Regulation Nº 650/2012: Some Open Issues

The new Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession was published in the OJEU on 27 July 2012 and will apply on a general basis "*to the succession of persons who die on or after 17 August 2015*". The need for an instrument at Community level has been emphasized in order to solve the difficulties due to the treatment of the different international succession aspects by means of the respective national rules of Private International Law.

Nowadays, before the general application of the rules contained in the new EU Regulation, in the specific area of the determination of international jurisdiction in matters of succession problems such as positive and negative conflicts of jurisdiction, lack of legal certainty, contradictory answers to situations of international *lis pendens* and the following obstacles of recognition and enforcement of decisions arise. An interesting question is if the new Regulation will totally or only partially solve this situation.

One of the most delicate issues in this field is that the new legal instrument foresees the problematic term "court" when it refers to the competent authority to deal with an international succession case, establishing an important limitation on the total unification of this aspect at European level, due to the fact that the determination of the competent non-judicial authorities and legal professionals in matters of succession, such as notaries, will be still possible under some circumstances by means of the national legislations of the Member States. This situation will probably entail some compatibility problems.

The new EU Regulation 650/2012 provides different common rules for the allocation of international jurisdiction, starting from the premise of the unity of forum with some exceptions. As it has already been pointed out by the legal literature, this part of the EU instrument causes considerable problems of interpretation, and it does not regrettably incorporate certain aspects which were

underlined in the previous legislative proposals. The choice of the last habitual residence of the deceased as a general criterion seems to be reasonable, although in some cases it may be difficult to identify it. Besides, party autonomy plays an important role in this chapter of the Regulation; in this sense, the different mechanisms of choice of the competent authority are formulated in a very complex way that will also probably imply practical problems. Besides, the new instrument in matters of succession allows an exceptional possibility of remission of jurisdiction between authorities of Member States. The wording of this aspect in the final text also presents some significant difficulties relating to the operation and the effects of this flexibility mechanism.

Moreover, the new Regulation on Succession and Wills contains a rule on subsidiary or residual jurisdiction, giving an answer for cases where the deceased's last habitual residence is not located in a Member State. In this context, it is important to know if this rule will certainly allow identifying a real link between the specific case and the Community territory. Regulation 650/2012 also provides for jurisdiction based on *forum necessitatis*, an interesting option which had been supported in legal literature and which tries to avoid a loss of effective legal protection.

Besides, the new EU legal instrument incorporates some rules in order to establish a partial declaration of acceptance, waiver or limitation of liability and to adopt provisional measures. The treatment of *lis pendens* and related actions is also foreseen. Among other questions, providing further details on these rules would have been appropriate, such as time-limits or exceptions to the solution based on the chronological order of the bringing of the claims in the case of *lis pendens*.

All the aforementioned aspects are examined in a new book entitled *La autoridad competente en materia de sucesiones internacionales: el nuevo Reglamento de la UE* (Prólogo de *Alegría Borrás*), Marcial Pons, 2013 (translated into English, it would be "The competent authority in international succession matters: the new EU Regulation (Prologue by *Alegría Borrás*)"), written by Maria Álvarez Torné, a Postdoctoral Researcher in Private International Law of the University of Barcelona. This work analyzes the different criteria on international jurisdiction in the new Regulation on Succession and Wills, describing the interesting previous decision-making process and also including a brief chapter dealing with the rules on applicable law, recognition and enforcement of decisions, acceptance and

enforcement of authentic instruments and the European Certificate on Succession. Facing the new scenario, this book essentially aims to answer to the question of the advantages and missed opportunities in the way of allocation of international jurisdiction contained in the EU Regulation, taking into account that this aspect will condition the following treatment of a succession case with cross-border elements. It is necessary to use the time prior to the application of the EU Regulation to prepare for the application of all its rules, and in this sense opening up forums of debate to discuss about the numerous interpretation difficulties has an increasingly importance.

Google Before the ECJ, Case C-131/12

Last year the Spanish Audiencia Nacional referred to the ECJ a number of questions in the framework of a process between Google and the Spanish Agency for Data Protection (AEPD); for the application see OJ C 165 from 09.06.2012. Summarizing, what the the Audiencia Nacional wants to know is whether Google is subjected to Spanish – European- law on data protection; if it is liable for the damages that diffusion of personal data may cause to citizens; and whether the individuals concerned can exercise their rights before the regulatory Spanish body and the Spanish tribunals, or if they have to go to court in the U.S. The Audiencia Nacional also wants to have the scope and contents of the rights to erasure and to block clarified, meaning whether an individual may apply for a search engine to stop indexing information about him/her published or included on the net by third parties . Google has maintained repeatedly that it merely accommodates third-party contents, and that it is not affected by the European legislation because it is based in California and responds to current regulations in the U.S.

The hearing took place yesterday at the New Great Courtroom. Advocate General

Jääskien's opinion will be published on 25 June; the ECJ sentence might be ready by the end of this year.

ECJ Rules Experts May Take Evidence Directly Abroad (corrected)

The first version of this post relied on an incorrect English translation of the ruling.

On February 21st, 2013, the Court of Justice of the European Union ruled in Prorail BV v. Xpedys NV (Case 332/11) that the Evidence Regulation does not govern exhaustively the taking of cross-border evidence, and that courts of Member states may designate experts to take evidence directly abroad, without following one of the methods laid down by the Regulation.

On 22 November 2008, a freight train bound from Belgium to the Netherlands was derailed near Amsterdam. In 2009, a Belgian Court designated an expert, defining the scope of his task, most of which was to be carried out in the Netherlands. In the course of this investigation, the expert was to proceed to the scene of the accident in the Netherlands, and to all other places where he might be able to gather useful information in order to determine the causes of the accident, the damage suffered by the wagons and the extent of the damage.

One party challenged the decision and requested the task of the Belgian expert be limited to determining the damage in so far as that task could be carried out in Belgium, that no expert's report on the Netherlands network and rail infrastructure or any account between the parties be authorised, or if his appointment were maintained, order that the expert carry out his activities in the Netherlands only in accordance with the procedure laid down in Regulation No 1206/2001.

The ECJ rules that Regulation No 1206/2001 applies as a general rule only if the court of a Member State decides to take evidence according to one of the two methods provided for by that regulation, in which case it is required to follow the procedures relating to those methods.

A national court wishing to order an expert investigation which must be carried out in another Member State is not necessarily required to have recourse to the method of taking evidence laid down in Articles 1(1)(b) and 17 of Regulation No 1206/2001.

There is one exception, however. The investigation which has been entrusted to the expert might, in certain circumstances, affect the exercise of the powers of the Member State in which it takes place, in particular where it is an investigation carried out in places connected to the exercise of such powers or in places to which access or other action is, under the law of the Member State in which the investigation is carried out, prohibited or restricted to certain persons.

Ruling:

> *Articles 1(1)(b) and 17 of Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters must be interpreted as meaning that the court of one Member State, which wishes the task of taking of evidence entrusted to an expert to be carried out in another Member State, is not necessarily required to use the method of taking evidence laid down by those provisions to be able to order the taking of that evidence.*

H/T: Maja Brkan

Preliminary Question on Art. 5 No.

3 Brussels I

It has not been mentioned on this blog that the German Federal Supreme Court on August 15, 2012 referred the following question relating to the interpretation of Article 5 No. 3 of the Brussels I Regulation to the Court of the European Union (Case C-387/12 – *Hi Hotel HCF SARL ./. Uwe Spoering*):

> *Is Article 5(3) of Regulation (EC) No 44/2001 to be interpreted as meaning that the harmful event occurred in one Member State (Member State A) in the case where the tort or delict which forms the subject-matter of the proceedings or from which claims are derived was committed in another Member State (Member State B) and consists in participation in the tort or delict (principal act) committed in the first Member State (Member State A)?*

The facts of the case are in large part disputed, but according to the Federal Supreme Court and for the sake of the preliminary ruling they are assumed to be as follows: the plaintiff *(Uwe Spoering)* is a photographer. On behalf of the defendant *(Hi Hotel)*, a hotel operator in Nice in the South of France, he took various pictures of the hotel interiour. He granted defendant the right to use the photographs in his brochures and on his website. However, in 2008, the plaintiff found nine of his photographs (re-)printed in two photobooks, one published by Phaidon Press (based in Berlin, Germany) and another one published by Taschen (based in Cologne, Germany). Phaedon Press had received the photographs via a Paris based sister company. The sister company, in turn, had received the photograps from the defendant.

The plaintiff brought an action for copyright infringement in Germany asking for a prohibitory injunction as well as damages. He argued that German courts were competent to hear the case under Art. 5 no. 3 of the Brussels I Regulation. According to this provision a person who is domiciled in a Member State, may be sued in matters relating to torts, delict or quasi-delict in the court of the Member State where the harmful event occurred or may occur. Plaintiff argued that the harmful event – the copyright infringement – occured in Germany because this is where Phaidon Press distributed the photographs. He further argued that defendant participated in the copyright infringement by handing over the photographs to Phaidon Press. Defendant, in contrast, argued that German courts

did not have jurisdiction under Art. 5 No. 3 Brussels I Regulation since he handed over the photographs to Phaidon's sister company in France and not in Germany.

With the preliminary question the German Federal Supreme Courts wants to know whether jurisdiction under Art. 5 No. 3 Brussels I Regulation covers claims for copyright infringment against accomplices if the accomplice (only) acted abroad.

The full text of the decision can be found here (in German). The reference to the CEU is available here (in English).

ERA-Summer Course on European Civil Litigation

From 17 to 21 June, 2013 the Academy of European Law (ERA) will host a summer course on European Civil Litigation. The course is designed to introduce lawyers to practical aspects of cross-border litigation and will concentrate on practical issues, including the (new) Brussels I Regulation, the European payment order and the European small claims procedure. More information is available here.

ERA-Conference on Cross-border Divorce and Maintenance

From 25 to 27 February 2013 the Academy of European Law (ERA) will host a conference on "Cross-border Divorce and Maintenance: Jurisdiction and Applicable Law" in Dublin. The conference will provide information on the

Brussels II bis Regulation, the Rome III Regulation as well as the Maintenance Regulation. Further information is available here. The programme reads as follows:

Monday, 25 February

- 08:45 Arrival and registration of participants

I. Cross-border divorce: jurisdiction and procedure

- 09:15 Opening session
- 09:45 Setting the scene: framework and key elements of cross-border cooperation in family matters
- 10:30 Coffee break
- 11:00 Cross-border divorce in the EU: jurisdiction, recognition andlis pendens
- 13:00 Lunch
- 14:30 Interaction of Regulation Brussels II bis with other EU legal instruments and mechanisms:
    - legal aid
    - service of documents
    - preliminary ruling procedure
    - alternative dispute resolution
- 15:30 Coffee break
- 16:00 Exercise I: Case studies on cross-border divorce
- 18:00 End of the first workshop day
- 19:30 Dinner

Tuesday, 26 February

II. Cross-border divorce: applicable law

- 09:00 Cross-border divorce in the EU: applicable law
- 10:30 Coffee break
- 11:00 The application of foreign law in a crossborder divorce case
- 12:00 Lunch
- 13:30 Exercise II: Case studies on the identification and application of foreign law in a divorce case
- 15:30 Coffee break

III. Cross-border maintenance

- 16:00 Jurisdiction and applicable law in crossborder maintenance cases
- 18:00 End of the second workshop day
- 19:30 Dinner

Wednesday, 27 February

- 09:00 Cooperation between Central Authorities and access to justice in cross-border maintenance cases
- 10:00 Exercise III: Case-study on a crossborder maintenance case
- 12:00 Coffee break

IV. EU initiatives on property regimes

- 12:30 The proposed legislation on property effects of marriage and registered partnership
- 13:00 Closing session
- 13:30 Lunch and end of the workshop

ERA-Conference on Cross-border Mediation, ADR & ODR

On April 25 and 26, 2013 the Academy of European Law (ERA) will host a conference on cross-border mediation, ADR & ODR. The conference will cover various aspects of cross-border alternative dispute resolution including the latest trends and developments in legislation at national, international and EU level. Further information is available here. The programme reads as follows:

Thursday, 25 April 2013

- 08:45 Arrival and registration
- 09:10 Welcome
  Angelika Fuchs

Moderator: *Ana Gonçalves*

I. CURRENT SITUATION OF MEDIATION IN A COMPARATIVE PERSPECTIVE

- 09:15 State of play following the implementation of the Mediation Directive: concepts and practice of mediation
  Jeremy Lack
- 09:45 Discussion
- 10:00 Integration of mediation in dispute resolution procedures, including the effects of mediation on limitation and prescription periods
  Carlos Esplugues
- 10:30 Discussion
- 10:45 Coffee break
- 11:15 Learning from the experience of others: what incentives for mediation are given?
  - The Netherlands, England and Wales: *Naomi Creutzfeldt-Banda*
  - France and Belgium: *Vincent Tilman*
  - Poland and Czech Republic: *Rafal Morek*
  - Italy and Spain: *Carlos Esplugues*
  - Portugal: *Ana Gonçalves*
- 13:00 Lunch

Moderator: *Jeremy Lack*

II. INNOVATIVE PROCESSES FOR CONSUMER
AND E-COMMERCE DISPUTE RESOLUTION

- 14:15 Consumer ADR & ODR: recent experiences in the member states
  Naomi Creutzfeldt-Banda
- 15:00 Discussion
- 15:15 Coffee break
- 15:45 Opportunities and challenges for ODR: how will consumers and traders benefit from the new EU legislation?
- 16:15 ODR and consumer protection: high standards or low costs? Taking a fresh look at the EU and UNCITRAL initiatives
  Hans Schulte-Nölke
- 16:45 Discussion
- 17:15 Towards an instrument on B2B ADR?

Vincent Tilman
- 17:45 Discussion
- 18:00 End of the first conference day
- 19:00 Evening programme and dinner

Friday, 26 April 2013

Moderator: *Diana Wallis*

III. MEDIATORS AND MEDIATION PROCEDURE

- 09:00 How to ensure the quality of mediation? Code of conduct and professional law for mediators
  Manon Schonewille (live via videolink)
- 09:30 Discussion
- 09:45 Skills of (e-) mediators
  Ana Gonçalves
- 10:15 Discussion
- 10:30 Coffee break
- 11:00 Results of mediation and enforcement of mediation agreements
  Elena D'Alessandro
- 11:30 Discussion
- 11:45 Confidentiality in mediation
  - Functions of confidentiality
  - What information is subject to confidentiality?
  - Which persons are bound to respect it?
- Disclosure of information in subsequent litigation or enforcement proceedings
  Rafal Morek
- 12:15 Discussion
- 12:45 Self-regulation or regulatory approach: how to further encourage parties to the mediation table?
  Diana Wallis
- 13:15 Lunch and end of the conference

Chafin v. Chafin: Hague Convention, Mootness, Extraterritorial Authority and Futility

This is cross-posted by the author on Letters Blogatory, as well.

We previewed the *Chafin* case on this site when certiorari was granted last summer. It was decided yesterday by a unanimous Court. This is the second Hague Convention case to reach the Court in three years, and while the decision itself is not altogether surprising, Chief Justice Roberts does include an interesting discussion that touches on a wide array of transnational issues (outside of the family law context).

Chafin involves a U.S. Army sergeant and a Scottish woman he had married while stationed in Germany. The couple later moved to Alabama, and after their divorce, disputed the care of their daughter, who is now five years old. After obtaining a federal court order under the Hague Convention declaring that Scotland was the girl's country of habitual residence, Mrs. Chafin returned to Scotland with the child. Sgt. Chafin appealed that decision to the Eleventh Circuit, but that court dismissed the case as moot because the child had already returned to Scotland, and was outside the court's jurisdiction. Circuits have been deeply split over a fundamental and very practical question: Is the court's jurisdiction over the dispute truly limited by the water's edge? In other words, if the case were to be reversed on appeal, does the uncertainty of enforcement of the order abroad render the case moot?

The Supreme Court reversed the decision of the Eleventh Circuit because, in Chief Justice John Roberts's words, "[t]his dispute is still very much alive." "On many levels, the Chafins continue to vigorously contest the question of where their daughter will be raised. This is not a case where a decision would address 'a

hypothetical state of facts.'" The Respondent and the Eleventh Circuit, the Court held, "confuse[d] mootness with the merits." To be sure, "Scotland [may] ignore a U.S. re-return order, or decline to assist in enforcing it," but a litigants "prospects of success are … not pertinent to the mootness inquiry," and the "uncertain[]" efficacy of the ultimate judgment "does not typically render cases moot."

That was enough for Mr. Chafin to win before the Court, but here is where the decision got a bit more interesting for transnational litigants writ large. As I've discussed before elsewhere, the circuits are decidedly split on that standard for ordering antisuit injunctions, and recent high-profile cases illustrate the uncertainty surrounding injunctive orders when it concerns foreign parties living abroad. The Court in *Chafin*, however, noted the existence of its power to make such orders with little apparent concern. U.S. courts can "command[] [a party properly before it] to take action … outside the United States" under the pain of sanctions for non-compliance, the Chief Justice said. He then swiftly moved from an assertion of the Court's inherent authority to an acknowledgment of its practical limits. Parties ignore our authority all the time, the Court seems to suggest (without expressly saying it that way, of course). For instance, U.S. Courts often "decide cases against foreign nations, whose choices to respect final rulings are not guaranteed." So Argentine bondholders and an Alabama father find themselves in the same legal limbo. It remains true that a return order may not give Mr. Chafin his daughter, "just as a an order that [a foreign state] pay $100 million may not make a plaintiff rich."

These propositions are little more than an interesting aside to the central holding of the case, but they illustrate the Court's view of its tenuous place in the broader arena of transnational justice.

European Parliament Draft Report

on European Account Preservation Order

The Legal Committee on Legal Affairs of the European Parliament has issued a Draft Report on the proposal for a regulation of the European Parliament and of the Council on creating a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters on February 5th, 2013.

H/T: Beatrice Deshayes

Luxembourg Conference on One Way Jurisdiction Clauses

The University of Luxembourg will host a lunchtime seminar on the validity of one way jurisdiction clauses on 27 February 2013.

The seminar, which will be held in French, will discuss the impact of the widely publicised case of the French Supreme court of September 2012 on contractual practices in France and Luxembourg.

The speakers will be Pascal Ancel, a leading scholar of French contract law who recently joined the university of Luxembourg, and myself.

More information can be found here.