UK Supreme Court Rules on Concept of Rights of Custody under Brussels IIa Regulation

On 15 May 2014, the Supreme Court of the United Kingdom delivered its judgment in In the matter of K (A Child) (Northern Ireland).

The Court issued the following press summary.

BACKGROUND TO THE APPEALS

This appeal concerns the meaning of the words 'rights of custody' in article 3 of the Hague Convention on the Civil Aspects of International Child Abduction ('the Convention'), and in the Brussels II Revised Regulation (EC) No 2201/2003 ('the Regulation') which complements and takes precedence over the Convention between most member states of the European Union. A child is wrongfully removed or retained in a country under the Convention if such removal or retention is in breach of 'rights of custody'. The issue is whether the rights of custody must already be legally recognised and enforceable, or include informal rights (termed 'inchoate rights'), the existence of which would have been legally recognised had the question arisen before the removal or retention in question.

The proceedings concern a boy ('K') born in Lithuania in March 2005. From the time of his birth until 2012 he lived with and was cared for by his maternal grandparents. His father separated from his mother before he was born and has played no part in his life. His mother moved to Northern Ireland without K in May 2006 and has lived there ever since. A month after K's birth she authorised her mother to seek medical assistance for K and, before she left for Northern Ireland, executed a notarised consent for her mother to deal with all institutions in relation to K on her behalf. In 2007 a court order was made in Lithuania putting K under the temporary care of his grandmother. This order terminated when K's mother returned in February 2012 seeking to take K into her own care. K's mother also applied to withdraw the notarised consents. Meetings were held at the Children's Rights Division of the local authority where orders were made for her to have weekly contact with K. She was advised that legal proceedings against her mother to obtain custody of K would be costly and protracted and

decided instead to seize K forcibly in the street while he was walking home from school with his grandmother on 12 March 2012, and to travel immediately back to Northern Ireland with him by car and ferry.

The grandparents were told by the Lithuanian authorities that they had no right to demand the return of K. However, in February 2013 they issued an originating summons in Northern Ireland seeking a declaration that K was being wrongfully retained in breach of their rights of custody. Maguire J refused their application, and their appeal against his decision was dismissed by the Northern Ireland Court of Appeal.

JUDGMENT

The Supreme Court by a majority (Lord Wilson dissenting) allows the appeal, finding that the grandmother did enjoy 'rights of custody' such that K's removal from Lithuania was wrongful. It orders that K should be returned to Lithuania forthwith. If K's mother wishes to apply for permission to argue at this very late stage that any of the exceptions to the court's obligation to return K found in article 13 of the Convention apply, this order will be stayed if she makes her application within 21 days. Lady Hale gives the only judgment of the majority. Lord Wilson gives a dissenting judgment.

REASONS FOR THE JUDGMENT

The courts of states parties to the Convention have on several occasions dealt with applications based on inchoate rights of custody [23-42]. In England and Wales such rights have been recognised where the person with legal rights of custody had abandoned the child or delegated his primary care to others [44], but other countries have taken a less expansive view. The Convention is not concerned with the merits of custody rights but it will only characterise a removal of a child as wrongful if it interferes with a right of custody which gives legal content to the situation altered by the removal. Thus it is not enough that K's removal was a classic example of the sort of conduct which the Convention was designed to prevent and to remedy, given the harmful effects on K of wresting him from the person he regarded as his mother and taking him without notice to a country where he knew no-one and did not speak the language [50-51]. The rights relied on by K's grandparents must amount to 'rights of custody' for the purposes of the Convention.

The majority considered that the English courts should continue to recognise inchoate rights as rights of custody under the Convention and the Regulation, provided that the important distinction between rights of custody and rights of access was maintained, and provided that (a) the person asserting the rights was undertaking the responsibilities and enjoying the powers entailed in the primary care of the child; (b) they were not sharing them with the person with a legally recognised right to determine where the child should live and how he should be brought up; (c) that person had abandoned the child or delegated his primary care to them; (d) there was some form of legal or official recognition of their position in the country of habitual residence (to distinguish those whose care of the child is lawful and those whose care is not); and (e) there is every reason to believe that, were they to seek the protection of the courts of that country, the status quo would be preserved for the time being while the long term future of the child could be determined in those courts in accordance with his best interests [59].

These conditions applied to the situation of K's grandparents. The Children's Rights Division was supervising the situation on the basis that K remained living with his grandparents while having contact with his mother. Taking K out of the country without his grandmother's consent was in breach of her rights of custody [61-62].

It followed that the court was bound under the Convention to make an order to return K to Lithuania forthwith. It may be that the grandparents would be content with legally enforceable contact arrangements and the mother now has every incentive to agree to these. If the mother were to seek permission at this late stage to raise one of the exceptions in article 13 to the court's obligation to order the return of the child within 21 days, the order would be stayed until the hearing on the first available date in the High Court to determine whether such permission should be granted to her [66].

Lord Wilson would have dismissed the appeal. In his view the rights of custody enjoyed by K's grandmother were terminated on the mother's return [71]. Even if the courts in Lithuania might have maintained the status quo while K's future was decided, this did not amount to recognition of rights of custody in the grandparents [72]. The Convention application should therefore have been dismissed. As a result, a welfare inquiry into K's interests could then have been conducted under the Children (Northern Ireland) Order 1995, in which his

grandparents might have been granted an order for contact or even residence [84].

Post Doctoral Researcher on Comparative Civil Procedure at the University of Luxembourg

The University of Luxembourg is seeking to recruit a post-doctoral researcher with a strong interest in international and comparative civil procedure.

Interested candidates should contact me by mid June at gilles.cuniberti@uni.lu.

European Account Preservation Order adopted

The European Commission issued yesterday the following Press Release.

European Account Preservation Order adopted: New EU rules will make it easier for companies to recover millions of cross-border debt

New EU rules making it easier for companies to recover claims across borders have been adopted today by EU Ministers. Member States in the General Affairs Council signed off on the agreement recently reached with the European Parliament to establish a European Account Preservation Order (MEMO/14/101) – a Regulation that will be directly applicable in the Member States (except in the UK and Denmark which have an opt-out in this area). The European Account Preservation Order is essentially a European procedure that will help businesses

recover millions in cross-border debts, allowing creditors to preserve the amount owed in a debtor's bank account. The proposal had been made by the European Commission in July 2011 (IP/11/923).

"Every Euro counts: Small and medium-sized enterprises are the backbone of European economies, making up 99% of businesses in the EU. Around 1 million of them face problems with cross-border debts. In economically challenging times companies need quick solutions to recover outstanding debts. This is exactly what the European Account Preservation Order is about," said Johannes Hahn, EU Commissioner responsible for Justice during Vice-President Viviane Reding's electoral leave. "Today's adoption is good news for Europe's SMEs and the economy. Thanks to these new rules, small businesses will no longer be forced to pursue expensive and confusing lawsuits in foreign countries."

While the EU's internal market allows businesses to enter in cross-border trade and boost their earnings, today around 1 million small businesses face problems with cross-border debts. Up to €600 million a year in debt is unnecessarily written off because businesses find it too daunting to pursue expensive, confusing lawsuits in foreign countries. The European Account Preservation Order will help recovering debt across borders by preventing debtors from moving their assets to another country while procedures to obtain and enforce a judgment on the merits are ongoing. It would thus improve the prospects of successfully recovering cross-border debt.

Next steps: After its publication in the Official Journal – the EU's Statute book , expected in June 2014, the Regulation will be directly applicable in the Member States (except in the UK and Denmark).

Background

The new European Account Preservation Order will allow creditors to preserve funds in bank accounts under the same conditions in all Member States of the EU (except the UK and Denmark where the new EU rules will not apply). Importantly, there will be no change to the national systems for preserving funds. The creditors will be able to choose this European procedure to recover claims abroad in other EU countries. The new procedure is an interim protection procedure. To actually get hold of the money, the creditor will always have to obtain a final judgment on the case in accordance with national law or by using one of the

simplified European procedures, such as the European Small Claims Procedure.

The European Account Preservation Order will be available to the creditor as an alternative to procedures existing under national law. It will be of a protective nature, meaning it will only block the debtor's account but not allow money to be paid out to the creditor. The procedure will only apply to cross-border cases. It provides common rules relating to jurisdiction, conditions and procedure for issuing an order; a disclosure order relating to bank accounts; how it should be enforced by national courts and authorities; and remedies for the debtor and other elements of defendant protection.

The European Parliament's Legal Affairs Committee (JURI) voted to back the Commission's proposal (MEMO/13/481) in May 2013. Ministers discussed the proposal at the Justice Council meeting on 6 June 2013 and reached a general approach on 6 December 2013 (SPEECH/13/1029). The European Parliament issued its support for the proposal in a plenary vote in April 2014 (see MEMO/14/308).

H/T: Maarja Torga

Trimble on the Marrakesh Puzzle

Marketa Trimble (University of Nevada William S Boyd School of Law) has posted The Marrakesh Puzzle on SSRN.

> *This article analyzes the puzzle created by the 2013 Marrakesh Treaty in its provisions concerning the cross-border exchange of copies of copyrighted works made for use by persons who are "blind, visually impaired, or otherwise print disabled" (copies known as "accessible format copies"). The analysis should assist executive and legislative experts as they seek optimal methods for implementing the Treaty. The article provides an overview of the Treaty, notes its unique features, and examines in detail its provisions on the cross-border exchange of accessible format copies. The article discusses three possible sources for implementation tools – choice of law rules, the exhaustion doctrine,*

and labeling – and concludes that a suitable method of implementing the cross-border exchange provisions of the Treaty may consist of a combination of appropriately-selected rules for choice of applicable law and rules for labeling.

The paper is forthcoming in the *International Review of Intellectual Property and Competition Law*.

Third PIL Workshop at Nanterre University

The University of Paris Ouest Nanterre la Defense will host its third private international law workshop on 14 May 2014 at 6:30 pm.

Christophe Lapp (ALTANA Law firm) and judge Pauline Dubarry (French Central authority) will present on the taking of evidence abroad.

Dr François de Bérard (Nanterre University) will act as a discussant.

For more information, please contact:

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ELI UNIDROIT Launch Pilot Studies in Civil Procedure Project

The European Law Institute has announced that its joint project with UNIDROIT on civil procedure will move on as follows.

Background

In 2004, the ALI (American Law Institute) and UNIDROIT adopted and jointly publishedPrinciples of Transnational Civil Procedure. The aim of the work was to reduce uncertainty for parties litigating in unfamiliar surroundings and promote fairness in judicial proceedings through the development of a model universal civil procedural code. The Principles, developed from a universal perspective, were accompanied by a set of Rules of Transnational Civil Procedure, which were not formally adopted by either UNIDROIT or the ALI, but constituted the Reporters' model implementation of the Principles, providing greater detail and illustrating how they might be developed. The Rules were to be considered either for adoption or for further adaptation in various legal systems, and along with the Principles can be considered as a 'model for reform in domestic legislation'.

ELI-UNIDROIT cooperation

ELI and UNIDROIT cooperation aims at adapting the ALI-UNIDROIT Principles from a European perspective in order to develop European Rules of Civil Procedure. This work will take as its starting point the 2004 Principles and aim to develop them in the light of: i) the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union; ii) the wider acquis of binding EU law; iii) the common traditions in the European countries; iv) the Storme Commission's work; and v) other pertinent European sources.

At the first stage of the project, three working groups consisting of academics, judges and practitioners will be established. These working groups should conduct pilot studies to test the viability of the methodological approach and overall project design, whilst the ultimate outcome remains to cover, as a minimum, the full range of issues addressed in the 2004 ALI-UNIDROIT Principles.

The pilot projects will cover the following topics:

i. Service and due notice of proceedings
ii. Provisional and protective measures
iii. Access to information and evidence

On 28 February 2014 the ELI Council appointed the following persons as co-reporters for the above mentioned topics: Neil Andrews, Gilles Cuniberti,

Fernando Gascon Inchausti, Astrid Stadler and Eva Storskrubb.

Issue 2014.1 Nederlands Internationaal Privaatrecht

The first issue of 2014 of the Dutch journal on Private International Law *Nederlands Internationaal Privaatrecht* includes an analysis of the Brussels I Recast and the influence on Dutch legal practice, an article on Child abduction and the ECHR, and two case notes; one on the Impacto Azul case and one on the Povse case.

- Marek Zilinsky, 'De herschikte EEX-Verordening: een overzicht en de gevolgen voor de Nederlandse rechtspraktijk', p. 3-11. The English abstract reads:

From 10 January 2015 onwards the Brussels I Recast (Regulation No. 1215/2012) shall apply. Under the new regulation which replaces the Brussels I Regulation (Regulation No. 44/2001), the exequatur is abolished and some changes are also made to provisions on jurisdiction and lis pendens. This article gives an overview of the changes effected by the Brussels I Recast compared to the proposed changes in the Proposal for a new Brussels I Regulation (COM(2010) 748 final). The consequences of the new regulation for Dutch practice are also dealt with briefly.

- Paul Vlaardingerbroek, 'Internationale kinderontvoering en het EHRM', p. 12-19. The English abstract reads:

With the Neulinger/Shuruk decision in 2009, the European Court of Human Rights caused a great deal of misunderstanding and confusion among judges and academics, because in this case the ECHR seemed to protect the abductors of children and to allow them to benefit from their misconduct. After the Neulinger case some further ECHR decisions followed that seemed to compete with the fundamental purposes of the Hague Convention on child abduction, but in this paper I will try to show that in more recent cases the European Court has mitigated the hard consequences of the Neulinger/Shuruk decision and has given a new direction in how to proceed and decide when the two conventions seem to compete.

- Stephan Rammeloo, 'Multinationaal concern – Aansprakelijkheid van

moedervennootschap voor schulden van dochtervennootschap: nationaal IPR (‘*scope rule*’) getoetst aan Europees recht (artikel 49 VWEU)’, p. 20-26. Case notes European Court of Justice 20-06-2013, Case C-186/12 (*Impacto Azul*), The English abstract reads:

In June 2013 the CJEU delivered a preliminary ruling under Article 49 TfEU with regard to the exclusion, under national law, of an EU Member State from the joint and several liability of parent companies vis-à-vis the creditors of their subsidiaries in a crossborder context. Article 49 TfEU does not prohibit any such exclusion resulting from a self-restricting unilateral scope rule under the national Private International Law of an individual EU Member State. The interpretative ruling of the Court does not, however, affect cross-border parental liability for company group members under Private International Law having regard to contractual or non-contractual (cf. tort, insolvency) liability.

- Monique Hazelhorst, ‘The ECtHR’s decision in *Povse*: guidance for the future of the abolition of exequatur for civil judgments in the European Union’, p. 27-33. Case notes European Court of Human Rights 18 June 2013, decision on admissibility, Appl. no. 3890/11 (*Povse* v. *Austria*). The abstract reads:

The European Court of Human Rights’ decision on admissibility in Povse is worthy of analysis because it sheds light on the preconditions for the abolition of exequatur for judgments in civil matters within the European Union. The abolition of this control mechanism is intended to facilitate the free movement of judgments among Member States on the basis of the principle of mutual recognition. Concerns have however been expressed about the consequences this development may have for the protection of fundamental rights. The Human Rights Court’s Povse decision provides welcome guidance on the limits imposed by the European Convention on Human Rights on the abolition of exequatur. This case note analyses the preconditions that may be inferred from the decision. It concludes that the Human Rights Court’s approach leaves a gap in the protection of fundamental rights which the accession of the EU to the Convention intends to fill.

Nagy on the law of companies and freedom of establishment

Csongor István Nagy (Budapest University of Technology and Economics) has

posted **The Personal Law of Companies and the Freedom of Establishment Under EU Law. The Enthronement of the Country-of-Origin Principle and the Establishment of an Unregulated Right of Cross-Border Conversion**, published in the *Hungarian Yearbook of International Law and European Law 2013* on SSRN.

This paper presents, from a critical perspective, the development of the CJEU's case-law on the collision between the personal law of companies and the freedom of establishment with special emphasis on the CJEU's recent judgment in VALE.

It is argued that this ruling treats the incorporation theory as 'the law of the land', putting an end to the explanation that EU law does not establish a connecting factor, the determination of which is a Member State competence, but simply precludes some plights that frustrate the freedom of establishment. Furthermore, the case-law on the personal law of companies is put in the context of the country-of-origin concept as a general and fundamental principle of EU law. It is argued that although the incorporation theory fits better the system of the internal market characterised by free movement rights, as a general proposition, the categorical application of this principle to all fields of private law suppresses conflicts analysis and, as such, is a dubious development. Conflicts problems should receive a conflicts law answer. The oversimplified application of the country-of-origin principle, though certainly warranted in the field of public law, does away with private international law problems without carefully examining and adequately solving them.

Furthermore, it is also argued that in Cartesio and VALE the CJEU seems to have created an unregulated right of cross-border conversion. In Cartesio, the Court established a right of 'departure', i.e. companies have the right to move their seat to another Member State in order to convert into the legal person of the receiving country, while losing their original legal personality. In VALE, the CJEU seems to have established a right of 'arrival', derived from the principle of non-discrimination. However, EU law prescribes only the theoretical possibility of conversion ('departure' and 'arrival'), and leaves the technicalities of this conversion to national law.

Gopalan on the Making of International Commercial Law

Dean Sandeep Gopalan (Newcastle Law School, Australia) has posted New Trends in the Making of International Commercial Law on SSRN.

> *This paper analyzes trends in the making of international commercial law including the impetus for generating conventions, the growth of regional conventions, and soft law.There has never been a better time to be an international commercial law scholar. After decades of being held hostage to state-centered ideas, international commercial law has finally broken through to become more solution oriented. Increasingly, nation states are becoming less important in the creation of international commercial law with the growth of regional organizations, non-state actors, and international arbitration. This is spurred on by the march of globalization and the need for international commercial law. The term "harmonization will be used as a surrogate to discuss the creation of international commercial law as it is the primary means by which international commercial law is created. This article seeks to explore two preponderant trends that have become visible in the making of international commercial law. In Part I, I shall describe the background. In Parts II and III, I will highlight the growing role of regional endeavors at harmonization, and the rise of non-binding instruments.*

Swiss Conference on European Procedural Law and Third States

On 5/6 June 2014, the Institut für Internationales Privatrecht und Verfahresnrecht of the University of Bern, the Centre for Conflict Resolution of the University of Lucern and the Swiss Institute of Comparative Law will host in Lausanne a conference on the Challenges of European Civil Procedure for the Lugano States and Third States.

The conference focuses on the role of the Lugano Convention in the changing

legal context in Europe, due to the European Union’s inputs of the past decade.

The role of organizations like the Hague conference and the importance of multilateral and bilateral negotiations for the development of international civil procedure, in addition and in parallel with the European evolution, are the topics that will engage the discussion of the panelists.

The program of the conference may be found here: