Fordham CLIP on Internet Jurisdiction in Germany

Desiree Jaeger-Fine, Joel Reidenberg, Jamela Debelak and Jordan Kovnot (Fordham CLIP) have posted Internet Jurisdiction: A Survey of German Scholarship and Cases on SSRN.

> *In late June 2013, Fordham CLIP completed a study, "Internet Jurisdiction: A Survey of German Scholarship and Cases." This project provides a survey of the case law and legal literature analyzing jurisdiction for claims arising out of Internet activity in Germany. A companion study, released simultaneously, explores similar issues as they are treated in the United States. The goal of the report is to identify trends in legal literature and case law and to serve as a comprehensive, objective resource to assist scholars and policy-makers looking to learn about the issues of jurisdiction on the Internet with a focus on the German legal system and relevant EU laws.*
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> *The research survey shows that, although various trends can be identified within German and EU case law, no consensus on the treatment of international jurisdiction can be ascertained. Although the academic literature demonstrates awareness of the problems and pitfalls in Internet-related cases, clear solutions are seldom offered. Moreover, notwithstanding German Federal Supreme Court and European Court of Justice decisions that have set the stage for further development, the research indicates that the coexistence of German and European Law, as well as the presence of separate subject matter-specific legal regimes, preclude the identification of any real consensus views.*

Gomez on the Enforcement of the

Lago Agrio Judgment

Manuel Gomez (Florida International University College of Law) has posted The Global Chase: Seeking the Recognition and Enforcement of the Lago Agrio Judgment Outside of Ecuador on SSRN.

> *The Lago Agrio judgment is by all measures the largest and most complex award rendered against a multinational oil company in Ecuador, and perhaps in the entire region. With regard to its size, the type of remedies awarded to the plaintiffs by the Sucumbíos court, and the mechanisms through which those remedies will be made effective, the enforcement of the Lago Agrio judgment has rekindled a debate on several important issues that pertain to the litigation of complex cases in South America. The Lago Agrio judgment has revealed the complexity of the multi-layered, multi-step process of enforcing a foreign judgment across different jurisdictions. In so doing, the Lago Agrio ruling has a direct bearing on the larger debate about the judicial protection of collective rights in Latin America, the controversial treatment of punitive damages in countries of the civil law tradition, and the undue influence of litigants on the performance of the courts. The development of the Chevron-Ecuador litigation in South America is one of the most important pieces in the context of this saga and has been generally neglected from the consideration of academicians. This Article fills that gap.*
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> *By switching its attention away from the litigation handled by U.S. courts, and focusing into the generally overlooked South American court cases, this Article helps to complete the puzzle of the Chevron saga with regard to the factors that affect the recognition and enforcement of foreign judgments in that region. More specifically, this Article will discuss the interplay between the procedural steps routinely required by the national laws of the enforcing jurisdictions, the treaty obligations assumed by the nations involved, the statutory defenses allowed to the parties, and the litigation strategies employed by counsel to effectively assist or impede the judgment from being fulfilled. The contribution of this Article is two-fold. First, it discusses with certain level of detail the recognition and enforcement regime of foreign judgments across Latin America with special attention to the domestic and the international legal regimes applicable to Argentina and Brazil. Second, by giving importance to the context within which the Lago Agrio litigation and related proceedings are taking place,*

this Article addresses defendant's strategies to evade the enforcement of an adverse judgment, and the incentives and challenges faced by plaintiffs, including the strategies procedural and otherwise, to obtain the recognition and enforcement of said foreign judgment. Although the discussion offered in this Article in centered on a single case, in a broader sense this Article highlights the practical difficulties of transnational judgment enforcement and the strategies employed by the parties across multiple countries.

The article is forthcoming in the *Stanford Journal of Complex Litigation* 2013.

CJEU to Rule on Prorogation and Transfer of Jurisdiction under the Brussels II a Regulation

Ester di Napoli earned a PhD from the University of Padova with a dissertation on European private international law in family matters.

The Civil Division of the Court of Appeal of England and Wales recently made a request for a preliminary ruling on the interpretation of Articles 12 and 15 of Regulation (EC) No 2201/2003 concerning **jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility** (the Brussels II *a* Regulation). So far, none of these provisions has been the object of a preliminary ruling by the CJEU.

Articles 12 and 15 provide a number of exceptions to the general rule set forth in Article 8, according to which matters of parental responsibility should be decided by the courts of the Member State where the child is habitually resident. Pursuant to Article 12(3), the courts of a Member State shall also have jurisdiction where (a) the child has a substantial connection with that Member State, in particular by virtue of the fact that one of the holders of parental responsibility is habitually resident in that Member State or that the child is a national of that Member State,

and (b) the jurisdiction of such court has been accepted by all the parties to the proceedings and is in the best interests of the child ("prorogation of jurisdiction"). Under Article 15, jurisdiction may be transferred, in exceptional circumstances, to a court with which the child "has a particular connection", provided that the court in question appears to be "better placed to hear the case".

The CJEU is asked to clarify, in the first place, how long a prorogation of jurisdiction made in conformity with Article 12 should be deemed to last, *i.e.* whether the jurisdiction of the prorogated court (in the case at hand, a Spanish court) only continues until there has been a final judgment in the proceedings for the benefit of which the prorogation was made, or if it continues "even after the making of a final judgment". Secondly, as regards Article 15, the CJEU is asked to determine whether jurisdiction may be transferred from one Member State (Spain) to another (United Kingdom) in circumstances where there are no current proceedings concerning the child in the first State.

The case from which the referral originated concerns a minor ("S"). In February 2010, S, then a 5-year-old child, left Spain and moved to England with his mother. A few weeks later, the father instituted proceedings in Spain regarding various issues concerning the parental responsibility over S. The parents subsequently reached an agreement (only signed by the mother) on some of these issues, including the provision for S to reside with the mother in England. A few months later, the father re-instigated the proceedings before the same Spanish Court with a new application for residence. At the same time, the mother applied for substantive relief in England. The English Court then made an order declaring that S was habitually resident in England and Wales, and that the English courts had exclusive jurisdiction to determine issues in respect of the child. The parents renewed their negotiations in Spain and prepared a further agreement, specifying the arrangements for S's future care. In doing so, the mother made clear that she was relying on Article 12(3) of Brussels II *a* Regulation, as she believed that the English Court had sole jurisdiction to make orders in respect of S. The agreement ('convenio') was signed by both parents in July, witnessed by a court clerk and then endorsed by the Spanish Court by an order of October 2010. The order actually brought the Spanish proceedings to an end.

In December 2010, the mother commenced new proceedings in the English Courts, seeking a variation of the contact arrangement decided in the Spanish 'convenio'. In response, the father commenced proceedings in Spain and then in

England, seeking enforcement of the Spanish order of October 2010.

In December 2011, the English Court issued an order, by consent, confirming that the mother had accepted the jurisdiction of the Spanish court, in conformity with Article 12(3) of the Brussels II *a* Regulation, which later resulted in the Spanish order of October 2010, and that she no longer intended to object to the enforcement of such Spanish order.

She then moved to ask the Spanish Court to declare that it lacked the jurisdiction to deal with S or any proceedings concerning S, and that in the event the Court considered that it continued to have jurisdiction, asked for the transfer of the proceedings to England, pursuant to Article 15 of the Brussels II *a* Regulation. In February 2012, the Spanish Court confirmed that there was no reason to declare lack of jurisdiction, the judgment having become final, and there being no pending proceedings between the parties.

The High Court subsequently declared that the prorogation of jurisdiction of the Spanish Court under Article 12(3) of the Brussels II *a* Regulation by the mother had come to an end with the making of the final order of October 2010, that there was no residual jurisdiction in Spain, and that the English Court did not need to seek a transfer (as, in any event, there were no "living" proceedings in Spain to transfer pursuant to Article 15). The English Court concluded that it could properly assume jurisdiction to determine issues relating to S pursuant to Article 8 of the Brussels II *a* Regulation.

Thanks to Nina Hansen of Freemans Solicitors, London.

Proposal for Amendment of the Brussels I-Regulation

The recently reformed Brussels I-Regulation is up for reform: according to a proposal for a Regulation of the European Parliament and of the Council (COM(2013) 554 final) of July 26, 2013 the Brussels I-Regulation (Regulation (EU)

No 1215/2012 (recast)) will be changed to account for the 2012 Unified Patent Court Agreement and the 2012 Protocol to the Benelux Treaty setting up the Benelux Court of Justice.

The proposal aims (1) to clarify that the Unified Patent Court and the Benelux Court of Justice are courts in the meaning of the Brussels I-Regulation, (2) to clarify the rules on jurisdiction, and (3) to define the application of *lis pendens* and related actions with respect to the Unified Patent Court and the Benelux Court of Justice.

The proposal is available here.

2007 Hague Protocol in Force since August 1st

The Hague Conference on Private International Law has announced that on 1 August 2013, the *Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations* (hereinafter the 2007 Hague Protocol) came into force at the international level between Serbia and the European Union (all Member States of the European Union with the exception of Denmark and the United Kingdom).

The Hague Conference is marking this occasion by making the Explanatory Report on the 2007 Hague Protocol, drawn up by Andrea Bonomi, publicly available. Click here to download an electronic copy of the Explanatory Report.

In accordance with a decision of the Council of the European Union and Article 15 of Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and co-operation in matters relating to maintenance obligations, the 2007 Hague Protocol has been applied since 18 June 2011 between all Member States of the European Union

(with the exception of Denmark and the United Kingdom). Click here for more detailed information in this respect.

For more general information on the 2007 Hague Protocol, please click here.

Woodward on Legal Uncertainty and Aberrant Contracts

William J. Woodward Jr. (Santa Clara Law School) has posted Legal Uncertainty and Aberrant Contracts: The Choice of Law Clause on SSRN.

> *Legal uncertainty about the applicability of local consumer protection can destroy a consumer's claim or defense within the consumer arbitration environment. What is worse, because the consumer arbitration system cannot accommodate either legal complexity or legal uncertainty, the tendency will be to resolve cases in the way the consumer's form contract dictates, that is, in favor of the drafter. To demonstrate this effect and advocate statutory change, this article focuses on fee-shifting statutes in California and several other states. These statutes convert very common one-way fee-shifting terms (consumer pays business's attorneys fees if business wins but not the other way around) into two-way fee-shifting provisions (loser pays winner's fees in all cases). As written, these statutes level the lopsided playing field created by the drafter and, indeed, may give consumers access to lawyers in cases where their claims or defenses are strong. But choice of law provisions, found in the same consumer forms, introduce near-impenetrable uncertainty into the applicability of those same statutes, thereby reducing or eliminating the intended statutory benefits. Statutory change is needed to restore the intended benefits of the otherwise applicable fee-shifting statutes (and of other local consumer protection similarly degraded by drafters' choice of law clauses); the article concludes by presenting a roadmap for state statutory reform.*

CJEU to Issue a New Opinion on the External Competence of the EU

Pietro Franzina is associate professor of international law at the University of Ferrara.

The European Commission has recently asked the Court of Justice of the European Union (CJEU) to render an opinion pursuant to Article 218(11) of the TFEU concerning the Union's competence to entertain "external" relations in the area of judicial cooperation in civil matters (Opinion 1/13: see the announcement in the *Official Journal* of 3 August 2013). The proceeding comes almost ten years after the request (then submitted by the Council) that eventually resulted in the Lugano Opinion of 7 February 2006.

The new question reads as follows: "Does the acceptance of the accession of a third country to the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction fall within the exclusive competence of the Union?".

Although little is known of the background of the request, the latter seems to refer to the proposals presented by the Commission, back in 2011, contemplating the adoption of Council decisions requiring Member States to "deposit simultaneously", "in the interest of the Union", a declaration aimed to accept the accession of various States (Gabon, Andorra, Seychelles, the Russian Federation, Albania, Singapore, Morocco and Armenia) to the Hague Child Abduction Convention.

It is worth recalling that, under Article 38(4) of the Convention, the accession of a State "will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession".

In the Commission's view, as stated in the explanatory memorandum

accompanying the proposals mentioned above, international child abduction falls – in consonance with the Lugano Opinion – "into the exclusive external competence of the European Union, because of the adoption of internal Union legislation by means of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility". As a matter of fact, the Regulation "introduces even stricter rules than the 1980 Hague Convention on parental child abduction", "refers directly to the Hague Convention and upholds its principles in European Union law".

In these circumstances, since the Convention does not contain any provisions allowing the accession of international organizations, like the European Union, it is for the Member States to ratify or accede to the Convention in the interest of the Union. According to the Commission, this implies that the Member States should likewise declare that they accept, in the interest of the Union, the accession of new States to the Convention, whenever a decision to that effect has been taken by the Union.

None of the proposals has been adopted so far. Various countries have acceded to the Convention after the accession of the States indicated above, but none of the new accessions has been followed by a Commission proposal envisaging an acceptance "in the interest of the Union": reference is made to the accession of Guinea (7 November 2011), Lesotho (18 June 2012), Korea (13 December 2012) and Kazakhstan (3 June 2013).

In the meanwhile, some Member States have "individually" declared their acceptance of some of the accessions in question. Belgium, for example, accepted the accession of Armenia, Seychelles, Morocco, Singapore and Andorra, while Spain did the same in respect of all of the States mentioned above, as well as Guinea (for more information, see the Spreadsheet showing acceptances of accessions to the Child Abduction Convention at the website of the Hague Conference on Private International Law).

It is beyond the scope of this post to outline the arguments that could in principle be put forward by the European institutions and the Member States in favour, or against, the Commission's claim regarding the Union's external competence in respect of these acceptances.

Rather, it is worth observing that the implications of the Court's opinion – were this to uphold the Commission's view – would not be limited to the situation from which the request originated.

On the one hand, the Child Abduction Convention is not the only international convention in the field of private international law providing for an acceptance procedure similar to the one illustrated above (see, for example, Article 39 of the Hague Convention of 1970 on the Taking of Evidence Abroad in Civil and Commercial Matters).

On the other hand, and more importantly, declarations of acceptance such as those considered in the Commission's request are but one of the several acts that may be performed in connection with an international treaty, once the latter has been concluded. Should the Court decide that, in principle, it is for the Union to accept the accession of a third country to a convention to which a Member State is a party (provided that the accession affects the operation and effects of the internal legislation of the Union), this would probably pave to the way to the Union becoming solely responsible for a number of other initiatives regarding the conventions concluded by Member States in the area of private international law, such as the withdrawal of reservations or the denunciation of the relevant treaties.

New Journal on Brazilian Law

The first issue of a new journal on Brazilian law, Panorama of Brazilian Law, was just released.

It is a multilingual journal aiming at providing the world with a window to Brazilian law. Professor Carmen Tiburcio, who is head of the Private International Law Department of the Rio de Janeiro State University, together with Raphael Carvalho de Vasconcelos and Bruno Rodrigues de Almeida, both professors of international law at the UFRRJ are leading this initiative.

The first issue includes a number of papers of interest for readers of this blog:

- a Brief Overview of Private International Law in Brazil (Carmen Tiburcio),
- an article on Cross-Border Consumption and Brazilian Law (Raphael Carvalho de Vasconcelos)
- and an article on the CISG and Party Autonomy in Brazilian International Contract Law (Iacyr de Aguilar Vieira)

H/T: Gustavo Vieira da Costa Cerqueira

A Judgment of the ECHR at the Intersection between International Child Abduction, Parental Responsibility and Migration Law

Pietro Franzina is associate professor of international law at the University of Ferrara.

By a judgment of 30 July 2013 (available only in French), a Chamber of the European Court of Human Rights found that Switzerland had violated its obligations under Article 8 of the European Convention on Human Rights in a cross-border case concerning the return of a minor and his custody (application No. 33169/10, *Polidario* v. *Switzerland*; a press release in English may be found here).

Article 8 of the Convention enshrines the right to respect for private and family life. It provides that there shall be "no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

In 2001, the applicant, Catherine Polidario, a national of the Philippines, had a child with a Lebanese man who had acquired Swiss nationality. A few months later, Ms Polidario, then an illegal immigrant, was ordered to leave the country. She returned to the Philippines with the child. In 2004 she signed an *affidavit* authorising the father to have his son back in Switzerland. The father did not return his son to the Philippines, although the affidavit made clear that he was to keep the child just "for the holidays".

Despite the fact that Ms Polidario held custody rights and parental authority in respect of the child, her attempts with the Swiss authorities to obtain his return to the Philippines were unsuccessful (the State of Philippines, by the way, is not a party to the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction).

While proceedings were pending in Switzerland concerning the custody of the child, Ms Polidario asked the Swiss immigration authorities for leave to remain in the country, as a means to exercise her parental rights and to maintain a relationship with her son.

Finally, from 2010, custody of the child was awarded to the father and Ms Polidario was granted access rights which had to be exercised in Switzerland, whereas she had no authorisation to stay in the country.

In its judgment, the Court recalled at the outset that, pursuant to Article 8 of the European Convention, States must not only refrain from interfering with an individual's private and family life. Positive obligations arise from the said provision along with negative ones, requiring States to adopt measures aimed at ensuring the actual enjoyment of family rights. This implies, *inter alia*, that the rights relating to the relationship between a parent and his or her child should be determined by the competent authorities on the ground of the legally relevant elements, and not on the ground of the mere fact that a *de facto* situation has eventually consolidated over time ("et non par le simple écoulement du temps").

Thus, the Court added, where the custody of a child is disputed, appropriate measures (including those preparatory measures as may be necessary in order to allow a parent and a child to reunite) should be taken rapidly, since the passage of time may entail irreparable consequences for the family relationships at stake. This was particularly true in the circumstances, in view, among other things, of

the age of the child, of the fact that the proceedings in respect of return were brought by the applicant while residing in the Philippines and of the limited financial resources available to the applicant herself.

The Court conceded that, starting from 2010, measures had been taken by the Swiss authorities with a view to ensuring the effective exercise of the applicant's right to entertain regular contacts with the child, although this right – failing an authorisation to reside in Switzerland – had to be exercised by Ms Polidario as an illegal resident, thereby in the absence of a full legal entitlement ("sans bénéficier d'un statut juridique"). The Court further conceded that, in the meanwhile, notably after the procedure in Strasbourg had been initiated, the situation had improved thanks to a temporary permit of stay issued in favour of Ms Polidario.

Yet, according to the Court, the fact remains that the Swiss authorities, by failing to proceed rapidly in respect of the return of the child and his custody and by refusing to issue the applicant with a residence permit, have in fact prevented Ms Polidario to effectively exercise her rights as a parent for six years, *i.e.* from the time of the abduction of the child, in 2004, until 2010.

In the Court's view, this amounted to a violation of Article 8 of the Convention.

International Arbitration and the U.S. Federal Courts: The "Pro-Arbitration Campaign" and the UNCITRAL Rules

In the United States at least, judicial decisions deferring competence to arbitrators seem to be on the rise—if not in number, at least in profile. International Arbitration is no exception. Last week, the United States Court of Appeals for the Ninth Circuit held that both the 1976 and 2010 versions of the UNCITRAL Arbitration Rules authorize the arbitral panel to determine its own

jurisdiction and arbitrability. In Oracle America, Inc. v. Myriad Group, A.G. (9th Circ. Docket No. 11-17186, July 26, 2013), the Court of Appeals concluded that "incorporation of the United Nations Commission on International Trade Law (UNCITRAL) arbitration rules into an arbitration provision in a commercial contract constitutes clear and unmistakable evidence that the parties to the contract intended to delegate questions of arbitrability to the arbitrator."

The complete facts of the case including the parties' arbitration clause is set out in the text of the judicial decision. In brief, Oracle and Myriad signed a Source License agreement which provided that "[a]ny dispute arising out of or relating to this License shall be finally settled by arbitration [before the AAA and under the UNCITRAL rules]," with certain specified exclusions. When a dispute developed between the parties, Oracle filed suit in the U.S. District Court for the Northern District of California and sought an injunction preventing Myriad, a Swiss company, from proceeding with arbitration. Myriad responded with a motion to compel arbitration. The District Court granted the injunction and denied the motion to compel arbitration, concluding that the incorporation of the UNCITRAL arbitration rules did not constitute clear and unmistakable evidence that the parties intended to delegate questions of arbitrability to the arbitrator. The district court reasoned that the relevant provision of the 2010 UNCITRAL rules states only that the arbitrator has authority, but not exclusive authority, to decide its own jurisdiction.

The Ninth Circuit rejected that holding. First, the appellate panel resolved a threshold dispute as to whether the 1976 or 2010 versions of the UNCITRAL Rules applied, and ultimately held that there was no substantive difference between the two versions in this regard. With this said, the real issue was whether the incorporation of the UNCITRAL Rules "constitutes clear and unmistakable evidence that the parties intended to arbitrate arbitrability." The Ninth Circuit followed the DC Circuit and the Second Circuit and answered in the affirmative. Indeed, "[v]rtually every circuit to have considered the issue has determined that incorporation of the American Arbitration Association's (AAA) arbitration rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability. *** The AAA rules contain a jurisdictional provision similar to Article 21(1) of the 1976 UNCITRAL rules and almost identical to Article 23(1) of the 2010 UNCITRAL rules."

This decision (and those it relies on) may form the international component of a

nationwide trend for federal courts to fall in line with the U.S. Supreme Court's "pro-arbitration campaign." Naturally, though, we must juxtapose this decision with BG Group v. Republic of Argentina, which the Supreme Court will hear and decide in its upcoming term (indeed, the D.C. Circuit case favorably cited by the Ninth Circuit in Oracle was the decision under review in BG Group!). BG Group involves an investment treaty arbitration conducted in the UNCITRAL rules between a British company and Argentina. The tribunal had held that it had jurisdiction to decide the dispute, notwithstanding BG Group's failure to proceed first in Argentina's own courts which the treaty required as a prerequisite to arbitration. While the tribunal would surely have power to decide on arbitrability challenges after the agreement to arbitrate became effective (at least in the Ninth, Second and D.C. Circuits), what about decisions on threshold contract defenses before the agreement to arbitrate is even triggered? The district court confirmed the award, holding that the arbitrators had power to decide such questions, but the DC Circuit reversed. As the parties and amici begin to file their briefs before the Court, the how far the "pro-arbitration" policies of the FAA and the New York Convention extend is very much in play.