House of Commons Select Committee on European Scrutiny and the Conflict of Laws

The House of Commons Select Committee on European Scrutiny has produced its thirty-seventh report. It includes discussion of the

- **Draft Regulation on the law applicable to contractual obligations (Rome I)**,
- **Commission Green Paper on conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition**, and the
- **Draft Council Regulation amending Regulation (EC) No. 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters**.

The section on the Draft Regulation on the law applicable to contractual obligations (Rome I) contains an interesting, if out-of-date, appraisal of the Rome I Proposal by Parliamentary Under-Secretary of State at the Department for Constitutional Affairs (Baroness Ashton of Upholland) in a letter dated 20th July 2006. The Under-Secretary of State's objections to Rome I follow the usual pattern, the legislative bones of contention include: Article 1 (scope); Article 3 (freedom of choice); Article 4 (applicable law in the absence of choice); Article 5 (consumer contracts); Article 7 (agency); Article 8(3) (application of the mandatory rules of third countries); Article 13 (voluntary assignment and contractual subrogation) and Article 21 (States with more than one legal system).

Article 8(3) (application of the mandatory rules of third countries) is, of course, cited by the Under-Secretary of State as "the greatest single reason behind the [UK] Governments decision not to opt-in under our Protocol". The Select Committee agreed with the Under-Secretary's evaluation, stating:

> *We welcome the Government's decision not to opt into this proposal. We also agree with the Government that notwithstanding this decision the United Kingdom should try to participate constructively in the framing of the proposed legal instrument. We ask the Minister to keep us informed as negotiations*

continue.

With its deletion in both the JURI report (to which the Under-Secretary alludes in her letter), and the Finnish Presidency text produced on the basis of meetings in the Committee of Civil Law (we do not believe the Finnish Presidency Rome I text is publicly available yet), a partial thawing of the attitude towards Rome I *may* be on the horizon in the UK executive.

In response to the Commission Green Paper on conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition, Government Minister Harriet Harman "cautiously" states:

> *This is an area of very considerable technical complexity, and the differences in the law relating to matrimonial property differs significantly among the various Member States.* ***The relatively high-level questions raised in the Green Paper do not obviously reflect this concern****. The Government will consider how best to respond to the Green Paper and will keep the Scrutiny Committees informed.*

The Scrutiny Committee's equally cautious response:

> *We ask the Minister to explain under what legal base, if any, the Commission may bring forward future legislative measures pertaining to the applicable law regimes governing trans-national matrimonial property proceedings. We also ask the Minister for further information as and when the Government's position on the specific questions raised by the Commission crystallises, and in any event, before the Government formally replies to the Commission.*

The Draft Council Regulation amending Regulation (EC) No. 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters also receives a mixed welcome, with the Parliamentary Under-Secretary of State raising concerns about the applicable law under the Draft Regulation:

> *A number of other Member States have rules which allow foreign law to apply to family proceedings. However, family courts in the UK are not accustomed to applying foreign law. The Government's approach is that such provisions are*

not obviously necessary here and that the law of the forum should continue to apply.

"The Government is concerned that to apply the law of a foreign jurisdiction in the UK could involve considerable practical difficulties, cause delay and increase costs, because it may be necessary to call expert evidence as to the foreign law. It is Government policy that the costs to parties should be reasonable. The Government is not at this point wholly persuaded that there are such problems with the lex fori principle to justify departure from that principle.

The response by the Scrutiny Committee is fairly negative as well:

...we share the Government's reservations about the practical difficulties involved in the application of a foreign law in matrimonial proceedings. We ask the Ministers if the Government's thinking in this respect has changed and, if not, if the Government nevertheless intends to opt into this proposal under Title IV.

...we are concerned in particular about the added complexity and additional costs of litigation likely to flow from applying foreign law not only in the courts of England and Wales but also in Scotland and Northern Ireland.

Finally, we note that legal problems associated with "international marriages" are not restricted to marriages between spouses of EU nationalities. We therefore ask the Minister if the Government agrees that the Hague Conference on Private International Law would more appropriately deal with this issue.

All comments welcome.

Publication: On Jurisdiction and the Recognition and Enforcement of Foreign Money Judgments

Christian Schulze (University of South Africa) has published a mongraph: ***On Jurisdiction and the Recognition and Enforcement of Foreign Money Judgments*** (Unisa Press). It is the first book of its kind to cover African countries, including Botswana • Malawi • Namibia • South Africa • Swaziland • Tanzania • Uganda • Zambia. The publisher states:

> *This is a systematic and thorough exposition, with abundant reference to relevant local and international statutes, conventions, treaties, case laws and other authorities, which makes it a very valuable source of knowledge in this field.*
>
> *In an ever-shrinking world where trade and commerce flow almost naturally across all national boundaries, it is no surprise that the number of cross-border disputes is on the rise. A significant problem associated with the resulting increasing international litigation is the absence of international courts with mandatory jurisdiction in international commercial matters.*
>
> *Once the litigant has overcome the hurdle of identifying the court which has jurisdiction to hear the international dispute, he may yet face the problem of having the judgment of that court recognised and enforced in another country.*
>
> *This book is intended to provide some guidelines for establishing the right forum and having a judgment recognised and enforced in another forum. It deals not only with South African, but also with European and English law, as well as the laws of seven Southern African countries.*

ISBN 1 86888 340 X (item 7461) xxii + 331pp, soft cover :SA price R119,00 (VAT incl) :Other countries in Africa R169,40 (airmail incl) :Europe and elsewhere: US$31.30 GB?19.90 €27.40 (airmail incl). It can be purchased directly from Unisa Press.

We will shortly be posting a review of the book, so stay tuned.

Rome II – All Change?

There is a short note in the new issue of the New Law Journal by Stephen Turner (*Beachcroft LLP*) entitled "**Rome II – all change?**" The abstract reads:

> *Considers the UK law as it applies to torts committed overseas, with reference to the House of Lords ruling in Harding v Wealands, where a road traffic accident had occurred in Australia. Examines the provisions of the Private International Law (Miscellaneous Provisions) Act 1995 on how to deal with international disputes and how the provisions of the Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (Rome II) will change how the appropriate jurisdiction is determined, considering if any exception should be made for product liability claims.*

Ref: *New Law Journal N.L.J. (2006) Vol.156 No.7247 Pages 1666-1667.* Available on Lawtel.

Conference: Private International Law in Family Matters

The international conference titled “Family Relations Having an International Element in the Case Law of the States Successors to the Former SFRY and in the European Union” (*Obiteljskopravni odnosi s me?unarodnim obilježjem u sudskoj praksi država bivše SFRJ i Europskoj uniji*) was held on 26 and 27 October 2006 in Zagreb, Croatia. The conference was dedicated to various private international law issues in the field of family law, but had a particular purpose to enable comparison of the case law in this field which is generally subject to the same

conflict rules in all the successor states of the former Yugoslavia, with some exceptions in Slovenian law as a result of the adoption of the new Private International Law Act in 1999, and of course membership in the EU. Therefore, the first part of the conference consisted of national reports:

- *Croatian National Report*: Prof. dr. sc. Hrvoje Sikiri? (Faculty of Law, University of Zagreb)
- *Serbian National Report*: Prof. dr. sc. Bernadet Bordaš (Faculty of Law, University of Novi Sad)
- *Slovenian National Report:* Doc. dr. sc. Suzana Kralji? (Faculty of Law, University of Maribor)
- *Interlocal Family Conflict of Laws in Bosnia and Herzegovina*: Prof. dr. sc. Valerija Šaula (Faculty of Law, University Banja Luka)

The next part of the conference was dedicated to the Hague Conventions in the area of family law, in particular the following were discussed:

- *The 1993 Hague Convention on Adoption*: Doc. dr. sc. Vjekoslav Puljko (Faculty of Law, University of Osijek)
- *The Hague Conventions on Maintenance*: Prof. dr. sc. Vesna Tomljenovi? (Faculty of Law, University of Rijeka)
- *The Law Applicable to Maintenance of Children*: Mr. sc. Mirela Župan (Faculty of Law, University of Osijek)

The third set of presentations dealt with some property-related aspects of family relations:

- *Law Applicable to Property Relations in Marriage and Non-Marital Cohabitation*, Mr. sc. Ivana Kunda (Faculty of Law, University of Rijeka)
- *Law Applicable to Marital Agreement*: Mr. sc. Irena Majstorovi? (Faculty of Law, University of Zagreb)
- *Engagements in Private International Law*: Prof. dr. sc. Vilim Bou?ek (Faculty of Law, University of Zagreb)

Although former presentations often made references to Community legislation *de lege lata* and *de lege ferenda*, the last section was particularly devoted to two recent developments:

- *New Proposal on the Brussels II bis Regulation*: Prof. dr. sc. Vesna Lazi?

(Faculty of Law, University of Utrecht)
- *Law Applicable to Divorce*: Iva Perin, dipl. iur. (Faculty of Law, University of Zagreb)

The conference discussion yielded some general conclusions, among which the non-application by the courts of conflict rules seemed to have caught the attention of most participants. National reporters as well as other speakers identified the problem in the lack of reasons concerning the court's jurisdiction and governing law in international cases. While the conference participants unanimously agreed that the non-application of conflict of law and conflict of jurisdiction rules is a chronic disease in the entire region, its cause was perceived differently. Prof. Gašo Kneževi? attributed this phenomenon to the complexity of the private international law, Prof. Željko Mati? believed that the reason laid in the lack of awareness and, as Prof. Batiffol noted long ago, was an instinctive rejection of the foreign law, Prof. Vesna Lazi? found further reason to exist in the lengthy and complex process of ascertaining the content of foreign law to what Prof. Vesna Tomljenovi? subscribed and added that the attorneys at law sometimes make the choice when commencing the proceedings not to raise the issues of international jurisdiction and applicable law in order to avoid over-complex proceedings. In the represented legal systems of the South-East European region the polarization is thus more than obvious: on the one hand, the scholarly interpretations ascribe to the conflict rules the strength of *ius cogens*, and on the other hand, the courts are practicing the facultative application of the conflict rules. The discussion recognised the need to resolve this situation. Proposed means to that effect might include intensified education for practitioners or, as Prof. Tibor Varady proposed, concentration of jurisdiction in certain matters. One interesting observation was made by Assist. Prof. Davor Babi? who envisioned the emergence of *Matrimonium Europea* similarly to the creation of *Societas Europea*.

This was the fourth time in a row that private international law scholars gathered to talk about contemporary developments in the region and the EU, making this international conference almost a traditional one. The first one, held in 2003, was hosted by the University of Niš (Serbia), the second by the University of Maribor (Slovenia) and the third by the University of Belgrade (Serbia). It is noteworthy that the 2006 conference was organized by the Faculty of Law of the University of Zagreb in the year when this Faculty is celebrating its 230th anniversary.

Torts and Choice of Law: Searching for Principles

Keith N. Hylton (*Boston University School of Law*) has just published an article entitled "**Torts and Choice of Law: Searching for Principles**" on SSRN. The abstract reads:

> *If a tortious act (e.g., negligently firing a rifle) occurs in state X and the harm (e.g., killing a bystander) occurs in state Y, which state's law should apply? This is a simple example of the "choice of law" problem in torts. The problem arises between states or provinces with different laws within one nation and between different nations. In this comment, prepared for the 2006 American Association of Law Schools Annual Meeting, I examine this problem largely in terms of incentive effects, and briefly consider how the analysis could be incorporated into the standard introductory course on tort law. I conclude that a zone of foreseeable impact rule provides the best underlying principle in conflict of law situations. This rule supports the traditional legal approach (lex loci) to conflicts of laws and helps to explain modern approaches as well.*

You can download the full article here.

October 2006 Round-Up: Private International Law Decisions in United States Courts

Three recent decisions from the U.S. federal courts present some interesting

issues for this site's readership. The first case of interest comes from the Second Circuit Court of Appeals, often a bellwether for private international law matters. In Royal Sun Alliance Ins. Co. of Canada v. Century Int'l Arms, Inc., a unanimous panel led by Judge Lynch reversed a dismissal entered by the district court because of a parallel proceeding underway in Canada. Tightening the court's abstention doctrine, the panel held that "[T]he existence of a parallel action in an adequate foreign jurisdiction must be the beginning, not the end, of a district court's determination of whether abstention is appropriate. . . . [Beyond] the mere existence of an adequate parallel action, . . . additional circumstances must be present — such as a foreign nation's interest in uniform . . . proceedings — that outweigh the district court's general obligation to exercise its jurisdiction." On remand, the court ordered the district court to consider granting "a measured temporary stay [that] need not result in a complete forfeiture of jurisdiction, . . .[a]s a lesser intrusion on the principle of obligatory jurisdiction." Such an action, in the court of appeals' eyes, "might permit the district court a window to determine whether the foreign action will in fact offer an efficient vehicle for fairly resolving all the rights of the parties, [which should] normally should be considered before a comity-based dismissal is entertained."

Second, a deepening split of authority was presaged in an unpublished decision of the District of New Jersey. In Rogers v. Kasahara, plaintiff utilized the Article 10(a) of the Hague Service Convention to serve process on Japanese defendants via "postal channels." The Eighth and Fifth Circuits adhere to a "strict constructionist" view of the convention, and hold that the meaning of the word "send" in Article 10(a) does not include "serve"; that is, they permit the sending of judicial documents by mail, but only after service of process was accomplished by some other means. The Second and Ninth Circuits, however, hold in accordance with the bulk of international consensus that the meaning of "send' in Article 10(a) includes "serve," allowing postal channels to be utilized absent a specific objection by the signatory state. The District of New Jersey, recognizing further discordance within its home circuit (i.e. the Third), followed the latter approach and denied a motion to dismiss for the failure to properly serve the foreign defendants. A copy of this decision will be posted when one becomes available.

Lastly, notwithstanding the lively academic debate and his own protestations to the contrary, Seventh Circuit Judge Richard A. Posner decided that U.S. courts must sometimes accord precedential effect to foreign law. In Carris v. Marriott

Int'l, Inc., a plaintiff filed suit in Illinois as a result of breaking his leg while jet skiing in the Bahamas. A unanimous panel applied the "most significant relationship" analysis, and concluded that Bahamian law applied to the dispute, despite Plaintiff's argument — disputed in its correctness by Judge Posner — that his primary recourse under the "apparent authority" doctrine of English common law, was not available in Bahamian courts.

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.