 March 2007**.

Hat-tip to *Andrew Dickinson* for the link.

Recognition and Enforcement of

Foreign Intellectual Property Judgments: Analysis and Guidelines for a New International Convention

Yoav Oestreicher (Bar Ilan University) has posted an article on the Social Science Research Network (SSRN) entitled, "**Recognition and Enforcement of Foreign Intellectual Property Judgments: Analysis and Guidelines for a New International Convention**". The abstract reads:

This dissertation attempts to analyze the reasons for the continuing failure of the international community to agree on a single international comprehensive instrument that regulates recognition and enforcement of foreign judgments, especially following the negotiations that took place at the Hague Conference on Private International Law until June 2005, by concentrating on intellectual property as a model. It is concluded that the continuing attempt to base the proposed instruments on a "mixed" or "double" convention model, thus combining the question of recognition and enforcement of the foreign judgment with the substantially complicated question of jurisdiction of the rendering court is unjustified. The inability to agree on the jurisdiction question due to economic, cultural and financial reasons resulted in the continuing inability to regulate this field.

The dissertation proposes a somewhat revolutionary minimalist solution to the problem, which is based on a "simple" convention model that promotes a "presumption of enforceability" rule with very broad exceptions such as public policy, due process, and jurisdiction. The proposed guidelines for a new international convention do not directly address the issue of jurisdiction, but rather indirectly, as an exception to the general rule of enforcement. By creating the convention within the framework of the TRIPs Agreement, it will enjoy some of the elements that are already contained therein. In the future, this model could be broadened in scope to also apply to other fields of law. Success of this proposed convention will bring stability and create confidence and trust among potential member countries, thus serving as the basis for a

broader international solution.

The full article can be downloaded from here.

EU Council Publishes Decision on Accession to the Hague Conference

The EU Council has released its **decision on the accession of the Community to the Hague Conference on Private International Law (**see our earlier note here for its announcement after the JHA meeting). The decision states:

> *1. The Community shall accede to the Hague Conference on Private International Law (HCCH) by means of the declaration of acceptance of the Statute of the HCCH (Statute), as set out in Annex I to this Decision, as soon as the HCCH has taken the formal decision to admit the Community as a Member.*
>
> *2. The Community shall also deposit a declaration of competence specifying the matters in respect of which competence has been transferred to it by its Member States, as set out in Annex II to this Decision, and a declaration on certain matters concerning the HCCH, as set out in Annex III to this Decision.*

The Declaration of competence of the European Community specifying the matters in respect of which competence has been transferred to it by its Member States is set out in Annex II of the decision; the European Community notably has competence under Title IV of the EC Treaty to adopt measures in the field of judicial cooperation in civil matters having cross-border implications insofar as necessary for the proper functioning of the internal market (Articles 61(c) and 65 EC Treaty). These measures include:

- improving and simplifying the system for cross-border service of judicial

and extrajudicial documents; cooperation in the taking of evidence; the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases;
- promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction;
- eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.

See here for the full decision of the Council, as well as the Annexes (including the Statute of the Hague Conference on Private International Law).

United States Supreme Court to Consider Constitutionality of Punitive Damage Award

The United States Supreme Court is scheduled to hear argument on Monday, October 31, in a matter which again visits the basic question of when an American punitive damage award is unconstitutionally excessive. In *BMW of North America v. Gore*, 517 U.S. 559 (1996), the Supreme Court first created constitutional limitations on punitive damages, requiring courts to weigh the reprehensibility of the defendant's conduct, the relationship between the harm suffered by the victim and the amount of punitive damages, and the relationship between the size of the punitive damage award and civil or criminal penalties that could be imposed for the defendant's conduct. Most recently, in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), the Court prohibited consideration of wrongful conduct other than the harm to the individual victim in assessing punitive damages, and noted that few awards exceeding a single-digit ratio of punitive to compensatory damages would be constitutional, although there could be exceptions. Now at issue in *Philip Morris USA v. Williams* is whether and how the Supreme Court's limitations in *Gore* and *Campbell* ought to apply to tortfeasors that engaged in what is deemed "extraordinarily reprehensible" conduct.

Though not a traditional topic of private international law, this case is of obvious interest to

international practitioners and private international law scholars, as American judgments abroad have long met significant opposition to recognition and enforcement abroad due to the incidence and size of punitive damage awards.

Interesting articles regarding the case and upcoming argument can be found here and here. The decision of the Oregon Supreme Court below can be found here. As always, we have provided links to both the Petitioner's Brief on the Merits as well as Respondent's Brief. The published oral argument transcript is linked here.

Another Step Forward: Recognition of Non-Monetary Orders in Ontario

The courts of Ontario have taken another step forward in the recognition and enforcement of foreign non-monetary orders. *In Re Grace Canada Inc.* (available here) the Superior Court of Justice recognized a Manitoba order which had allowed a law firm to act in a particular matter by finding it was not in a conflict of interest. Grace Canada Inc. had opposed recognition on the basis that the Manitoba order was non-monetary. The Superior Court of Justice relied on two earlier recent Court of Appeal for Ontario decisions supporting the recognition of non-monetary orders: *Re Cavell Insurance Co.* (available here) and *Pro-Swing v. ELTA Golf Inc.* (available here). An appeal of the latter decision was heard by the Supreme Court of Canada in December 2005 and a decision is eagerly awaited.

Conference: The Evolving World of International Law

The American Branch's 2006 International Law Weekend 2006 will be held on **Thursday-Saturday, October 26-28, 2006**, at the Association of the Bar of the City of New York (42 West 44th St, New York, NY). The theme this year is **"The Evolving World of International Law."** The panels on private international law focus on the following topics:

Enforcing Foreign Judgments and Awards: Worlds Apart? Friday October 27, 2006, 9:00 am – 10:30 am

This panel will compare the recognition and enforcement of foreign judgments and international arbitration awards. It will also discuss the proposed Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters. In particular, this panel will explore whether the new Hague Convention, if adopted, would bridge the present gap between the enforcement of foreign judgments and international arbitration awards.

- Chair: Julie Bedard, Esq., *Skadden, Arps, Slate, Meagher & Flom LLP*
- *Panelists:* Prof. George A. Bermann*, Jean Monnet Professor of EU law & Walter Gellhorn Professor of Law, Columbia University School of Law*
- John Fellas, Esq.*, Partner Hughes Hubbard & Reed LLP*
- John L. Gardiner, Esq.*, Partner, Arps, Slate, Meagher & Flom LLP*

From *Owusu* to *Parlatino:* European Union and Latin American Challenges to Forum Non Conveniens Friday October 27, 2006, 10:45 am – 12:15 pm

In 2005, the European Court of Justice, in *Jackson v. Owusu*, ruled forum non conveniens to be incompatible with the United Kingdom's obligations under the Brussels regulation. A continent apart, the Ecuadorian legislature in 1998 pronounced that, when an Ecuadorian filed an action abroad, the act of filing terminated the jurisdiction of the Ecuadorian courts. This legislation caused the Parlatino movement to urge the adoption of similar legislation throughout the Latin America. What is the future of the FNC in the light of these actions?

- Chair: Professor Michael Gordon Wallace, *University of Florida Levin*

College of Law

- Panelists:Henri Saint Dahl, Esq., *Adjunct Secretary General, Inter-American Bar Association*
- Prof. Alejandro M. Garro, *Columbia University School of Law*
- Prof. Loukas Mistelis, *Queen Mary, University of London*
- Prof. Louise E. Teitz, *Roger Williams University*

Recent Developments and Future Trends in Private International Law
Friday October 27, 2006, 4:00 pm – 5h30 pm

Harmonization and codification in the field of private international law has an increasing impact on the work of practitioners and the interests of their clients. This panel will address some of the most important developments and the interest of their clients. This panel will address some of the most important developments and ongoing projects taking place in UNCITRAL, UNIDROIT, the Organization of American States and the Hague Conference of Private International Law, including in such diverse areas as recognition and enforcement of judgments and choice of court agreements, secure finance, electronic commerce, consumer protection, service of process and taking abroad.

- Chair: David P. Stewart, Esq., Office of the Legal Adviser, *U.S. Department of State & Co-chair, ABILA Extraterritorial Jurisdiction Committee*
- Panelists:David A. Baron, Esq., *McDermott Will & Emery LLP*
- Prof. Amelia H. Boss, *Temple University Beasley School of Law*
- Prof. Ronald A. Brand, *University of Pittsburgh School of Law*
- John M. Wilson, Esq., Legal Adviser, *Department of International Legal Affairs, Organization of American States*

All panels are open to students and all members of the ILA and cosponsoring organizations without charge. For others there is a fee payable at the door.

For more information, please visit the web site of the American Branch of the International Law Association.

U.S. Supreme Court To Hear Case Concerning The Scope and Applicability of The Forum Non Conveniens Doctrine

For the first time since *Piper Aircraft Co. v. Reyno* in 1982, the United States Supreme Court will hear a case concerning the scope and applicability of the forum non conveniens doctrine when parallel proceedings are contemplated in a foreign court. In granting the petition for a writ of certiorari in *Sinochem Int'l Co., Ltd. v. Malaysia International Shipping Corp.*, No. 06-102, the Supreme Court agreed to decide "[w]hether a district court must first conclusively establish jurisdiction before dismissing a suit on the ground of *forum non conveniens*?" This question has divided the Unites States Courts of Appeals for nearly a decade, with the D.C. and Second Circuits holding that jurisdiction is not a prerequisite for a forum non conveniens dismissal, and the Ninth, Fifth, Seventh and Third Circuits holding the opposite. The decision, which should be forthcoming in the Spring of 2007, has potential importance to all non-U.S. companies who are sued in the courts of the United States for matters having little or no connection to the U.S. The Justices selected the *Sinochem* matter as one of the nine cases that it granted review to on September 26 (out of 1,900 petitions that had been stacked up on the Court's docket over its Summer recess). The case will be argued before the Justices in January 2007.

The Order granting the Writ of Certiorari is available here; the Petition for Writ of Certiorari is available here; the Brief in Opposition to Certiorari is available here; and the Reply Brief in Support of Certiorari is available here.

Disclaimer: Charles Kotuby is an Associate in the Washington D.C. Office of Jones Day, who represents Petitioner in this matter.