

Beaumont and Holliday on “Habitual Residence” in Child Abduction Cases

Paul Beaumont, Professor of European Union and Private International Law and Director of the Centre for Private International Law, University of Aberdeen (Scotland/UK), and *Jayne Holliday*, Research Assistant and Secretary of this Centre, have published an insightful and carefully researched new working paper on “Recent Developments on the Meaning of ‘Habitual Residence’ in Alleged Child Abduction Cases” in the series of the Aberdeen Centre for PIL (Working Paper No. 2015/3, the full content is available [here](#)). The highly recommended article is based on an overview of the recent developments within European and International Family Law that was presented by Professor Beaumont at the conference on “Private International Law in the Jurisprudence of European Courts – Family at Focus” held in Osijek, Croatia, June 2014. Drawing from that presentation, the working paper focuses on the recent developments on the meaning of habitual residence in child abduction cases from the UK Supreme Court and the Court of Justice of the European Union (CJEU). In particular, the authors analyze the move by the UK Supreme Court towards a more uniform definition of habitual residence in line with the jurisprudence of the CJEU under the Brussels IIbis Regulation.

The authors summarize their findings as follows:

“Over the past 30 years the concept of habitual residence of the child in the UK has developed from one which put weight on parental intention to a mixed model, which takes a more child centric and fact based approach. By following the jurisprudence of the CJEU, the UK Supreme Court has made a genuine and conscious attempt to provide a uniform interpretation of the 1980 Abduction Convention. This will hopefully have the effect of creating a more uniform approach to the definition of habitual residence amongst all Contracting States to the Hague Abduction Convention. [...] If enough weight is given to parental intention of the custodial parent(s) of newborns then physical presence is not required to establish habitual residence. This is an easier solution to arrive at if the myth that habitual residence is a pure question of fact is abandoned. Whilst a

mixed question of fact and law is the best way to analyse the ‘habitual residence’ of the young child, it is not appropriate to introduce into the equation a suggestion that somehow habitual residence cannot change when the custodial parent lawfully removes a child to another country just because that decision was still subject to appeal in that country even though the appeal did not suspend the custodial parent’s right to take the child out of the country lawfully. Such an appeal should not prevent the loss of the child’s habitual residence in the country where the appeal is made and should not impact on the ‘stability’ of the child’s residence in the new jurisdiction to prevent habitual residence being established there within a few months of the residence beginning.”

Conference on “European Minimum Standards for Judicial Bodies”, University of Regensburg on 12/13 November 2015

Matthias Weller is Professor for Civil Law, Civil Procedure and Private International Law at the EBS University for Economics and Law Wiesbaden and Director of the Research Center for Transnational Commercial Dispute Resolution (www.ebs.edu/tcdr) of the EBS Law School.

Mutual trust amongst the Member States of the European Union in other legal systems is a prerequisite for the expansion of the free movement of judgments and judicial titles within the European Judicial Area. To justify such mutual trust amongst the European Member States requires, inter alia, the definition of common minimum standards in the various judicial systems.

A joint project between the law faculties of the University of Regensburg (Prof. Dr. Christoph Althammer) and the EBS Law School in Wiesbaden (Prof. Dr. Matthias Weller, Mag.rer.publ.) has set itself the goal to search for and explore further such minimum standards in the judicial systems within the European

Judicial Area. After the first conference in Wiesbaden in 2014 (see conference report earlier on this blog [here](#)), where the discussion has been initiated from a broader perspective, the project will be continued with the upcoming two-days-conference in Regensburg (conference language: German) that is dedicated to a central issue within this field: European minimum standards for judicial bodies.

The focus will be on three main requirements (independence, efficiency, specialization) which will be presented by experts from both academia and legal practice. These topics will be complemented by a legal comparative analysis with regard to the French, Greek and Italian legal system before the discussion will conclude with a final synthesis.

We would like to cordially invite you to join the discussion! For registration and the conference flyer see [here](#).

Now available: New edition of Volumes 10 and 11 of the „Münchener Kommentar“ on Private International Law

It has not yet been mentioned on this blog that Volumes 10 and 11 of the Munich Commentary on the German Civil Code (Münchener Kommentar zum Bürgerlichen Gesetzbuch), are now available in their sixth edition (2015). A standard German language treatise on both German and European private international law, the new edition contains a detailed article-by-article analysis of the Rome I, II and III Regulations (by Abbo Junker, Munich; Dieter Martiny, Hamburg/Frankfurt an der Oder); Ulrich Spellenberg, Bayreuth; Peter Winkler von Mohrenfels, Rostock), the Hague Protocol on Maintenance (Kurt Siehr, Hamburg/Zurich), the European Succession Regulation (Anatol Dutta, Regensburg), and the Hague Conventions on the Protection of Children and

Adults (by Kurt Siehr, Hamburg/Zurich; Volker Lipp, Göttingen).



The sixth edition of Volumes 10 and 11 is the first edition that has been edited by our co-editor Jan von Hein (Freiburg/Germany) as the volume editor. Jan is the successor to Hans-Jürgen Sonnenberger (Munich) and has contributed to the commentary himself with a completely new section on the general principles of European and German private international law.

The new edition has been well received in the German literature (translations kindly provided by the volume editor):

„A battle cruiser of private international law has been set on a new course.“
(IPRax 2015, 387)

„...a truly indispensable work.“ (Ludwig Bergschneider, FamRZ 2015, 1364)

Further information is available on the publisher's website.

M. E. Burge on Party Autonomy and Legal Culture

Mark Edwin Burge, Associate Professor of Law, Texas A&M University School of Law, has published a highly interesting article on the relationship between party autonomy and legal culture, providing new insights on the success (or failure) of legal transplants in choice of law: “Too Clever by Half: Reflections on Perception, Legitimacy, and Choice of Law Under Revised Article 1 of the Uniform Commercial Code”, 6 *William & Mary Business Law Review* 357 (2015).

The abstract reads as follows:

“The overwhelmingly successful 2001 rewrite of Article 1 of the Uniform Commercial Code was accompanied by an overwhelming failure: proposed section 1-301 on contractual choice of law. As originally sent to the states, section 1-301 would have allowed non-consumer parties to a contract to select a governing law

that bore no relation to their transaction. Proponents justifiably contended that such autonomy was consistent with emerging international norms and with the nature of contracts creating voluntary private obligations. Despite such arguments, the original version of section 1-301 was resoundingly rejected, gaining zero adoptions by the states before its withdrawal in 2008. This Article contends that this political failure within the simultaneous overall success of Revised Article 1 was due in significant part to proposed section 1-301 invoking a negative visceral reaction from its American audience. This reaction occurred not because of state or national parochialism, but because the concept of unbounded choice of law violated cultural symbols and myths about the nature of law. The American social and legal culture aspires to the ideal that ‘no one is above the law’ and the related ideal of maintaining ‘a government of laws, and not of men.’ Proposed section 1-301 transgressed those ideals by taking something labeled as ‘law’ and turning on its head the expected norm of general applicability. Future proponents of law reform arising from internationalization would do well to consider the role of symbolic ideals in their targeted jurisdictions. While proposed section 1-301 made much practical sense, it failed in part because it did not—to an American audience—make sense in theory.”

The full article is available [here](#).

Out Now: Basedow on “The Law of Open Societies - Private Ordering and Public Regulation in the Conflict of Laws”

Prof. Dr. Dr. h.c. mult. *Jürgen Basedow*, LL.M. (Harvard), Director of the Max Planck Institute for Comparative and International Private Law, Hamburg, has published a revised and updated version of the widely read and well-received lectures given by the author during the 2012 summer courses of the Hague

Academy of International Law (on the first edition, see the post by *Gilles Cuniberti* here). This superbly written and well-researched book is a must-read for anyone interested in the paradigm shifts that private international law has undergone in recent decades. The abstract provided by the publisher reads as follows:

“This book endeavours to interpret the development of private international law in light of social change. Since the end of World War II the socio-economic reality of international relations has been characterised by a progressive move from closed to open societies. The dominant feature of our time is the opening of borders for individuals, goods, services, capital and data. It is reflected in the growing importance of ex ante planning – as compared with ex post adjudication – of cross-border relations between individuals and companies. What has ensued is a shift in the forces that shape international relations from states to private actors. The book focuses on various forms of private ordering for economic and societal relations, and its increasing significance, while also analysing the role of the remaining regulatory powers of the states involved. These changes stand out more distinctly by virtue of the comparative treatment of the law and the long-term perspective employed by the author.”

Further information is available on the publisher’s website [here](#).

The Trust Re-visited - The Hague Convention 30 Years After

The Society of Trust and Estate Practitioners (STEP), in cooperation with the Swiss Association of Trust Companies (commonly abbreviated as SATC, not to be confused with an American TV sitcom), is organising an international conference in Lausanne (Switzerland) on recent experience and current trends under the Hague Convention on the Law Applicable to Trusts and on their Recognition of 1985. The event will take place on 3 November 2015; the conference language will be English.

According to the flyer, the conference “will consider how in thirty years since the conclusion of the Hague Trust Convention the trust has become more widely accepted and trust service providers have greater opportunities, in many countries, including Switzerland. The speakers will demonstrate how the trust is playing a full and positive role in the world of wealth management and fiduciary services in Switzerland, as well as cover recent international trust law developments and jurisprudence. The ambitious program features distinguished speakers from the judiciary, academia, the Swiss government, regulatory and the financial services world and promises to be an extraordinary conference.”

The full programme and details on registration are available [here](#).

Request for preliminary ruling on Art. 5 No. 1 Brussels I Regulation

On 18 August 2015, the German Federal Supreme Court referred the following questions relating to the interpretation of Article 5 No. 1 of the Brussels I Regulation to the CJEU (my translation):

1. Must Art. 5 No. 1 lit. a) of the Brussels I Regulation be interpreted as covering a claim for compensation under Art. 7 of the EU Air Passenger Regulation against an airline that is not the contracting partner of the passenger but operates the flight by way of a codeshare agreement with the passenger’s contracting partner?

2. If Art. 5 No. 1 Brussels I Regulation applies: In case of a flight connection consisting of several flights without any meaningful stay at the connecting airports, is the place of departure of the first flight the place of performance within the meaning of Art. 5 No. 1 lit. b) Brussels I Regulation, if the flights are operated by different airlines by way of a codeshare agreement and if the claim for compensation is directed against the airline that operates the – severely delayed – second flight?

The facts of the underlying case are straightforward: The claimant booked a flight with Air France from Stuttgart to Helsinki via Paris. The flight from Paris to Helsinki was operated by Finnair by way of a codeshare agreement with Air France. The flight from Paris to Helsinki was delayed by three hours and twenty minutes. Therefore, the claimant sought compensation from Finnair under the EU Air Passenger Rights Regulation – and brought an action against Finnair in Stuttgart. The Court of First Instance (Amtsgericht) and the Regional Court (Landgericht) both rejected the claim for lack of jurisdiction. The Federal Supreme Court (Bundesgerichtshof), in contrast, wasn't so sure, and, therefore, referred the above questions to the CJEU.

The press release of the Federal Supreme Court is available [here](#) (in German).

European Succession Regulation in Force

On 17 August 2015 the European Succession Regulation has entered into force. It provides for uniform rules on the applicable law as well as recognition and enforcement of decisions in matters of succession. It also creates a European Certificate of Succession that enables person to prove his or her status and rights as heir or his or her powers as administrator of the estate or executor of the will without further formalities.

More information is available on the European Commission's website.

Book on International Protection of Adults

A voluminous book on the **International Protection of Adults**, edited by Richard Frimston, Alexander Ruck Keene, Claire van Overdijk and Adrian Ward, has just been published (Oxford University Press, 2015).

The blurb reads:

Increasing numbers of people have connections with one country, but live and work in another, frequently owning property or investments in several countries. People with lifelong or subsequently developed impairments of capacity move cross-border or have property or family interests or connections spread across different jurisdictions. This new work fills a gap in a specialist market for a detailed work advising lawyers on all the considerations in these situations.

The book provides a clear, comprehensive, and unique overview of all relevant capacity and private international law issues, and the existing solutions in common law and civil law jurisdictions and under Hague Convention XXXV. It sets out the existing law of various important jurisdictions, including detailed chapters on the constituent parts of the UK, Ireland, Jersey, the Isle of Man and the Hague 35 states; and shorter chapters on 26 Non-Hague states and those within federal states, including coverage of the United States, several Australian and Canadian states, and a number of other Commonwealth jurisdictions. Containing a number of helpful case studies and flowcharts, the book draws upon the expertise of the editors in their respective fields, together with detailed contributions from expert practitioners and academics from each relevant jurisdiction.

Furhter information is available [here](#).

First Application of ECJ's Ruling in C-352/13, CDC Hydrogen Peroxide, in Dutch Private Enforcement Proceedings

By Polina Pavlova, research fellow at the MPI Luxembourg.

July, 21st 2015 has marked another important step in the private enforcement of competition law in Europe. Only two months after the long awaited preliminary ruling in the case *CDC Hydrogen Peroxide* (C-352/13) was delivered on May, 21st, the Amsterdam Court of Appeal seems to be the first one to apply the new ECJ case law on jurisdiction in cartel damage cases. Its judgment (accessible here in Dutch and German) dealt with compensation claims against members of the sodium chlorate cartel and applied the recently established ECJ principles even before the referring court itself (the Dortmund District Court) could render a judgment on its jurisdiction.

Background of the case is the bundled enforcement of the claims of damaged customers in the aftermath of the Decision of the EU Commission from June, 11th 2008 fining a number of undertakings for their participation in a sodium chlorate cartel operating EEA wide. Following this decision, Cartel Damage Claims, a special purpose vehicle based in Brussels, started buying off claims of the cartel victims and filed a suit against several cartel members before the District Court of Amsterdam. The latter accepted jurisdiction with a judgment from June, 4th 2014: a judgment which was subject to scrutiny and eventually confirmed by the Amsterdam Court of Appeal.

The application in the appeal proceedings questioned the jurisdiction of the Dutch courts over a cartel member seated in Finland. The Amsterdam judges confirmed the decision of the lower court according to which, since one of the co-defendants in the first instance proceedings was seated in the Netherlands, jurisdiction can be based on ex-Article 6 (1) of the Brussels I Regulation. Transposing the reasoning of the ECJ in *CDC Hydrogen Peroxide* – issued in a parallel scenario –

to the proceedings at hand, the Court of Appeal considered the EU jurisdictional rule on joint defendants applicable. The close connection between the claims in the sense of ex-Article 6 (1) and in particular the same situation of fact and law – a requirement well established in ECJ case law – was deemed fulfilled: Following *CDC Hydrogen Peroxide*, the national appellate court decided that the commitment of a continuous competition law infringement sanctioned by the Commission's Decision was sufficient to create an identical factual and legal background of the cartel damage claims. In addition, the court clarified that a company which has been held responsible for the cartel by the Commission can serve as an anchor defendant for the purposes of ex-Article 6 (1) even where the latter is a parent company of a cartel member and has not directly participated in the infringement.

Finally, the Amsterdam Court of Appeal (upholding the first instance decision) confirmed that the standard jurisdiction and arbitration clauses contained in the supply agreements between the cartel members and their customers do not apply to cartel damage claims. As far as the evoked jurisdiction agreements were concerned, the appellate court applied the reasoning of the ECJ in *CDC Hydrogen Peroxide* relating to the interpretation ex-Article 23 (para 70 f.). The disputes were qualified as deriving from a competition law infringement previously unknown to the customers and not from the multiple contractual relationships between suppliers and customers as such. They could thus not be covered by the standard wording of a jurisdiction clause regulating the contractual relation of the parties. Regarding the arbitration agreements, the court saw no reason to deviate from the aforementioned interpretation.

The appeal of the Finish cartel member was thus dismissed.

It is interesting to note that in this judgment the national Court of Appeal merely confirms what the Amsterdam District Court had already decided in 2014, long before the ECJ rendered its *CDC Hydrogen Peroxide* ruling. Even though the lower court did not await the judgment of the ECJ, its result seems to fall completely in line with the now EU-wide binding principles formulated by the Luxembourg judges. This demonstrates that the ECJ case law now simply prescribes what private enforcement friendly jurisdictions were doing anyway.

What is perhaps more intriguing, is to observe where the national court went even one step further than the ECJ in completely transposing the considerations

on the material scope of the choice-of-court clauses to the other type of dispute resolution clauses at issue, i.e. the arbitration agreements. This was motivated by the sole consideration that there are no reasons to judge differently in this regard. While this might be a welcome interpretation, the issue of the applicability and interpretation of arbitration clauses was left untouched by the ECJ ruling (see para 58, particularly evident in comparison to the Advocate General's opinion in the *CDC Hydrogen Peroxide* proceedings which dealt extensively with the issue, see there at para 118 ff.). Nevertheless, the equal treatment of the two types of (standard) dispute resolution clauses as regarding their scope seems to be common before Member State courts. This feature might prove to broaden the actual effect of the *CDC Hydrogen Peroxide* case law beyond its explicit scope (see e.g. the judgment of the District Court of Helsinki from of the July, 4th 2013, also concerning the Hydrogen Peroxide cartel). It remains to be seen how other jurisdictions will see the application of arbitration clauses in cartel damage cases.

The mentioned proceedings are only instances of a much broader landscape of private enforcement of cartel damage claims in the EU conducted to a great extent by special vehicles such as CDC. It seems that the Dutch jurisprudence might be, once again, setting an example on how international jurisdiction in competition law damage cases is to be dealt with by member state courts.