EU Matrimonial Property and Divorce Proposals

The EU has published a **Green Paper** and a **Proposal** in the fields of matrimonial property, and the jurisdictional rules and law applicable to divorce respectively.

Green paper on conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition

> *The Commission has adopted a new Green Paper to launch a wide-ranging consultation exercise on the difficulties arising in a European context for married and unmarried couples when settling the property consequences of their union and the legal means of solving them. The Green Paper mainly deals with issues concerning the determination of the law applicable to the property consequences of such unions and ways and means of facilitating the recognition and enforcement in Europe of judgments and formal documents relating to matrimonial property rights, and in particular marriage contracts.*

> *In this Green Paper the Commission focuses on questions concerning matrimonial property rights, that is to say the legal rules relating to the spouses' financial relationships resulting from their marriage, both with each other and with third parties, in particular their creditors. We are concerned here, for example, with couples not sharing the same nationality who separate and leave property in a Member State, or couples sharing the same nationality who divorce and have property in another Member State. The Green Paper also considers the question of the property consequences of other forms of unions, such as registered partnerships. In all Member States, more and more couples are formed without a marriage bond. To reflect this new social reality, the Green Paper also addresses the question of the property consequences of the separation of unmarried couples in an international context.*

New Community rules on applicable law and jurisdiction in divorce matters to increase legal certainty and flexibility and ensure access to

court in "international" divorce proceedings

> *The Commission proposes to introduce harmonised rules on applicable law and to revise the existing jurisdiction rules in divorce matters. The aim is to enhance legal certainty and flexibility for the thousands of couples who are involved in "international" divorce proceedings each year in the European Union. Another aim is to ensure access to court for EU citizens living in third States.*

Source: BIICL Mailing List

Harding v Wealands

The House of Lords has handed down its judgment in *Harding v Wealands* [2006] UKHL 32.

> *The issue is whether damages for personal injury caused by negligent driving in New South Wales should be calculated according to the applicable law selected in accordance with Part III of the Private International Law (Miscellaneous Provisions) Act 1995 (hereafter "Part III") or whether it is a question of procedure which falls to be determined in accordance with English law. The Court of Appeal, by a majority (Arden LJ and Sir William Aldous, Waller LJ dissenting) held that it should be determined in accordance with the applicable law, which they decided was the law of New South Wales. In my opinion the dissenting opinion of Waller LJ was correct and the question is one of procedure governed by the law of the forum (para. 13 per Lord Hoffman).*

The full judgment of the House of Lords can be downloaded from here. Comments on the decision are welcome.

EU Commission Study on “Brussels I”

The University of Heidelberg has been asked to head Study JLS/C4/2005/03 by the EU Commission, concerning the application of Regulation 44/2001/EC ("Brussels I"). The full description of the study is as follows:

The European Commission has asked Prof. Hess, Prof. Pfeiffer and Prof. Schlosser (University of Munich) to elaborate a comparative study concerning the evaluation of the practical application of the " Brussels I" Regulation in the 25 European Member States. The study shall prepare a report for the Commission on the application and on the future revision and improvement of the Regulation (see Article 73 Reg. 44/01/EC). The specific objective of the study is to conduct an empirical analysis of the application of Regulation 44/2001/EC.

For the preparation of the study, three questionnaires have been elaborated: The first aims at collecting statistical data about the application of the Regulation. The second focuses on collecting empirical information about the performance of the Brussels I Regulation. The last questionnaire addresses legal problems of the Regulation. The questionnaires are going to be sent to national reporters in the Member States. They will be transmitted to interested and experienced persons in the respective countries, i.e. judges, lawyers, bailiffs who are practising in the field of the Brussels Regulation. In addition, the collaborators of the project will contact and interview persons and ask them about their practical experience with the Brussels Regulation.

The organisers of the study are now looking for persons in all EU-Member States who are willing to answer the questions and to provide us with the necessary information. Everyone is invited to answer the questionnaires and to contact the the collaborators of the Institute.

To learn more about the Study, and to contribute, log on to their website.

The Impact of Recent Judgments of the European Court

Adrian Briggs' recent article in the **University of Oxford Faculty of Law Legal Studies Research Paper Series**, entitled *The Impact of Recent Judgments of the European Court on English Procedural Law and Practice*, is now available for download from here.

The abstract reads as follows:

"Writing in 1991 in the Revue critique de droit internationale prive, and analysing three decisions of the English courts on the relationship between jurisdiction under the Brussels Convention and the common law doctrine of forum non conveniens, Professor Gaudemet-Tallon entitled her paper "Forum non conveniens: une menace pour la convention de Bruxelles (a propos de trois arrets anglais recents)". Such a title left the reader in little doubt of the gist of the views which were to follow. But it marked the beginning of a period of intellectual debate, which required English lawyers to consider the extent to which the rules of the common law on the jurisdiction of courts would relate to the new arrangements contained in the rules of the Brussels and Lugano Conventions. By and large it is fair to say that the views of English lawyers were not uniform though, as is the way in England, the most influential view tends to be that of the Civil Division of the Court of Appeal; and it generally adhered to the view that a court could still find that the forum conveniens was in a non-Contracting State and so stay the proceedings, which had caused Professor Gaudemet-Tallon such alarm. In preparing this paper for the seminar, I had seriously considered giving it the sub-title "La Cour de Justice: une menace pour la moralite du litige commercial (a propos de trois arrets europeens recents)". But it seemed to me that it was a strategic mistake to tell people what they were going to hear for fear that they would stop listening. So let me introduce this paper by observing that, when seen from London, the European Court has just completed fifteen months of infamy. Or, to put it another way, its three recent judgments on matters of acute relevant to commercial litigation in London have left a sense of real

disappointment, and more than a little indignation. In part this is attributable to the lamentable quality of the reasoning displayed on the face of the judgments. But in further part, as it seems to me, it proceeds from a realisation that the European Court brings a public lawyers' approach to an issue which ought to be seen as being one of intensely private law, and appears to be unaware or unconcerned that this is itself an issue which is controversial. The structure of this paper is therefore as follows A. The fundamental nature of English law on the jurisdiction of courts (i) Rules of Jurisdiction (ii) Control of forum shopping (iii) The role of consent B. The material judgments of the Court of Justice (i) Failure to enforce jurisdiction agreements: Erich Gasser GmbH v MISAT srl (ii) Failure to prevent wrongdoing in the assertion of jurisdiction: Turner v Grovit (iii) Rejection of the right to apply forum non conveniens: Owusu v Jackson (iv) Summary view C. An explanation for differences in approach of English courts and the European Court D. The limits of the decisions: how far do they go ? (i) Jurisdiction under Article 2 (ii) Jurisdiction under Article 4 (iii) Proceedings between parties who have agreed to arbitrate (iv) Enforcement of jurisdiction agreements by other means (v) Future legislation on choice of law E. Conclusions."

UK Government to opt-out of Rome I Regulation

In a controversial decision, the UK Government has decided **not** to opt-in to the proposed Regulation on the law applicable to contractual obligations ("Rome I").

- Information on Rome I (press release)
- The Report of the Financial Markets Law Committee (which may have had an impact on the UK decision)

Further information will be posted as it becomes available.

Source: BIICL Mailing List

Cambridge Law Journal Case Notes

The new edition of the **Cambridge Law Journal**, **VOL 65; PART 1; 2006**, discusses two recent cases:

- Domicile – illegal resident: *Mark v. Mark*. (pp. 35-36)
- Renvoi – proof of foreign law: *Neilson v. Overseas Projects Corporation of Victoria Ltd*. (pp.37-39)

More details on the CLJ can be found at its website.

Source: Zetoc alerts

EU Council reach political agreement on Rome II

The EU Council, with Estonia and Latvia entering reservations, have reached a political agreement on the Regulation applicable to non-contractual obligations ("Rome II").

The press release from the 2725th Council Meeting can be downloaded here (PDF) – the relevant section can be found on pages 23-24.

Source: BIICL Mailing List

Overseas Treatment for NHS Patients

"**Overseas Treatment for NHS Patients**" by ***Cara Guthrie*** (Outer Temple Chambers) and ***Hannah Volpe*** (Bevan Brittan LLP) *Journal of Personal Injury Law* J.P.I. Law (2006) No.1 Pages 12-20.

The article considers the legal position of patients and NHS trusts in the event of a clinical negligence action arising from substandard medical treatment received outside the UK. Reviews the main principles underpinning both the NHS Overseas Commissioning Scheme and the E112 scheme, and the likely outcome of actions in which an NHS trust argued that its duty of care did not extend to the clinical services given by an overseas provider, highlighting the approach adopted by the Court of Appeal in *A (A Child) v Ministry of Defence*. Discusses, with the aid of case law, the potential conflict of laws issues arising under the E112 scheme where the defendant was either the NHS or the overseas hospital concerned.

Access Lawtel for more information.

Andromeda Marine SA v OW Bunker & Trading A/S

ANDROMEDA MARINE SA v OW BUNKER & TRADING A/S [2006] EWHC 777 (Comm)

The question before the High Court was whether it could be said that a party had clearly and precisely accepted a jurisdiction clause for the purposes of the Brussels Convention 1968 Art.17 when the purpose of the proceedings was to deny that it was bound by the contract that contained the jurisdiction clause.

Further information, and the full judgment, is available from Lawtel.

Journal of Private International Law, Volume 2, No. 1, 2006

The new issue of the Journal of Private International Law Volume 2, Number 1, will be published shortly. The contents are:

"Troublesome and Obscure": The Renewal of Renvoi in Australia by *Reid Mortensen*

The Public Policy and Mandatory Rules of Third Countries in International Contracts by *Adeline Chong*

Forum Non Conveniens Post-Owusu by *Barry J. Rodger*

European Choice of Law Rules in Divorce (Rome III): An Examination of the Possible Connecting Factors in Divorce Matters Against the Background of Private International Law Developments by *Veronika Gaertner*

Recognition of Foreign Relationships Under the Civil Partnership Act 2004 by *Kenneth McK. Norrie*

"Mind the Gap": A Practical Example of the Characterisation of Prescription/Limitation Rules by *Christopher Forsyth*

Drawing Inspiration? Reconsidering the Procedural Treatment of Foreign Law by *Kirsty J. Hood*

To view the abstracts for these articles please go here.